

insurance of a QDN do not constitute excusable delay under the default clause of this contract. Failure to complete corrective action in a timely manner may result in termination of the contract.

(3) This contract may be terminated for default if subsequent Government inspection discloses that plant quality or process controls are not being maintained, supplies that do not meet the requirements of the contract are being shipped, or if the contractor fails to comply with any other requirement of this clause.

(e) *Additional cost for inspection and testing.* The Contractor shall be charged for any additional cost of inspection/testing or reinspecting/retesting supplies for the reasons stated in paragraph (e) of FAR 52.246-2, Inspection of Supplies—Fixed Price. When inspection or testing is performed by or under the direction of GSA, charges will be at the rate of \$ \_\_\_\_\_\*\* per man-hour or fraction thereof if the inspection is at a GSA distribution center;

\$ \_\_\_\_\_\*\* per man-hour or fraction thereof, plus travel costs incurred, if the inspection is at any other location; and \$ \_\_\_\_\_\*\* per man-hour or fraction thereof for laboratory testing, except that when a testing facility other than a GSA laboratory performs all or part of the required tests, the Contractor shall be assessed the actual cost incurred by the Government as a result of testing at such facility. When inspection is performed by or under the direction of any agency other than GSA, the charges indicated above may be used, or the agency may assess the actual cost of performing the inspection and testing.

(f) *Responsibility for rejected supplies.* When the Contractor fails to remove or provide instructions for the removal of rejected supplies under paragraph (d) of this clause, pursuant to the Contracting Officer's instructions, the Contractor shall be liable for all costs incurred by the Government in taking such measures as are expedient to avoid unnecessary loss to the Contractor. In addition to the remedies provided in FAR 52.246-2, supplies may be—

(1) Stored and charged against the Contractor's account;

(2) Reshipped to the Contractor at its expense (any additional expense incurred by the Government or the freight carrier caused by the refusal of the Contractor to accept their return shall also be charged against the Contractor's account);

(3) Sold to the highest bidder on the open market and the proceeds applied against the accumulated storage and

other costs, including the cost of the sale; or

(4) Otherwise disposed of by the Government.

(g) *Subcontracting requirements.* The Contractor shall insert in any subcontracts the inspection or testing provisions set forth in paragraphs (a) through (d) of this clause and the Inspection of Supplies—Fixed Price clause of this contract. The Contractor shall be responsible for compliance by any subcontractor with the provisions set forth in paragraphs (a) through (d) of this clause and the Inspection of Supplies—Fixed Price clause.

(End of clause)

\*Normally insert 12 months as the period during which defective or otherwise nonconforming supplies must be replaced. However, when the supplies being bought have a shelf life of less than 1 year, you should use the shelf-life period, or in the instance where you reasonably expect a longer period to be available, you should use the longer period.

\*\*The rates to be inserted are established by the Commissioner of the Federal Acquisition Service or a designee.

#### 552.246-71 [Amended]

■ 10. Amend section 552.246-71 by—

■ a. Revising the date of the clause (June 1, 2009);

■ b. Removing from paragraph (c)(3) the words “the Virgin Islands” and adding the words “the U.S. Virgin Islands” in its place; and

■ c. Removing from the undesignated paragraph after “(End of clause)” the words “Federal Supply Service” and adding the words “Federal Acquisition Service” in its place.

#### 552.246-73 [Removed]

■ 11. Remove section 552.246-73.

#### 552.246-74 [Removed]

■ 12. Remove section 552.246-74.

#### 552.246-75 [Removed]

■ 13. Remove section 552.246-75.

#### 552.246-76 [Removed]

■ 14. Remove section 552.246-76.

■ 15. Add section 552.246-77 to read as follows:

#### 552.246-77 Additional Contract Warranty Provisions for Supplies of a Noncomplex Nature.

As prescribed in 546.710(a), insert the following clause in solicitations and contracts that include FAR 52.246-17, Warranty of Supplies of a Noncomplex Nature.

ADDITIONAL CONTRACT WARRANTY PROVISIONS FOR SUPPLIES OF A NONCOMPLEX NATURE (JUL 09)

(a) *Definitions. Correction.* as used in this clause, means the elimination of a defect.

(b) *Contractor's obligations.* When return, correction, or replacement is required, the Contractor shall be responsible for all costs attendant to the return, correction, or replacement of the nonconforming supplies. Any removal in connection with the above shall be done by the Contractor at its expense.

(c) *Remedies available to the Government.* When the nature of the defect in the nonconforming item is such that the defect affects an entire batch or lot of material, then the equitable price adjustment shall apply to the entire batch or lot of material from which the nonconforming item was taken.

(End of clause)

■ 16. Add section 552.246-78 to read as follows:

#### 552.246-78 Inspection at Destination.

As prescribed in 546.302-72 insert the following clause:

INSPECTION AT DESTINATION (JUL 09)

Inspection of all purchases under this contract will be made at destination by an authorized Government representative.

(End of clause)

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 635

[Docket No. 080728943-9716-02]

RIN 0648-AX12

#### Atlantic Highly Migratory Species; 2009 Atlantic Bluefin Tuna Quota Specifications and Effort Controls

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

ACTION: Final rule.

SUMMARY: NMFS announces the final rule to establish 2009 fishing year specifications for the Atlantic bluefin tuna (BFT) fishery, including quotas for each of the established domestic fishing categories and effort controls for the General category and Angling category. 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:** The rule is effective June 1, 2009, except that the General category retention limit found under the heading General Category Effort Controls is effective June 1, 2009 through August 31, 2009, and the Angling category retention limit found under the heading Angling Category Effort Controls is effective June 1, 2009, through December 31, 2009.

**ADDRESSES:** Supporting documents, including the 2009 Environmental Assessment (EA), Regulatory Impact Review (RIR), and Final Regulatory Flexibility Analysis (FRFA) and the 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan (Consolidated HMS FMP), are available from Sarah McLaughlin, Highly Migratory Species 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). The implementing regulations for Atlantic HMS are at 50 CFR part 635.

## I. Background

Background information about the need for the BFT quota specifications and effort controls for the 2009 fishing year (January 1 through December 31, 2009) was provided in the preamble to the proposed rule (74 FR 7577, February 18, 2009) and is not repeated here.

## II. Changes from the Proposed Rule

The proposed Angling category daily retention limit, for the entire season and for both the charter/headboat and private sectors of the fishery, was one school, large school, or small medium BFT (measuring 27 inches (68.6 cm) to

less than 73 inches (185.4 cm)) per vessel. Since publication of the proposed rule, NMFS has decided to change the recreational daily retention limit to one school BFT (measuring 27 inches to less than 47 inches (119.4 cm)) and one large school/small medium BFT (measuring 47 inches to less than 73 inches) per vessel after taking additional information and several issues into consideration.

First, NMFS has held internal and public discussions about the expected availability of school BFT to the fishery in 2009. After hearing from fishermen and reviewing catch size frequency data, NMFS predicts that 2009 landings will be similar to those in 2008 (which were 54.6 mt out of an adjusted 2008 quota of 119 mt). Thus, there is less concern than at the proposed rule stage that the school BFT subquota for 2009 would be exceeded with a daily retention limit of one school BFT and one large school/small medium BFT per vessel.

Second, NMFS has examined a daily retention limit of one school BFT and one large school/small medium BFT per vessel in the context of stock rebuilding and has determined that, due to low availability of school BFT, it is likely to result in a pattern of fishing mortality (e.g., fish caught at each age) consistent with the one used in the last stock assessment. Thus, this recreational fishery retention limit would be consistent with the assumptions used in the latest BFT stock status projections, and would not be expected to affect the rebuilding timeframe.

Third, NMFS has received extensive public comment (at the February 2009 HMS Advisory Panel meeting, public hearings, and written comments) indicating that a one–fish daily retention limit would have negative socio–economic impacts, particularly for the charter sector (see Comments and Responses section).

Lastly, landings over the last several years have been far below the total U.S. quota, and NMFS has not needed to make use of the Reserve, which is available for a variety of quota management purposes, including transfer to any quota category inseason or at the end of a fishing year. For 2009, there are over 180 mt available in the Reserve and NMFS does not currently intend or plan to make use of the ICCAT transfer provision to transfer BFT quota to another ICCAT Contracting Party in 2009. Therefore, NMFS has the flexibility to allocate some or all of the Reserve quota to the Angling category quota at the end of the year, if needed and as available, to cover potential overharvest of the Angling category quota.

For these reasons, the final rule implements an Angling category daily retention limit, for the entire season and for both the charter/headboat and private sectors of the fishery, of one school BFT, plus one large school/small medium BFT per vessel. This recreational daily retention limit is the same as implemented for the 2008 fishing season.

## III. 2009 Final Quota Specifications

In accordance with the 2008 ICCAT recommendation (Recommendation 08–04), the Consolidated HMS FMP percentage shares for each of the domestic categories, and regulations regarding annual adjustments at § 635.27(a)(10), NMFS establishes final quota specifications for the 2009 fishing year as follows: General category — 623.1 mt; Harpoon category — 51.6 mt; Purse Seine category — 246.0 mt; Angling category — 260.6 mt; Longline category — 74.3 mt; and Trap category — 1.3 mt. Additionally, 180.4 mt are allocated to the Reserve category for inseason adjustments, scientific research collection, potential overharvest in any category except the Purse Seine category, and potential quota transfers.

The General category quota of 623.1 mt is subdivided as follows: 33.0 mt for the period beginning January 1, 2009, and ending January 31, 2009; 311.5 mt for the period beginning June 1, 2009, and ending August 31, 2009; 165.1 mt for the period beginning September 1, 2009, and ending September 30, 2009; 81.0 mt for the period beginning October 1, 2009, and ending November 30, 2009; and 32.4 mt for the period beginning December 1, 2009, and ending December 31, 2009.

The Angling category quota of 260.6 mt is subdivided as follows: School BFT — 103.5 mt, with 39.8 mt to the northern area (north of 39°18' N. latitude), 44.5 mt to the southern area (south of 39°18' N. latitude), plus 19.1 mt held in reserve; large school/small medium BFT — 151.1 mt, with 71.3 mt to the northern area and 79.8 mt to the southern area; and large medium/giant BFT — 6.0 mt, with 2.0 mt to the northern area and 4.0 mt to the southern area.

The 25–mt Northeast Distant gear restricted area (NED) set–aside quota is in addition to the overall incidental longline quota to be subdivided in accordance with the North/South allocation percentages (i.e., no more than 60 percent to the south of 31° N. latitude). Thus, the Longline category quota of 74.3 mt is subdivided as follows: 29.7 mt to pelagic longline vessels landing BFT north of 31° N.

latitude and 44.6 mt to pelagic longline vessels landing BFT south of 31° N. latitude, with 25 mt set-aside for bycatch of BFT related to directed pelagic longline fisheries in the NED. NMFS accounts for landings under the 25-mt NED allocation separately from other Longline category landings.

#### IV. General Category Effort Controls

Because of the large quota available for the General category, NMFS increases the daily retention limit of BFT for the June–August subperiod from the default one–fish retention limit to a three–fish limit. Therefore, persons aboard vessels permitted in the General category may retain three large medium or giant BFT (measuring 73 inches or greater) per vessel per day/trip from July 1, 2009 through August 31, 2009. The BFT retention limit may be adjusted via inseason action, if warranted, under § 635.23(a)(4).

#### V. Angling Category Effort Controls

This final rule establishes an Angling category retention limit of one school BFT (27 inches to less than 47 inches), and one large school/small medium BFT (47 inches to less than 73 inches) per vessel per day/trip. This retention limit is effective for persons aboard vessels permitted in the Angling category from July 1, 2009 through December 31, 2009. This retention limit may be adjusted via inseason action, if warranted, under § 635.23(b)(3).

#### VI. Comments and Responses

Below, NMFS summarizes and responds to all comments made specifically on the proposed quota specifications and effort controls for the General and Angling categories. In addition, NMFS received comments on issues that were not considered part of this rulemaking. At the February 2009 HMS Advisory Panel meeting and throughout the comment period for this action, numerous commenters requested that NMFS change or eliminate what they perceive as unnecessarily restrictive BFT fishing restrictions (given the low rate of landings in the past few years) so that 2009 BFT landings can be maximized. Many of these comments reflect concerns about potential future reductions in U.S. BFT quota due to low landings. These comments state that maximizing landings in 2009 will help show that the United States is capable of landing its quota, and that this is the only way to prevent loss of U.S. quota when BFT allocations are renegotiated at the 2010 ICCAT meeting. However, some of these comments also reflect a misunderstanding of the ICCAT quota

allocation process, i.e., western Atlantic BFT quota cannot be transferred to eastern Atlantic BFT ICCAT Contracting Parties. These comments are summarized under “Other Issues” below.

##### A. BFT Quotas

*Comment 1:* NMFS received few comments specifically on the quota specifications. Some commenters support the action as proposed because it is consistent with the BFT rebuilding program, and some continue to express concern that halfway through the rebuilding period, spawning biomass is below what it was at the beginning of the rebuilding period. Two environmental groups state that the proposed rule is inconsistent with the regulations regarding application of overharvest and underharvest (e.g., the amounts applied to the quota categories for 2009 are not equal to the amounts underharvested by those categories in 2008) and deductions are not made for the quota categories that exceeded their subquotas. One specifies that the Longline category quota should be zero after accounting for dead discards.

*Response:* The specifications included in this rule reflect appropriate distribution of the underharvest allowed to be carried forward for the 2009 fishing year. Deductions are not made and are not required to be made for subquota categories that are exceeded where quota is available to cover such overharvest. Flexibility in quota distribution provides for several existing and potential management needs, namely: (1) ensuring that the Longline category has sufficient quota to operate during the 2009 fishing year while also accounting for BFT discards as required by ICCAT; (2) setting 15 percent of the 2009 U.S. quota in reserve for potential transfer to other ICCAT Contracting Parties, if warranted; and (3) providing the non–Longline quota categories a share of the remainder of the underharvest consistent with the Consolidated HMS FMP allocation scheme. Further, the regulations regarding determination criteria and annual adjustment of the BFT quota at § 635.27(a)(8) and (a)(10) allow NMFS to transfer quotas among categories based on several criteria (such as a review of landing trends, the projected ability of the vessels fishing under a 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 categories might be exceeded, the effects of the adjustment on accomplishing the objectives of the fishery management plan, etc.). This provides NMFS the

flexibility to apply the underharvest to the overall quota for the following fishing year, and distribute the underharvest as needed, provided that the total of the adjusted category quotas and the Reserve is consistent with the ICCAT recommendation.

*Comment 2:* Many commenters, including fishermen, academics, and environmental organizations, oppose the concept of a U.S. quota transfer to another ICCAT–contracting party for two main reasons. The first reason given by these commenters is that such action could set the stage for future permanent quota allocation reductions at ICCAT. The second reason suggested is that loss of U.S. quota could have negative stock impacts because other Contracting Parties implement less restrictive fishing measures, tend to catch the larger sized BFT, and/or take a high proportion of western origin BFT in their fisheries. Thus, it would be better for the stock if the quota were caught by U.S. vessels than vessels from less restrictive Contracting Parties. Some commenters misunderstood that the proposed rule actually proposed such a transfer as part of the proposed action. An industry representative suggests that NMFS fully allocate the underharvest carried forward from 2008 to the quota categories rather than holding a portion in the Reserve for potential transfer. Some commenters suggest that NMFS maintain the 155.2 mt that NMFS proposed to be held in Reserve for ICCAT transfer purposes and other domestic management purposes and instead use it specifically for covering potential Angling category overharvest (i.e., potential overharvest of the large school/small medium BFT subquota).

*Response:* NMFS did not propose any specific quota transfer in the proposed rule, but proposed setting aside 155.2 mt of 2008 underharvest in the Reserve category for potential transfer to other ICCAT contracting parties, if warranted, and for other domestic management objectives.

NMFS does not currently intend or plan to make use of the ICCAT transfer provision to transfer BFT quota to another ICCAT Contracting Party in 2009. As indicated in the proposed rule, the 2008 ICCAT recommendation allows the United States to transfer up to 15 percent of the total U.S. quota, consistent with domestic obligations and conservation considerations. Before considering a possible quota transfer, the United States, through NMFS, would evaluate several factors, including the amount of quota proposed to be transferred, the projected ability of U.S. vessels to harvest the total U.S. BFT quota before the end of the fishing

year, the potential benefits of the transfer to U.S. fishing participants (such as access to the EEZ of the receiving Contracting Party for the harvest of a designated amount of BFT), potential ecological impacts, and the Contracting Party's ICCAT compliance status. The United States would need to explore and analyze these factors prior to transferring quota through a separate action. In the proposed rule, NMFS proposed placing 155.2 mt (15 percent of the total U.S. quota) in the Reserve so that, if the United States were to approve a transfer, the quota could be from the Reserve and not from category-specific quotas.

Because of the ICCAT-recommended limit on quota carryover and given the recent trend of substantial U.S. quota underharvest, distribution of 155.2 mt of carryover to individual quota categories in the final action would not result in substantially greater future fishing opportunities or effects on the fishery than holding that amount in Reserve. Further, as indicated above, the regulations allow NMFS to transfer quotas among categories based on the determination criteria. Under the final action, there would be over 180 mt available in the Reserve. Therefore, should a situation arise in which a BFT domestic quota transfer from the Reserve to a quota category is needed to avoid exceeding that category's quota, NMFS could take action as appropriate (e.g., allocate some or all of the 180 mt of Reserve quota to the Angling category quota at the end of the year, if needed and as available, to cover potential overharvest of the Angling category quota).

NMFS understands the concerns regarding the potential impact of other ICCAT Contracting Parties' fishing activities on the BFT stock, specifically the concern that a greater proportion of those fish targeted and caught by other western Atlantic BFT Contracting Parties would be western origin (spawned) BFT than would result from U.S. fishing activities, given research showing a greater degree of mixed-origin (western Atlantic and eastern Atlantic/Mediterranean) BFT off the U.S. mid-Atlantic coast. Thus, as it is neither to the U.S. fishery's nor the BFT stock's benefit to transfer quota to another ICCAT Contracting Party, the United States currently has no plans to do so.

#### *B. General Category Effort Controls*

*Comment 1:* The specific comments NMFS received on the proposed General category daily retention limit included support for the proposed three-fish limit and request for a reduction to a

two-fish limit to speed stock recovery. As summarized below, NMFS received numerous comments seeking that NMFS help maximize commercial landings within the commercial quota, particularly the General category quota. Many commenters stated that it is not necessary for NMFS to maintain a maximum daily retention limit (3 fish under current regulations), but to instead use inseason authority to set the daily retention limit as appropriate given available quota. Several commenters felt that NMFS should not loosen any restrictions because that could slow stock recovery.

*Response:* The existing regulations allow NMFS to adjust the General category retention limit of large medium and giant BFT over a range of zero (on restricted-fishing days, which are not applicable for 2009) to three. Given the low early season harvest rate in recent years, NMFS is setting the June through August retention limit at three BFT to allow General category fishermen the maximum harvest of BFT possible under current regulations while keeping within the quota of the first General category subperiod. Stock recovery would be unaffected by this action.

#### **C. Angling Category Effort Controls**

*Comment 1:* Some commenters, including several environmental organizations, support the proposed Angling category daily retention limit of one school, large school, or small medium BFT (i.e., one fish measuring 27 to less than 73 inches) per vessel (the current default limit) so that the ICCAT-recommended limit on school BFT is not exceeded and the Angling category quota overall is not exceeded, as it was in 2007 and 2008. However, the majority of commenters oppose this limit in the proposed action and request that NMFS maintain the 2008 daily retention limit of one school BFT (27 inches to less than 47 inches) plus one large school/small medium BFT (47 inches to less than 73 inches). Many commenters participate in the HMS Charter/Headboat fishery and maintain that it is extremely difficult to attract customers with a daily limit of only one BFT and that loss of charter bookings would have a negative economic impact on their business and other shoreside businesses in coastal communities. As above, some suggest using the Reserve to cover any recreational overharvests.

*Response:* Since publication of the proposed rule, NMFS has reconsidered the recreational daily retention limit, taking several issues into consideration, including the extensive public comment received at the February 2009 HMS Advisory Panel meeting, public

hearings, and in writing. NMFS understands the concern of captains that it is extremely difficult for captains to book charter trips when clients feel that only one person per vessel per day/trip would be able to retain a BFT, and that a reduction in charter trips would economically impact not only the charter business but also potentially the support businesses in the surrounding coastal communities.

Following recent NMFS consideration of the public comment and the issues described in the Changes from the Proposed Rule section, including consistency with the BFT rebuilding Program, NMFS is establishing an Angling category daily retention limit of one school BFT (27 inches to less than 47 inches) and one large school/small medium BFT (47 inches to less than 73 inches).

NMFS will need to consider closely the results of the 2009 fishing year (i.e., available landings information and the retention limits implemented for the 2009 recreational fishery) when selecting the 2010 daily retention limit. The school BFT daily retention limit for 2010 will need to be set such that the United States is consistent with the ICCAT-recommended 2-year tolerance limit for BFT less than 115 cm over the 2009–2010 period.

*Comment 2:* One commenter suggested that NMFS eliminate the large medium and giant ("trophy") BFT fishery, i.e., the annual Angling category limit per vessel of one BFT measuring greater than 73 inches per year.

*Response:* NMFS does not believe that elimination of the trophy BFT fishery as part of the final action to set 2009 BFT quota specifications and effort controls is warranted. The subquota for recreational large medium and giant BFT has not been met in recent years. NMFS believes this comment was made in the spirit of sacrificing the ability to retain an annual trophy fish to gain a second fish on a daily basis. As above, the preferred alternative for the final action is a two-fish daily recreational retention limit.

#### **D. Other Issues**

*Comment 1:* The majority of comments NMFS received during the comment period requested that NMFS modify the existing regulations to improve the chances that the U.S. BFT quota can be achieved. Many comments stated it is critical to increase 2009 BFT landings because 2009 landings information will be considered at the ICCAT meeting in 2010, when BFT quotas are scheduled to be renegotiated. Similar to the concerns regarding any direct transfer from the United States to

other ICCAT Contracting Parties, some comments asserted that loss of U.S. quota would have negative stock impacts, due to how and where these other Parties may fish. Specific suggestions for regulatory changes made at the HMS Advisory Panel meeting, at the public hearings, and in written comments include:

#### 1. General Category

- Increase the General category maximum daily retention limit (currently three BFT measuring greater than 73 inches) or eliminate it and instead manage the General category fishery through daily retention limits set by inseason action. A related comment was to allow the daily retention limit to apply for each day of a multi-day trip.

- Extend the General category season. Some commenters specify that the General category season should be closed when the January subquota (adjusted with underharvest from the prior year) is filled, and some indicate it should remain open year-round.

#### 2. Harpoon Category

- Eliminate the two large medium BFT restriction on Harpoon category vessels.

#### 3. General and Harpoon Category

- Decrease the commercial minimum size for BFT. Most comments requested a reduction from the current 73-inch minimum size to a 65-inch (165-cm) minimum size, although others suggest a size between 65 and 73 inches, e.g., 66 inches (167.6 cm) or 68 inches (172.7 cm). Some also specify that only one of these smaller than 73-inch BFT be allowed per day in addition to some amount of BFT greater than 73 inches. For instance, one fish 65 to less than 73 inches plus unlimited (or maximum allowed under inseason daily retention limit) BFT greater than 73 inches per day.

- In combination with the decrease in commercial minimum size, reallocate quota within the applicable category in a "conservation neutral" way so as not to impact stock rebuilding.

#### 4. Longline Category

- Increase the Longline incidental BFT retention trip limits. Those requesting this change indicated the action would reduce regulatory discard of commercial-sized BFT (greater than 73 inches) and would provide greater economic incentive for Longline vessel operators to make pelagic longline trips for swordfish or other tunas, specifically contributing to the revitalization of the swordfish fishery. The specific limits suggested are: two BFT landed provided that at least 3,000 lb (1,360 kg) of non-

BFT species are caught, retained, and offloaded on the same trip; 3 BFT for at least 6,000 lb (2,722 kg); 4 BFT for at least 9,000 lb (4,082 kg); and 5 BFT for at least 12,000 lb (5,443 kg).

#### 5. Charter/Headboat Category

- Allow HMS Charter/Headboats to fish both commercially and recreationally on the same day.
- Allow harpoon use on HMS Charter/Headboat vessels.

#### 6. Angling Category

- Implement a census program in which every recreational fish is tagged so that NMFS does not have to depend on a statistical survey landings estimate.

#### 7. BFT Quotas

- If the Purse Seine category quota is not obtained by September 15 and effort is not current, reallocate that quota to the Angling, General, and Harpoon categories.

- Reallocate the quotas to allow a separate Charter/Headboat category quota.

In response, some commenters urge NMFS not to relax the regulations in these manners, particularly reduction of the minimum size, as these actions could have detrimental impacts on stock rebuilding. Some commenters urge NMFS to adopt more stringent regulations in order to provide more conservative protections for the fishery. Several environmental groups caution against loosening restrictions on the pelagic longline fishery. One comment in particular requested that NMFS reinstate target catch requirements in the NED. There was also a suggestion to increase the Atlantic Tunas and HMS permit fees to increase funds available for enforcement of the regulations.

*Response:* The suggestions listed above are beyond the scope of the rulemaking for this action. However, NMFS plans to publish an Advanced Notice of Proposed Rulemaking (ANPR) simultaneous with publication of this final rule or shortly thereafter in the **Federal Register**. The ANPR would be intended to analyze potential approaches to addressing concerns voiced by constituents during this comment period, consistent with the rulemaking process, Magnuson–Stevens Act requirements to end overfishing by the end of 2010 and rebuild the stock by 2019, ATCA, and other applicable law.

### VII. Classification

NMFS publishes these final specifications and effort controls under the authority of the Magnuson–Stevens Act and ATCA. The Assistant Administrator for Fisheries (AA) has

determined that the regulations contained in this final rule are necessary to implement the recommendations of ICCAT and to manage the domestic Atlantic HMS fisheries, and are consistent with the Magnuson–Stevens Act and its National Standards.

Because this a substantive rule that relieves a restriction by increasing the General category daily retention limit to three large medium or giant BFT per vessel and by increasing the Angling category daily retention limit to one school BFT and one large school/small medium BFT per vessel, it is not subject to a 30-day delay in effectiveness pursuant to 5 U.S.C. 553(d)(1). The default General category daily retention limit which would become effective when the season opens on June 1, 2009, without this action, is one large medium or giant BFT per vessel per day (§ 635.23(a)(2)). The default Angling category daily retention limit currently in effect is one school, large school, or small medium BFT per vessel per day (§ 635.23(b)(2)(ii)). Although the 2009 Angling category season officially began January 1, recreational effort historically picks up in the month of June.

Therefore, this action allows General category and Angling category permit holders to harvest more BFT than they could under existing regulations. The AA also finds good cause under U.S.C. 553(d)(3) to waive the 30-day delayed effectiveness period for the BFT quota specifications in this action. Without the waiver for the 30-day delayed effectiveness period, the codified U.S. BFT quota of 1,165.1 mt and related subquotas (allocated per quota allocations established in the Consolidated HMS FMP) would remain in effect. The 2008 ICCAT Recommendation concerning the ICCAT Rebuilding Program (ICCAT Recommendation 08–04) will enter into force on June 17, 2009. In order for the United States to be in compliance with this ICCAT Recommendation, which the United States agreed to at the November 2008 meeting of ICCAT, a total U.S. quota of 1,034.9 mt must be established by June 17, 2009.

This final rule been determined to be not significant for purposes of Executive Order 12866.

In compliance with Section 604 of the Regulatory Flexibility Act, a Final Regulatory Flexibility Analysis (FRFA) was prepared for this rule. The FRFA analyzes the anticipated economic impacts of the preferred actions and any significant alternatives that could minimize economic impacts on small entities. Each of the statutory requirements of Section 604 of the Regulatory Flexibility Act has been

addressed and a summary of the FRFA is below. The full FRFA and analysis of economic and ecological impacts, are available from NMFS (see ADDRESSES).

Section 604(a)(1) of the Regulatory Flexibility Act requires the Agency to state the objective and need for the rule. As stated earlier, the objective of this rule is to establish BFT quotas and effort controls for the General and Angling categories for the 2009 fishing year consistent with the Consolidated HMS FMP. This rule is needed to implement ICCAT recommendations as necessary and appropriate pursuant to ATCA and to achieve domestic management objectives under the Magnuson–Stevens Act.

Section 604(a)(2) of the Regulatory Flexibility Act requires the Agency to summarize significant issues raised by the public comment in response to the Initial Regulatory Flexibility Analysis (IRFA), a summary of the Agency's assessment of such issues, and a statement of any changes made as a result of the comments. NMFS received one comment specifically on the IRFA. The commenter wrote that NMFS should establish a separate quota allocation for the charter sector and suggested that NMFS should better quantify the positive economic impact of the charter sector in the BFT fishery. Establishment of a new quota category would involve an FMP amendment and is therefore outside the scope of this rulemaking.

Section 604(a)(3) of the Regulatory Flexibility Act requires the Agency to describe and provide an estimate of the number of small entities to which the rule will apply. The final action could directly affect the approximately 43,000 vessel owners permitted in the HMS Angling category, the HMS Charter/Headboat category, or the Atlantic tunas commercial permit categories (General, Harpoon, Purse Seine, Longline, and Trap categories). Of these, 9,871 permit holders (the combined number of commercial category permit holders, including charter/headboat vessels) are considered small business entities according to the Small Business Administration's standard for defining a small entity.

Section 604(a)(4) of the Regulatory Flexibility Act requires the Agency to describe the projected reporting, recordkeeping, and other compliance requirements of the final rule, including an estimate of the classes of small entities which would be subject to the requirements of the report or record. None of the alternatives considered for this final rule would result in additional reporting, recordkeeping, and compliance requirements.

Section 604(a)(5) of the Regulatory Flexibility Act requires the Agency to describe the steps taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes. Additionally, the Regulatory Flexibility Act (5 U.S.C. 603(c)(1) – (4)) lists four general categories of "significant" alternatives that would assist an agency in the development of significant alternatives. These categories of alternatives are: (1) establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) use of performance rather than design standards; and (4) exemptions from coverage of the rule for small entities.

In order to meet the objectives of this final rule, consistent with the Magnuson–Stevens Act, NMFS cannot exempt small entities or change the reporting requirements only for small entities, because all of the affected businesses (commercial vessel permit holders) are considered small entities. Thus, there are no alternatives discussed that fall under the first and fourth categories described above. In addition, none of the alternatives considered would result in additional reporting or compliance requirements (category two above). NMFS does not know of any performance or design standards that would satisfy the aforementioned objectives of this rulemaking while, concurrently, complying with the Magnuson–Stevens Act.

As described below, NMFS analyzed several alternatives in this final rulemaking and provides justification for selection of the preferred alternatives to achieve the desired objective.

NMFS has estimated the average impact that the alternative to establish the 2009 BFT quota for all domestic fishing categories would have on individual categories and the vessels within those categories. As mentioned above, the 2008 ICCAT recommendation reduced the U.S. BFT quota to 1,034.9 mt. This quota allocation includes 25 mt to account for incidental catch of BFT related to directed longline fisheries in the NED. This action would distribute the adjusted (baseline) quota of 1,009.9 mt to the domestic fishing categories based on the allocation percentages established in the Consolidated HMS FMP.

In 2008, the annual gross revenues from the commercial BFT fishery were approximately \$5.0 million.

Approximately 9,871 vessels are permitted to land and sell BFT under four commercial BFT quota categories (including charter/headboat vessels). The commercial categories and their 2008 gross revenues are General (\$4.0 million), Harpoon (\$313,781), Purse Seine (\$0), and Longline (\$722,016). The FRFA assumes that each vessel within a category will have similar catch and gross revenues to show the relative impact of the proposed action on vessels.

For the allocation of BFT quota among domestic fishing categories, NMFS analyzed a no action alternative and Alternative A2 (preferred alternative) which would implement the 2008 ICCAT recommendation. NMFS considered a third alternative (A3) that would have allocated the 2008 ICCAT recommendation in a manner other than that designated in the Consolidated HMS FMP. Alternative A3 would result in a de facto quota reallocation among categories, and an FMP amendment would be necessary for its implementation. Per the Consolidated HMS FMP, NMFS prepares quota specifications annually for the upcoming fishing year. Preparation of an FMP amendment would not be possible in the brief period of time between receipt of the ICCAT recommendation, which occurred in late November 2008, and the start of the 2009 fishing year on January 1, 2009. Therefore, analysis of the impacts of Alternative A3 is not available. But, if an FMP amendment was feasible, positive economic impacts would be expected to result on average for vessels in permit categories that would receive a greater share than established in the FMP, and negative economic impacts would be expected to result on average for vessels in permit categories that would receive a lesser share than established in the FMP. Impacts per vessel would depend on the temporal and spatial availability of BFT to participants.

As noted above, Alternative A2 would implement the 2008 ICCAT recommendation in accordance with the Consolidated HMS FMP and consistent with ATCA, under which the United States is obligated to implement ICCAT-approved quota recommendations, as necessary and appropriate. The preferred alternative would implement this quota and have slightly positive impacts for fishermen. The no action alternative would keep the quota at pre-2008 ICCAT recommendation levels (approximately 155 mt more) and would not be consistent with the purpose and need for this action and the Consolidated HMS FMP. It would

maintain economic impacts to the United States and to local economies at a distribution and scale similar to 2008 or recent prior years, and would provide fishermen additional fishing opportunities, subject to the availability of BFT to the fishery, in the short term. In the long term, however, as stock rebuilding is delayed, negative impacts would result.

The preferred alternative also would implement the provision of the 2008 ICCAT recommendation that limits school BFT landings to 10 percent of the total U.S. quota, calculated on a two-year average, over 2009 and 2010. This is expected to have neutral impacts to fishermen who fish for school BFT, particularly those who rely exclusively on the school size class for BFT harvest, as NMFS has successfully managed the school BFT fishery since the 2006 recommendation so as to not exceed the school BFT tolerance on an annual basis.

The proposed three fish daily retention limit (measuring 73 inches or greater) per vessel is the preferred alternative for the opening retention limit for the General category, which would be in effect June 1–August 31, 2009. It is expected to result in the most positive socio-economic impacts by providing the best opportunity to harvest the quota while avoiding oversupplying the market, thus maximizing gross revenues. Other considered alternatives were the no action alternative (one BFT 73 inches or greater) per vessel and a retention limit of two BFT (73 inches or greater) per vessel. Both of these alternatives are expected to be too restrictive given the large amount of quota available for the General category during the 2009 fishing year and could result in the negative economic impact of lower gross revenues. Although early season landings seldom occur at a rate that could oversupply the market, NMFS will monitor landings closely to ensure that the increased retention limit does not contribute to an oversupply.

Three alternatives were considered for Angling category retention limits for the 2009 fishing year. Alternative C1, which was preferred in the draft EA/RIR/IRFA and is the no action alternative (C1) is a daily retention limit of one fish measuring 27 inches to less than 73 inches per vessel for all sectors of the Angling category for the entire 2009 fishing year. The other alternative that would provide a constant daily retention limit is Alternative C2 (one fish measuring 27 inches to less than 47 inches and one fish measuring 47 inches to less than 73 inches per vessel). This alternative was not preferred in the draft

EA/RIR/IRFA as it was then anticipated to result in overharvest of the quota (specifically the large school/small medium BFT subquota), based on the results of the 2008 season and the apparent trend in increasing fish weight in the large school/small medium BFT size range. Additional information has helped NMFS develop more specific analyses showing that the Angling category did not have to be as restricted as originally assumed. Alternative C3 (one fish measuring 27 inches to less than 47 inches and, for certain periods, one fish measuring 47 inches to less than 73 inches per vessel) would be designed to constrain large school/small medium BFT landings to the available subquota and would be more restrictive with regard to retention of this size class than Alternative C2. However, this was not the preferred alternative in the draft EA/RIR/IRFA as it was not then considered to be sufficiently restrictive to constrain the recreational landings to the adjusted large school/small medium BFT subquota and as it may not provide consistent and equitable fishing opportunities to all users. Although NMFS requested specific public comments on Alternative C3, none were submitted.

After considering additional fishery information, public comment, and other management objectives, NMFS has selected Alternative C2 as the preferred alternative. NMFS has the flexibility to allocate some or all of the Reserve quota to the Angling category quota at the end of the year, if needed and as available, to cover potential overharvest of the Angling category quota. Such use of the Reserve would minimize the likelihood that future Angling category quotas (specifically the large school/small medium BFT subquota) would need to be reduced due to 2009 recreational fishery overharvest. Based on current projections and analyses, NMFS does not anticipate an overharvest of the school BFT subquota.

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

Fisheries, Fishing, Fishing vessels, Foreign relations, Management, Treaties.

Dated: May 26, 2009.

#### John Oliver

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR part 635 is 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.*; 16 U.S.C. 1801 *et seq.*

■ 2. In § 635.27, paragraphs (a) introductory text, (a)(1)(i), (a)(2), (a)(3), (a)(4)(i), (a)(5), (a)(6), (a)(7)(i), (a)(7)(ii), and (a)(10)(iii) are revised to read as follows:

#### § 635.27 Quotas.

(a) *BFT*. Consistent with ICCAT recommendations, and with paragraph (a)(10)(iv) of this section, NMFS may subtract the most recent, complete, and available estimate of dead discards from the annual U.S. BFT quota, and make the remainder available to be retained, possessed, or landed by persons and vessels subject to U.S. jurisdiction. The remaining baseline annual U.S. BFT quota will be allocated among the General, Angling, Harpoon, Purse Seine, Longline, Trap, and Reserve categories. BFT may be taken by persons aboard vessels issued Atlantic Tunas permits, HMS Angling permits, or HMS Charter/Headboat permits. The baseline annual U.S. BFT quota is 1,009.9 mt, not including an additional annual 25 mt allocation provided in paragraph (a)(3) of this section. Allocations of the baseline annual U.S. BFT quota are: General – 47.1 percent (475.7 mt); Angling – 19.7 percent (199.0 mt), which includes the school BFT held in reserve as described under paragraph (a)(7)(ii) of this section; Harpoon – 3.9 percent (39.4 mt); Purse Seine – 18.6 percent (187.8 mt); Longline – 8.1 percent (81.8 mt), which does not include the additional annual 25 mt allocation provided in paragraph (a)(3) of this section; and Trap – 0.1 percent (1.0 mt). The remaining 2.5 percent (25.2 mt) of the baseline annual U.S. BFT quota will be held in reserve for inseason or annual adjustments based on the criteria in paragraph (a)(8) of this section. NMFS may apportion a quota allocated to any category to specified fishing periods or to geographic areas and will make annual adjustments to quotas, as specified in paragraph (a)(10) of this section. BFT quotas are specified in whole weight.

(1) \* \* \*

(i) Catches from vessels for which General category Atlantic Tunas permits have been issued and certain catches from vessels for which an HMS Charter/Headboat permit has been issued are counted against the General category quota in accordance with § 635.23(c)(3). The amount of large medium and giant BFT that may be caught, retained,

possessed, landed, or sold under the General category quota is 47.1 percent (475.7 mt) of the baseline annual U.S. BFT quota, and is apportioned as follows:

(A) January 1 through January 31 – 5.3 percent (25.2 mt);

(B) June 1 through August 31 – 50 percent (237.8 mt);

(C) September 1 through September 30 – 26.5 percent (126.1 mt);

(D) October 1 through November 30 – 13 percent (61.8 mt); and

(E) December 1 through December 31 – 5.2 percent (24.7 mt).

\* \* \* \* \*

(2) *Angling category quota.* In accordance with the framework procedures of the HMS FMP, prior to each fishing year or as early as feasible, NMFS will establish the Angling category daily retention limits. The total amount of BFT that may be caught, retained, possessed, and landed by anglers aboard vessels for which an HMS Angling permit or an HMS Charter/Headboat permit has been issued is 19.7 percent (199.0 mt) of the baseline annual U.S. BFT quota. No more than 2.3 percent (4.6 mt) of the annual Angling category quota may be large medium or giant BFT. In addition, over each 2–consecutive–year period (starting in 2009, inclusive), no more than 10 percent of the annual U.S. BFT quota, inclusive of the allocation specified in paragraph (a)(3) of this section, may be school BFT. The Angling category quota includes the amount of school BFT held in reserve under paragraph (a)(7)(ii) of this section. The size class subquotas for BFT are further subdivided as follows:

(i) After adjustment for the school BFT quota held in reserve (under paragraph (a)(7)(ii) of this section), 52.8 percent (44.5 mt) of the school BFT Angling category quota may be caught, retained, possessed, or landed south of 39°18' N. lat. The remaining school BFT Angling category quota (39.8 mt) may be caught, retained, possessed or landed north of 39°18' N. lat.

(ii) An amount equal to 52.8 percent (48 mt) of the large school/small medium BFT Angling category quota

may be caught, retained, possessed, or landed south of 39°18' N. lat. The remaining large school/small medium BFT Angling category quota (42.9 mt) may be caught, retained, possessed or landed north of 39°18' N. lat.

(iii) An amount equal to 66.7 percent (3.1 mt) of the large medium and giant BFT Angling category quota may be caught, retained, possessed, or landed south of 39°18' N. lat. The remaining large medium and giant BFT Angling category quota (1.5 mt) may be caught, retained, possessed or landed north of 39°18' N. lat.

(3) *Longline category quota.* The total amount of large medium and giant BFT that may be caught incidentally and retained, possessed, or landed by vessels that possess Longline category Atlantic Tunas permits is 8.1 percent (81.8 mt) of the baseline annual U.S. BFT quota. No more than 60.0 percent (49.1 mt) of the Longline category quota may be allocated for landing in the area south of 31°00' N. lat. In addition, 25 mt shall be allocated for incidental catch by pelagic longline vessels fishing in the Northeast Distant gear restricted area as specified at § 635.23(f)(3).

(4) \* \* \*

(i) The total amount of large medium and giant BFT that may be caught, retained, possessed, or landed by vessels that possess Purse Seine category Atlantic Tunas permits is 18.6 percent (187.8 mt) of the baseline annual U.S. BFT quota. The directed purse seine fishery for BFT commences on July 15 of each year unless NMFS takes action to delay the season start date. Based on cumulative and projected landings in other commercial fishing categories, and the potential for gear conflicts on the fishing grounds or market impacts due to oversupply, NMFS may delay the BFT purse seine season start date from July 15 to no later than August 15 by filing an adjustment with the Office of the Federal Register prior to July 1.

\* \* \* \* \*

(5) *Harpoon category quota.* The total amount of large medium and giant BFT that may be caught, retained, possessed, landed, or sold by vessels that possess

Harpoon category Atlantic Tunas permits is 3.9 percent (39.4 mt) of the baseline annual U.S. BFT quota. The Harpoon category fishery closes on November 15 each year.

(6) *Trap category quota.* The total amount of large medium and giant BFT that may be caught, retained, possessed, or landed by vessels that possess Trap category Atlantic Tunas permits is 0.1 percent (1.0 mt) of the baseline annual U.S. BFT quota.

(7) \* \* \*

(i) The total amount of BFT that is held in reserve for inseason or annual adjustments and fishery-independent research using quotas or subquotas is 2.5 percent (25.2 mt) of the baseline annual U.S. BFT quota. Consistent with paragraph (a)(8) of this section, NMFS may allocate any portion of this reserve for inseason or annual adjustments to any category quota in the fishery.

(ii) The total amount of school BFT that is held in reserve for inseason or annual adjustments and fishery-independent research is 18.5 percent (19.1 mt) of the total school BFT Angling category quota as described under paragraph (a)(2) of this section. This is in addition to the amounts specified in paragraph (a)(7)(i) of this section. Consistent with paragraph (a)(8) of this section, NMFS may allocate any portion of the school BFT Angling category quota held in reserve for inseason or annual adjustments to the Angling category.

\* \* \* \* \*

(10) \* \* \*

(iii) Regardless of the estimated landings in any year, NMFS may adjust the annual school BFT quota to ensure that the average take of school BFT over each 2–consecutive–year period beginning in the 2009 fishing year does not exceed 10 percent by weight of the total annual U.S. BFT quota, inclusive of the allocation specified in paragraph (a)(3) of this section, for that period.

\* \* \* \* \*

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