

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 090508897-1635-03]

RIN 0648-AX85

Atlantic Highly Migratory Species; Adjustments to the Atlantic Bluefin Tuna General and Harpoon Category Regulations

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

ACTION: Final rule.

SUMMARY: NMFS is adjusting the Atlantic bluefin tuna (BFT) fishery regulations to: increase the General category maximum daily retention limit; allow the General category season to remain open until the January subquota is reached, or March 31, whichever happens first; and increase the Harpoon category daily incidental retention limit. This action is intended to enable more thorough utilization of the available U.S. BFT quota for the General and Harpoon (commercial handgear) categories; minimize bycatch and bycatch mortality to the extent practicable; expand fishing opportunities for participants in the commercial winter General category fishery; and increase NMFS' flexibility for setting the General category retention limit depending on available quota.

DATES: This rule is effective [Insert 30 days after publication in the Federal Register], except for § 635.23(a)(4) and § 635.27(a)(1)(i)(A), which are effective [insert date of publication in the FEDERAL REGISTER].

ADDRESSES: Supporting documents, including the Environmental Assessment, Regulatory Impact Review, and Final Regulatory Flexibility Analysis (EA/RIR/FRFA), 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 and others, such as the Fishery Management Plans described below, also may be downloaded from the HMS website at [www.nmfs.noaa.gov/sfa/hms/](http://www.nmfs.noaa.gov/sfa/hms/).

FOR FURTHER INFORMATION CONTACT: Sarah McLaughlin or Tom Warren, 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 requires the Secretary of Commerce (Secretary) to promulgate regulations, as may be necessary and appropriate, to implement 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, NMFS.

## Background

Background information about the need for amendment of the regulations regarding the BFT General category maximum daily retention limit, General category season, and Harpoon category daily incidental retention limit was provided in the preamble to the proposed rule (74 FR 57128, November 4, 2009) and is not repeated here.

At the proposed rulemaking stage in 2009, the proposed rule was titled “Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Season and Retention Limit Adjustments.”

As the rule has evolved through the notice and comment process, NMFS has determined that keeping the proposed rule title at this stage would confuse the regulated public; therefore, to clarify the purpose and content of the rulemaking, NMFS has changed the title of the rule to “Atlantic Highly Migratory Species; Adjustments to the Atlantic Bluefin Tuna General and Harpoon Category Regulations.” Any changes to the rule’s provisions that were made between the proposed and final rule are discussed in depth below.

NMFS extended the original 45-day comment period on the proposed rule through March 31, 2010, based on public, Congressional, and non-governmental organization requests for NMFS to wait to complete any related final rulemaking until after the March 2010 meeting regarding the Convention on the International Trade in Endangered Species of Wild Flora and Fauna, and until the 2010 publication of new research.

NMFS delayed issuing a final rule pending a new ICCAT BFT stock assessment and subsequent ICCAT recommendation on BFT conservation and management in 2010, as well as the decision on a May 2010 petition to list BFT as threatened or endangered under the Endangered Species Act (ESA). In May 2011, NMFS determined that listing BFT as threatened or endangered under the ESA was not warranted, but listed BFT as a species of concern. NMFS will revisit the status of BFT under the ESA in 2013. Because the concerns that led to NMFS addressing the BFT regulations in the 2009 proposed rule still exists, NMFS is now taking this final action.

#### Changes from the Proposed Rule

In the proposed rule, with regard to the General category January subquota, NMFS proposed to allow, annually, the General category to remain open from January 1 until the January subquota is determined to be fully harvested, rather than have a set period from

January 1 through January 31, as allowed under the current regulations. To effect this change, NMFS proposed to adjust the time period for which the January subquota would be available, such that it would begin January 1 and end when the January subquota is projected to be reached, or May 31, whichever comes first. NMFS indicated that the action likely would lengthen the General category season only by a few weeks, with the duration of the extension dependent on weather conditions and availability of large medium and giant BFT to the fishery during the winter months.

As described in the Comments and Responses section below, following consideration of public comment on the potential impacts of extending the General category season through May of each year, NMFS has decided that the General category season should remain open until the January subquota is reached or March 31, whichever happens first) rather than May 31, as originally proposed. This action is within the scope of alternatives analyzed in the draft EA.

#### Provisions Implemented in this Final Rule

##### Adjustment of the General Category Maximum Possible Daily Retention Limit

NMFS implements in this final rule, an increase to the General category maximum possible daily retention limit to five fish per vessel. NMFS may increase or decrease the actual allowed daily retention limit of large medium and giant BFT over a range from zero to a maximum of five per vessel via inseason action based on the determination criteria and other relevant factors provided under § 635.27(a)(8):

- (i) The usefulness of information obtained from catches in the particular category for biological sampling and monitoring of the status of the stock.

(ii) 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.

(iii) 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.

(iv) The estimated amounts by which quotas for other gear categories of the fishery might be exceeded.

(v) Effects of the adjustment on BFT rebuilding and overfishing.

(vi) Effects of the adjustment on accomplishing the objectives of the fishery management plan.

(vii) Variations in seasonal distribution, abundance, or migration patterns of BFT.

(viii) 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.

(ix) Review of dealer reports, daily landing trends, and the availability of the BFT on the fishing grounds.

#### Adjustment of the General Category Season

NMFS implements an adjustment to the regulation that specifies the time period for which the General category January subquota is available, such that the period that begins January 1 would end upon the effective date of a closure notice that NMFS would file with the Office of the Federal Register when the quota apportioned to the period that begins January 1 is projected to be reached, or March 31, whichever comes first. In the future, NMFS will publish a closure action for the General category January subquota in the Federal Register, if necessary to close the fishery prior to March 31.

#### Adjustment of the Harpoon Category Daily Incidental Retention Limit

NMFS implements an increase to the Harpoon category daily incidental retention limit of large medium BFT from two to four per vessel. This action is intended to provide Harpoon category vessels a reasonable opportunity to harvest the allocated Harpoon category quota in its designated time frame (June 1 through November 15 of each year) and minimize the potential for dead discards to the extent practicable.

#### Comments and Responses

NMFS received approximately 6,000 written comments, the majority of which were sent through a campaign by a non-governmental organization (NGO) representing environmental interests. Fifteen letters were sent by individuals or organizations (including fishing industry, fishery management council, state, and NGOs), and oral comments were received from the approximately 15 attendees of public hearings in Gloucester, MA, and Silver Spring, MD. NMFS considered all comments received, and below, responds to comments made on the proposed rule. Similar or same comments from multiple individuals are grouped together by subject. In addition, NMFS received comments on issues that were not part of this rulemaking. These comments are summarized under “Other Issues” below.

Comment 1: The justification and rationale for an increase in the Harpoon category daily retention limit of large medium BFT is not valid (i.e., the premise that catch has consistently been under the quota is not correct). In 2009, the Harpoon category BFT landings exceeded the baseline quota, and even with the 2009 adjustment to the baseline quota, 25 mt had to be transferred from the Reserve category in August 2009 to ensure that the harpooners did not exceed their quota. We take issue with NMFS’ statement that “While the recreational Angling category and the commercial Longline category have been able to fill their subquotas in recent years, the commercial handgear categories (General and

Harpoon) have not.” Furthermore, the 2010 quota is the lowest in nearly three decades, and starting next year, roll-over of underage will be limited to 10 percent of the baseline quota.

Response: NMFS is required under the Magnuson-Stevens Act and ATCA to provide U.S. fishing vessels with a reasonable opportunity to harvest the ICCAT recommended quota. For the General and Harpoon categories, on average, recent landings have been less than either the base or adjusted quotas. Over the last three years, the General category landed an average of 77 percent of its base quota and 60 percent of its adjusted quota, while the Harpoon category landed an average of 68 percent of its base quota and 44 percent of its adjusted quota. This action provides NMFS the option to implement a wider range of daily retention limits to facilitate the harvest of the available U.S. BFT quota, if conditions warrant. Use of such flexibility through the implementation of the higher daily retention limits for the General category will be contingent upon the availability of quota and subject to the determination criteria and other relevant factors outlined in § 635.27 (a)(8). The August 28, 2009, transfer to the Harpoon category (74 FR 44298) was conducted in accordance with the criteria mentioned above.

Comment 2: The reasoning underlying the proposed rule is flawed, as evidenced by NMFS’ statement that “These three effort controlling actions would affect only when and where BFT mortality occurs, and not the magnitude.” The measures are intended to facilitate the utilization of the U.S. quota, and will increase BFT fishing mortality in addition to affecting the timing and location of catch, and therefore NMFS should not implement the proposed measures.

Response: NMFS has determined that, when evaluating the effect of management measures, it is important to consider time scales as they relate to the action under

consideration. Relevant scientific information, ICCAT recommendations (e.g., quotas), and the Consolidated HMS FMP are structured principally on an annual basis. Although on a particular fishing day, a vessel may catch more or fewer BFT, the maximum fishing mortality is capped by the annual quota. This rule modifies neither the annual quota, nor the fishing mortality associated with that quota. Given the variability of the location of BFT, a higher daily retention limit may enable better alignment of catch with fish availability, while not increasing overall catch.

Comment 3: Even if catch is within the ICCAT established quota, that level of catch could lead to accelerated stock declines and further compromise the rebuilding program. NMFS should end overfishing and minimize bycatch. Limiting fishing mortality is even more important now that the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) opted not to prohibit international trade of BFT.

Response: NMFS agrees that limiting fishing mortality is important. NMFS does so within the limits of the ICCAT-recommended quota and in implementing its Magnuson-Stevens Act and ATCA obligations. The 2011 U.S. quota is consistent with the current ICCAT recommended total allowable catch, which is expected to allow for continued BFT stock growth under both the low and high stock recruitment scenarios considered by ICCAT's Standing Committee on Research and Statistics (SCRS). NMFS implements numerous regulatory measures and collects commercial landings data on a daily basis to ensure available quotas are not exceeded. Using its inseason management authority, NMFS will be able to monitor and make adjustments to the commercial fishery in a timely manner (close to 'real time'), as commercial data are required to be submitted within 24 hours of

landing. Although BFT was not listed under CITES in 2010, international trade is highly regulated consistent with ICCAT requirements.

Comment 4: Increasing the daily retention limit could have negative economic consequences as the flood of fish on the market would likely lower the ex-vessel price of the fish.

Response: NMFS believes it is unlikely that any potentially implemented increase in the BFT daily retention limit would have significant, negative economic impacts on the ex-vessel price. The price for BFT exported to Japan is dependent on a number of factors, including: quality, size, and global supply of BFT at the time. Increased revenues would depend on availability of large medium and giant BFT to the fishery, as well as the daily retention limit set by NMFS through inseason action. In 2010, 404 trips (20 percent of successful trips) landed three large medium or giant BFT. If each of these 404 trips landed five large medium or giant BFT instead of three, a total of 808 additional fish would have been landed (over the course of the fishing year under a limit of five fish). If the General category retention limit were increased to five for any portion of the fishing year, this action also could have positive socioeconomic impacts by allowing vessels to extend their range while remaining profitable.

Comment 5: The General category should not have a retention limit. NMFS should implement Alternative A3 (elimination of the maximum daily retention limit).

Response: Retention limits for the General category are necessary to ensure that the General category landings do not exceed their allocated proportion of the U.S. quota established in the Consolidated HMS FMP. Furthermore, retention limits allow NMFS to distribute fishing opportunities both temporally and geographically, thereby ensuring fishing

in one area does not preclude opportunities in other areas. For these reasons, NMFS is not implementing the commenter's recommendation.

Comment 6: Increasing the General category trip limit to five large medium or giants would allow vessels capable of fishing further offshore to take advantage of the opportunity to do so if market conditions and weather permit. The increase in maximum daily retention limit should allow additional flexibility and a more reasonable opportunity for the General category to catch its share of the U.S. quota. NMFS should also increase the daily retention of large medium BFT in the Harpoon category to four per vessel.

Response: In this final rule, NMFS implements an increase to the maximum possible General category BFT daily retention limit to five fish per vessel as well as an increase to the daily incidental retention limit of large medium BFT from two to four per vessel. This action is intended to enable more thorough utilization of the available U.S. BFT quota for the General and Harpoon categories, minimize bycatch and bycatch mortality to the extent practicable, expand fishing opportunities for participants in the commercial winter General category fishery, and increase NMFS' flexibility for setting the General category retention limit depending on available quota.

Comment 7: The North Carolina Division of Marine Fisheries supports the proposed action to allow full access to the January subquota. The BFT fishery is very important to coastal North Carolina fishing communities during the winter months.

Response: The Agency is aware of the importance of the winter BFT fishery. NMFS agrees that enhanced access to the January subquota is warranted. Increasing access to the January subquota through March 31 will allow additional opportunities to harvest the available January subquota, reduce the potential for late spring gear conflict between fishery

participants, and mitigate the potential impacts of any additional fishing effort during months previously unfished. This measure will provide participants in this region with an interest in harvesting BFT a reasonable opportunity to harvest the available quota consistent with the goals of the Consolidated HMS FMP.

Comment 8: NMFS should establish equal monthly General category time periods and subquotas (Alternative B3) rather than increasing the maximum retention limit to 5 fish (Alternative A2). The expanded seasonal opportunities of Alternative B3 far outweigh the benefits of high retention limits that often result in lower product quality and shorter seasons. Fishermen from all states would be equal and capable of traveling to wherever the BFT are. Alternative B3 does not discriminate between residents of different states, is fair and equitable to all such fishermen, is reasonably calculated to promote conservation, and does not allow any individuals, entities, or states to acquire an excessive share of BFT fishing privileges, as required by the Magnuson-Stevens Act.

Response: Alternative B3 (dividing the General category allocations equally between months) was not selected because the potential negative social and economic impacts outweigh the positive impacts and because NMFS believes the topic of quota allocation merits further consideration and analyses. The negative aspects of this alternative are the potential for gear conflicts and a derby fishery, as well as the potential for the historical geographic distribution of the fishery to be dramatically altered. Although this alternative would provide some stability to the fishery by establishing a known amount of quota that would be available at the first of each month, if catch rates are high in the early portion of the month, these quotas could be harvested rapidly and may lead to derby style fisheries on the first of each month. The preferred alternative (B2b) provides additional fishing opportunities

within available quotas while acknowledging the traditional fishery. Current regulations do not preclude General category vessels from traveling from one area to another.

Comment 9: The characteristics of BFT foraging aggregations make them susceptible to high levels of fishing mortality. In some instances, the majority of an entire cohort can be taken in a spatially and temporally discrete region and period, respectively. A large number of General category vessels with an increased limit in the middle of a large and aggressively feeding group of BFT could result in near elimination of that group, potentially having widespread age and/or genetic impacts on the stock.

Response: NMFS manages the General category BFT fishery principally through the overall General category quota and time period subquotas. Assuming there is no significant change in the selectivity of the fishery, the action would be consistent with ICCAT recommendations and stock assessments.

Comment 10: Although allowing the General category January subquota to be fished through May 31 will likely extend the season by a month or less, based on recent mortality information and available quota, concerns remain that this action would infringe on the de facto time-area closure that currently exists from February 1 through May 31. The majority of fish available to the fishery during this period are off the coast of the mid-Atlantic, and recent research has shown that these fish are primarily adolescents, interspersed with mature western BFT on their way to the Gulf of Mexico to breed. This aggregation therefore has a high reproductive value because the fish are within a year or two of spawning, or even more importantly, are in the middle of their migration to the spawning ground, and warrant heightened protection. As immigration of eastern BFT has decreased due to overfishing in the Mediterranean Sea, there has likely been a shift in frequency of the mid-Atlantic

aggregation towards more fish of western origin. Increasing mortality in the region would therefore counter rebuilding of the western population.

Response: NMFS agrees with the commenter that the action would likely effectively lengthen the General category season by only a few weeks. The duration of the actual extension would depend on weather conditions and availability of large medium and giant BFT to the fishery during the winter months. NMFS has taken this comment into consideration and has modified the end date of the duration of access to the January subquota from May 31 to March 31. As indicated above, this is expected to mitigate any potential impacts to the species of any additional fishing effort during months previously unfished, as well as reduce the potential for late spring gear conflict between fishery participants (i.e., if General category fishing activity continues through May while the Harpoon category must wait until June 1 to begin fishing).

#### Other Issues

NMFS received comments on the issues outlined under the six subheadings below. These suggestions are beyond the scope of this rulemaking. However, NMFS is undertaking a comprehensive review of BFT management to determine whether existing management measures need to be adjusted more broadly to meet the multiple goals for the BFT fishery, and these issues may be considered through future actions.

##### 1. Reduction of Minimum Size

NMFS should consider lowering the minimum fish size to 65 inches for the General and Harpoon categories. Lowering of the minimum size could be achieved in a resource neutral fashion with a modest transfer/sacrifice (possibly temporary, possibly permanent) of giant BFT quota to the medium category. It would still leave the United States with the

largest minimum size of any ICCAT Contracting Party. Another commenter noted that the majority of available fish are currently 65 to 73 inches (curved fork length) and suggested that management should be modified to reflect this availability of smaller fish.

## 2. Modification of Pelagic Longline Trip Limits

NMFS should have increased the incidental pelagic longline trip limits to a maximum of five fish with a directed catch of 12,000 lb. As interactions with BFT increase over the next several years, NMFS needs a plan for dealing with increased interactions in light of efforts to revitalize the pelagic longline fishery for swordfish.

## 3. Modification of Permit Category Restrictions and Quota Use

NMFS should allow vessels in the General and Charter Headboat categories the opportunity to participate in both the Angling category and General category on the same trip or fishing day. The conservative U.S. quotas protect the resource and the mandate of the Magnuson-Stevens Act and ATCA is to provide maximum opportunities to catch these quotas. NMFS also received comment that because of the current inactivity of at least two of the purse seine vessels, the associated purse seine quota should be used to account for pelagic longline discards and NMFS should allow increased incidental landings of BFT by longlines. NMFS should authorize the use of harpoon gear by Charter/Headboat category vessels when they do not have paying passengers onboard.

## 4. General Category Season

NMFS should reopen the General category fishery in May instead of June.

## 5. Elimination or Curtailment of the BFT Fishery

NMFS received comment that the entire BFT fishery should be closed, that pelagic longlining in the Gulf of Mexico should be prohibited at all times, or that pelagic longlining

in the Gulf of Mexico should be prohibited during the spawning period (last week of April through first week of June), or from March to September.

#### 6. Validity of Current Quota

NMFS received comment that evaluation of the proposed measures with respect to the current quotas would result in an incorrect conclusion, due to an underlying concern that the current quota is not valid, due to a retrospective pattern in the stock assessment. Specifically, the comment states that if the United States had been catching its quota in recent years, the western BFT biomass would be approximately 30 percent lower than its already depleted current level. It follows that this rule could lead to accelerated declines and compromise the ICCAT rebuilding program even more than it has already been compromised.

#### Classification

The Assistant Administrator for Fisheries, NMFS, has determined that this final action is consistent with the Magnuson-Stevens Act, ATCA, and other applicable law, and is necessary to achieve domestic management objectives under the Consolidated HMS FMP.

The Assistant Administrator for Fisheries (AA) finds good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effectiveness for this action. This waiver applies only to those provisions related to the General category fishery. This action would increase the General category maximum possible BFT daily retention limit from three to five fish (with limit adjustments to be executed via inseason actions as appropriate following consideration of determination criteria at § 635.27(a)(8)). It also increases NMFS' flexibility and range for setting the General category retention limit depending on available quota. This action would also extend the duration of time over which General category participants may fish the

available General category January subquota, from January 1 through January 31 to January 1 through March 31 of each year. These provisions are consistent with ICCAT recommendations and the Consolidated HMS FMP and provide the General category BFT fishery with potential beneficial economic impacts. If these provisions are delayed to allow for the 30-day delay in implementation, the General category BFT fishery would open on January 1, 2012, but would be limited to the current January timeframe and retention limit range. This would prevent the fishery from fully realizing the economic benefits of this rule. For these reasons, the AA finds good cause to waive the 30-day delay in effectiveness.

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

In compliance with section 604 of the Regulatory Flexibility Act (RFA), a Final Regulatory Flexibility Analysis (FRFA) was prepared for this rule. The FRFA incorporates the Initial Regulatory Flexibility Analysis (IRFA), a summary of the significant issues raised by the public comments in response to the IRFA, and NMFS responses to those comments, and a summary of the analyses completed to support the action. The full FRFA and analysis of economic and ecological impacts are available from NMFS (see ADDRESSES). A summary of the FRFA follows.

In compliance with section 604(a)(1) of the RFA, the purpose of this rulemaking is, consistent with the Consolidated HMS FMP objectives, the Magnuson-Stevens Act, ATCA, and other applicable law, to adjust regulations for the BFT commercial handgear fisheries. This action is intended to enable more thorough utilization of the available U.S. BFT quota for the General and Harpoon categories; minimize bycatch and bycatch mortality to the extent practicable; expand fishing opportunities for participants in the commercial winter

General category fishery; and increase NMFS' flexibility for setting the General category retention limit depending on available quota.

Section 604(a)(2) of the RFA requires agencies to summarize significant issues raised by the public in response to the 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 numerous comments on the proposed rule (74 FR 57128, November 4, 2009) during the comment period. A summary of these comments and the Agency's responses are included in Chapter 14 of the EA/RIR/FRFA and are included in this final rule. Although NMFS did not receive comment specifically on the IRFA, NMFS received some comments expressing concern that increasing the General category daily retention limit could have negative economic consequences from oversupplying the market, which could result in lower ex-vessel prices. For more information, see comment #4 in the section entitled "Comments and Responses."

Section 604(a)(3) of the RFA requires agencies to provide an estimate of the number of small entities to which the rule would apply. The implementation of the ICCAT-recommended baseline annual U.S. BFT quota would apply to all participants in the Atlantic BFT fisheries, all of which are considered small entities, because they either had average annual receipts less than \$4.0 million for fish-harvesting, average annual receipts less than \$6.5 million for charter/party boats, 100 or fewer employees for wholesale dealers, or 500 or fewer employees for seafood processors. These are the Small Business Administration (SBA) size standards for defining a small versus large business entity in this industry. As shown in Table 7 of the EA/RIR/FRFA, for 2008 there were 9,871 vessels permitted to land and sell BFT under four commercial BFT quota categories (including charter/headboat

vessels), with 4,721 vessels in the General category, 4,827 in the Charter/Headboat category, and 26 in the Harpoon category. For 2010, 8,052 vessels were permitted to land and sell BFT under four commercial BFT quota categories (including charter/headboat vessels), with 3,849 vessels in the General category, 4,174 in the Charter/Headboat category, and 29 in the Harpoon category.

Under section 604(a)(4) of the RFA, agencies are required to describe any new reporting, record-keeping and other compliance requirements. The action does not contain any new collection of information, reporting, record keeping, or other compliance requirements.

Under section 604(a)(5) of the RFA, agencies are required to describe any alternatives to the rule which accomplish the stated objectives and which minimize any significant economic impacts. These impacts are discussed below and in Chapters 4 and 6 of the EA/RIR/FRFA. 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 rule, consistent with the Magnuson-Stevens Act, ATCA, and the ESA, NMFS cannot establish differing, or clarifications, consolidations, or simplifications to, compliance requirements for small entities or exempt small entities

from compliance requirements. Thus, there are no alternatives discussed that fall under the first, third, and fourth categories described 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 different alternatives in this rulemaking and provides rationale for identifying the preferred alternatives to achieve the desired objective. The FRFA assumes that each vessel within a category will have similar catch and gross revenues to show the relative impact of the action on vessels.

The alternatives considered and analyzed are described below. The IRFA indicated that in 2008, the annual gross revenues from the commercial BFT fishery were approximately \$5.0 million. The commercial quota categories and their 2008 gross revenues were General (\$4.0 million), Harpoon (\$313,781), Purse Seine (\$0), and Longline (\$722,016). Using data from 2010, the year for which the most recent, complete revenue data are available, the annual gross revenues from the commercial BFT fishery were approximately \$8.9 million. The commercial categories and their 2010 gross revenues are General (\$7.8 million), Harpoon (\$202,643), Purse Seine (\$0), and Longline (\$878,908).

#### General Category Maximum Daily Retention Limit

Alternative A1, the status quo alternative, would maintain the current maximum daily retention limit of three large medium BFT. The status quo alternative could result in negative economic impacts to the extent that the daily retention limit may constrain large medium and giant BFT landings. The inability of the General category to land and sell its full allotted quota results in decreased optimum yield.

Alternative A2, an increase in the maximum possible daily retention limit to five fish per vessel, could have positive economic impacts if NMFS sets the daily retention limit to four or five fish via inseason action, due to the increased potential to land additional large medium and giant BFT rather than discarding fish in excess of the current maximum daily retention limit (e.g., if a fourth commercial size BFT is caught in one day). The IRFA indicated that, based on 2008 data, ex-vessel revenues per trip could increase on average by approximately \$8,500 per active vessel (2 fish x the 2008 average fish weight of 500 lb x \$8.44 General category ex-vessel average price/lb), depending on availability of large medium and giant BFT to the fishery. Using 2010 data, ex-vessel revenues per trip could increase on average by approximately \$5,250 per active vessel (2 fish x the 2010 average fish weight of 379 lb x \$6.93 General category ex-vessel average price/lb), depending on availability of large medium and giant BFT to the fishery. Allowing a higher maximum daily retention limit could also reduce the trip costs per fish landed, and thus improve profitability of trips when additional fish are available. Alternative A2 is the preferred alternative, as it would increase opportunities for General and Charter/Headboat category vessels within the General category quota, which is set consistent with ICCAT recommendations and the Consolidated HMS FMP.

Alternative A3, elimination of the maximum daily retention limit, would have positive economic impacts associated with the increased potential to land all large medium and giant BFT in excess of the current maximum daily retention limit rather than discarding them. Although this alternative would provide the most positive economic impacts, it is not preferred because of the potential negative ecological impact of a relatively large potential increase in BFT mortality, including undersized fish.

## General Category Season

Under Alternative B1, the status quo alternative, the General category season would end on January 31 of each fishing year or when the General category January subquota is harvested, whichever happens first. Under this alternative, NMFS anticipates neutral impacts on General and Charter/Headboat category vessels.

Under both Alternative B2, as proposed, and preferred Alternative B2b, which would allow the General category to remain open until the date NMFS determines that the available January subquota has been reached (or is projected to be reached) or March 31, whichever happens first, NMFS anticipates that overall economic impacts of this alternative to the General category and Charter/Headboat BFT fishery as a whole would be neutral since the same overall amount of the General category quota would be landed and the value of the General category quota would not be changed. However, General category fishermen in the southern region (more than 1,000 vessels) would be positively affected by this alternative as it would allow increased opportunities to land and sell BFT commercially and increased utilization of existing investment in gear and equipment, especially if quota is still available for harvest after January 31.

Under Alternative B3, which would establish a January through December General category season and establish 12 equal monthly General category time periods and subquotas (of 8.3 percent each), resulting impacts would be mixed, but positive overall. Winter fishery participants would benefit from increased opportunities to harvest large medium and giant BFT, if available, during the months of February through March. General category and Charter/Headboat category participants in the New England area, or those participants that pursue BFT in the summer months, might experience some adverse economic impacts due to

the shift in quota to the earlier (winter) portion of the season. However, these effects would be mitigated by the effects of the carrying forward of unharvested quota from one time period to the next. This is not the preferred alternative at this time as NMFS believes the topic of quota allocation merits further consideration and analyses.

#### Harpoon Category Daily Incidental Retention Limit

Alternative C1, the status quo alternative, would maintain the current incidental daily retention limit of two large medium BFT. The status quo alternative could result in negative economic impacts to the extent that the incidental limit constrains large medium BFT landings. The inability of the Harpoon category to land and sell its full allotted quota results in decreased optimum yield.

Alternative C2, an increase in the incidental daily retention limit to four large medium BFT, would have positive economic impacts associated with the increased potential to land additional large medium BFT rather than discarding fish in excess of the current incidental limit (e.g., if a third large medium is caught while pursuing giant BFT). The IRFA indicated that, based on 2008 data, ex-vessel revenues per trip could increase on average by approximately \$4,600 per active vessel (2 fish x the 2008 average Harpoon category fish weight of 360 lb x \$6.36 Harpoon category ex-vessel average price/lb), depending on availability of large medium BFT to the fishery. Using 2010 data, ex-vessel revenues per trip could increase on average by approximately \$3,000 per active vessel (2 fish x the 2010 average Harpoon category fish weight of 260 lb x \$5.75 Harpoon category ex-vessel average price/lb), depending on availability of large medium BFT to the fishery. Allowing a higher daily incidental retention limit could also reduce the trip costs per fish landed, and thus improve profitability of trips when additional fish are available. Alternative C2 is the

preferred alternative as it would increase opportunities for Harpoon category vessels to land the Harpoon category quota while balancing concerns regarding BFT stock health.

Alternative C3, elimination of the incidental limit, would have positive economic impacts associated with the increased potential to land all large medium BFT in excess of the current incidental limit rather than discarding them. Although this alternative would provide the most positive economic impacts, it is not preferred because of the potential negative ecological impact of a relatively large potential increase in large medium BFT mortality.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as “small entity compliance guides.” The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. Copies of the compliance guide are available from NMFS (see ADDRESSES).

List of Subjects in 50 CFR Part 635

Fisheries, Fishing, Fishing vessels, Foreign relations, Imports, Penalties, Reporting and recordkeeping requirements, Treaties.

Dated: November 23, 2011

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Eric C. Schwaab,  
Assistant Administrator for Fisheries,  
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 § 635.23, paragraphs (a)(4) and (d) are revised to read as follows:

§ 635.23 Retention limits for BFT.

\* \* \* \* \*

(a) \* \* \*

(4) To provide for maximum utilization of the quota for BFT, NMFS may increase or decrease the daily retention limit of large medium and giant BFT over a range from zero (on RFDs) to a maximum of five per vessel. Such increase or decrease will be based on the

criteria provided under § 635.27(a)(8). NMFS will adjust the daily retention limit specified in paragraph (a)(2) of this section by filing an adjustment with the Office of the Federal Register for publication. In no case shall such adjustment be effective less than 3 calendar days after the date of filing with the Office of the Federal Register, except that previously designated RFDs may be waived effective upon closure of the General category fishery so that persons aboard vessels permitted in the General category may conduct tag-and-release fishing for BFT under § 635.26.

\* \* \* \* \*

(d) Harpoon category. Persons aboard a vessel permitted in the Atlantic Tunas Harpoon category may retain, possess, or land an unlimited number of giant BFT per day. An incidental catch of only four large medium BFT per vessel per day may be retained, possessed, or landed.

\* \* \* \* \*

3. In § 635.27, paragraph (a)(1)(i)(A) is revised to read as follows:

§ 635.27 Quotas.

(a) \* \* \*

(1) \* \* \*

(i) \* \* \*

(A) January 1 through the effective date of a closure notice filed by NMFS announcing that the January subquota is reached, or projected to be reached under § 635.28(a)(1), or until March 31, whichever comes first - 5.3 percent (25.2 mt);

\* \* \* \* \*

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