

NORTH CAROLINA—OZONE
[8-Hour standard]

Designated area	Designation ^a		Category/classification	
	Date ¹	Type	Date ¹	Type
Haywood and Swain Cos. (Great Smoky NP), NC:				
Haywood County (part)	This action is effective 12/07/09	Attainment.		
Swain County (part)	This action is effective 12/07/09	Attainment.		

^a Includes Indian Country located in each county or area, except as otherwise specified.
¹ This date is June 15, 2004, unless otherwise noted.
² Early Action Compact Area, effective date deferred until April 15, 2008.
³ November 22, 2004.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 090130102-91386-02]

RIN 0648-AX59

International Fisheries; Western and Central Pacific Fisheries for Highly Migratory Species; Bigeye Tuna Catch Limits in Longline Fisheries in 2009, 2010, and 2011

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

ACTION: Final rule.

SUMMARY: NMFS issues regulations under authority of the Western and Central Pacific Fisheries Convention Implementation Act (WCPFC Implementation Act) to establish a catch limit for bigeye tuna (*Thunnus obesus*) in the U.S. pelagic longline fisheries in the western and central Pacific Ocean for each of the years 2009, 2010, and 2011. Once the limit of 3,763 metric tons (mt) is reached in any of those years, retaining, transshipping, or landing bigeye tuna caught in the western and central Pacific Ocean will be prohibited for the remainder of the year, with certain exceptions. The limit will not apply to the longline fisheries of American Samoa, Guam, or the Commonwealth of the Northern Mariana Islands (CNMI). This action is necessary for the United States to satisfy its international obligations under the Convention on the Conservation and

Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Convention), to which it is a Contracting Party.

DATES: The rule is effective December 12, 2009.

ADDRESSES: Copies of supporting documents that were prepared for this final rule, including the regulatory impact review (RIR), environmental assessment (EA), and Supplemental EA, as well as the proposed rule, are available via the Federal e-Rulemaking portal, at <http://www.regulations.gov>. Those documents, and the small entity compliance guide prepared for this final rule, are also available from the Regional Administrator, NMFS, Pacific Islands Regional Office, 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814-4700. The initial regulatory flexibility analysis (IRFA) and final regulatory flexibility analysis (FRFA) prepared for this rule are included in the proposed rule and this final rule, respectively.

FOR FURTHER INFORMATION CONTACT: Tom Graham, NMFS PIRO, 808-944-2219.

SUPPLEMENTARY INFORMATION:

Electronic Access

This final rule is also accessible at <http://www.gpoaccess.gov/fr>.

Background

On July 8, 2009, NMFS published a proposed rule in the **Federal Register** (74 FR 32521) that would revise regulations at 50 CFR part 300, subpart O, in order to implement certain decisions of the WCPFC. The proposed rule was open to public comment through August 7, 2009.

This final rule is implemented under authority of the WCPFC Implementation Act (16 U.S.C. 6901 *et seq.*), which authorizes the Secretary of Commerce, in consultation with the Secretary of State and the Secretary of the Department in which the United States Coast Guard is operating (currently the

Department of Homeland Security), to promulgate such regulations as may be necessary to carry out the obligations of the United States under the Convention, including the decisions of the WCPFC. The authority to promulgate regulations has been delegated to NMFS.

The objective of this final rule is to implement, with respect to U.S. longline vessels, a Conservation and Management Measure (CMM) adopted by the WCPFC in December 2008, at its Fifth Regular Annual Session: CMM 2008-01, "Conservation and Management Measure for Bigeye and Yellowfin Tuna in the Western and Central Pacific Ocean."

This final rule provides for the timely implementation for U.S. longline fisheries of the annual catch limit for bigeye tuna established in CMM 2008-01 for each of the years 2009, 2010, and 2011. This final rule does not apply to the longline fisheries of American Samoa, Guam, or the CNMI, as described further below.

The preamble to the proposed rule includes further background information, including information on the Convention and the WCPFC, the international obligations of the United States under the Convention, the provisions of CMM 2008-01 as they relate to longline vessels, and the basis for the proposed regulations.

New Requirements

This final rule establishes annual bigeye tuna catch limits in U.S. longline fisheries in the Convention Area as follows:

Establishment of the Limit

CMM 2008-01 includes longline fishery-related provisions specifically applicable to Participating Territories in the WCPFC, which include American Samoa, Guam, and the CNMI. The longline fisheries of Participating Territories are subject to annual bigeye

tuna catch limits of 2,000 mt. Where the Participating Territory is undertaking responsible development of its domestic fisheries, it is not subject to those annual limits. Given these provisions, and the fact that the 2,000 mt catch level is well in excess of historical bigeye tuna catches in American Samoa, Guam, and the CNMI, NMFS has determined there is no need to establish bigeye tuna catch limits in the longline fisheries of any of the U.S. Participating Territories at this time. Accordingly, the bigeye tuna catch limit established in this final rule applies only to U.S. longline fisheries other than those of American Samoa, Guam, and the CNMI.

Under CMM 2008–01, the bigeye tuna limit for U.S. longline fisheries in each of the years 2009, 2010, and 2011 is the amount of bigeye tuna captured in the Convention Area by the Hawaii and west coast longline fleets in 2004 and retained on board, less 10 percent. The amount captured and retained in 2004, which is specified in CMM 2008–01 based on information provided by the United States to the WCPFC, was 4,181 mt. Therefore, the annual limit is 3,763 mt.

For the purpose of this final rule, the longline fisheries of the three U.S. Participating Territories are distinguished from the other longline fisheries of the United States based upon a combination of the types of Federal longline fishing permits registered to the fishing vessel and where the bigeye tuna are landed. Specifically, bigeye tuna landed in any of the three U.S. Participating Territories, with certain provisos, will be assigned to the longline fishery of that Participating Territory. Furthermore, bigeye tuna that are captured by a fishing vessel registered for use under a valid American Samoa Longline Limited Access Permit, with certain provisos, will be assigned to the longline fishery of American Samoa. The provisos in both these cases are that: (1) the bigeye tuna must not be captured in the portion of the U.S. exclusive economic zone (EEZ) surrounding the Hawaiian Archipelago, and (2) they must be landed by a U.S. fishing vessel operated in compliance with one of the permits required under the regulations implementing the Fishery Management Plan for the Pelagic Fisheries of the Western Pacific Region developed by the Western Pacific Fishery Management Council (WPFMC) and the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species developed by the Pacific Fishery Management Council; specifically, a permit issued under 50 CFR 660.707 or 665.21. Any

bigeye tuna assigned to the longline fisheries of any of the three U.S. Participating Territories as described above will not be subject to the limit. All other bigeye tuna captured by longline gear in the Convention Area by U.S. longline vessels and retained will be subject to the limit.

Announcement of the Limit Being Reached

Once NMFS determines in any of the years 2009, 2010, or 2011 that the limit is expected to be reached by a specific future date in that year, NMFS will publish a notice in the **Federal Register** announcing that specific restrictions will be effective on that specific future date until the end of the calendar year. NMFS will publish the notice at least seven calendar days before the effective date of the restrictions to provide fishermen advance notice of the restrictions. NMFS will also endeavor to make publicly available, such as on a web site, regularly updated estimates and/or forecasts of bigeye tuna catches in order to help fishermen plan for the possibility of the limit being reached.

Prohibited Activities Once the Limit is Reached

Starting on the announced date and extending through the last day of that calendar year, it will be prohibited to use a U.S. fishing vessel to retain on board, transship, or land bigeye tuna captured in the Convention Area by longline gear, except any bigeye tuna already on board a fishing vessel upon the effective date of the restrictions may be retained on board, transshipped, and/or landed, provided that they are landed within 14 days after the restrictions become effective. A vessel that has declared to NMFS pursuant to 50 CFR 665.23(a) that the current trip type is shallow-setting is not subject to this 14-day landing restriction. Furthermore, for the same reasons described above in establishing the limit, bigeye tuna captured by longline gear may be retained on board, transshipped, and/or landed if they are captured by a fishing vessel registered for use under a valid American Samoa Longline Limited Access Permit or if they are landed in American Samoa, Guam, or the CNMI, with the following provisos: First, the bigeye tuna must not have been caught in the portion of the EEZ surrounding the Hawaiian Archipelago, and second, they must be landed by a U.S. fishing vessel operated in compliance with a valid permit issued under 50 CFR 660.707 or 665.21.

Starting on the announced date and extending through the last day of that calendar year, it will also be prohibited

to transship bigeye tuna caught in the Convention Area by longline gear to any vessel other than a U.S. fishing vessel operated in compliance with a valid permit issued under 50 CFR 660.707 or 665.21.

These restrictions do not apply to bigeye tuna caught by longline gear outside the Convention Area, such as in the eastern Pacific Ocean. However, to help ensure compliance with the restrictions related to bigeye tuna caught by longline gear in the Convention Area, this final rule establishes two additional, related, prohibitions that will be in effect starting on the announced date and extending through the last day of that calendar year. First, it will be prohibited to fish with longline gear both inside and outside the Convention Area during the same fishing trip, with the exception of a fishing trip that is in progress at the time the announced restrictions go into effect. In that exceptional case, the vessel will still be required to land any bigeye tuna taken within the Convention Area within 14 days of the effective date of the restrictions, as described above. Second, if a vessel is used to fish using longline gear outside the Convention Area and the vessel enters the Convention Area at any time during the same fishing trip, the longline gear on the fishing vessel must be stowed in a manner so as not to be readily available for fishing while the vessel is in the Convention Area. These additional prohibitions do not apply to the following vessels: (1) vessels on declared shallow-setting trips pursuant to pursuant to 50 CFR 665.23(a); or (2) vessels operating for the purposes of this rule as part of the longline fisheries of the U.S. Participating Territories, including vessels registered for use under valid American Samoa Longline Limited Access Permits and vessels landing their bigeye tuna catch in one of the three U.S. Participating Territories, so long as these vessels conduct fishing activities in accordance with the provisos described above.

Comments and Responses

Comment 1: Fishing restrictions that protect leatherback and loggerhead turtles should not be relaxed. If longline fishing practices in Hawaii push these magnificent animals toward extinction then maybe those practices must be reduced or banned altogether.

Response: This rule would not relax any current measures that protect endangered species and marine mammals, and in fact would establish a catch limit where one does not currently exist.

Comment 2: All longline fishing, which is horribly environmentally destructive and responsible for species decimation, should be banned, and needs to be stopped in all U.S. waters.

Response: The purpose of this rule is to implement the longline fishery-related aspects of WCPFC CMM 2008–01, which establishes annual catch limits for the longline fisheries of WCPFC members. Because CMM 2008–01 does not call for banning longline fishing anywhere, considering such a ban would be beyond the scope of the purpose of and need for this rule.

Comment 3: Without catch rates based on sustainability of the bigeye tuna fish stocks bigeye tuna will be overfished; the human population of the earth is growing but the tuna stocks are not; we need strong regulations that are rigorously enforced to protect bigeye tuna; the proposed catch limits for bigeye tuna should be adopted.

Response: NMFS acknowledges the comment.

Comment 4: The CNMI strongly recommends that the final rule clearly reflect the relevant provisions of CMM 2008–01, specifically, that: (1) the longline fisheries of the CNMI are limited to a catch of 2,000 mt of bigeye tuna each year, from 2009 through 2011; (2) the catch of bigeye tuna in the longline fisheries of the CNMI is not limited if the CNMI is undertaking a program of responsible development; and (3) the CNMI may enter into “charter, lease or other similar arrangements” to utilize its fish catch limit subject to a determination by the CNMI that the vessels involved are an integral part of the domestic fleet of the CNMI.

Response: NMFS agrees with the first two statements and has included explanatory remarks in the preamble, noting that consistent with paragraphs 32 and 34 of CMM 2008–01, the longline fisheries of American Samoa, Guam, and the CNMI are not subject to the annual limits established by this rule. NMFS also agrees that the CNMI, as a Participating Territory, may enter into charter, lease or other similar arrangements with U.S. vessels with respect to catches of bigeye tuna, to the extent permitted by law. NMFS, however, does not agree that catches under such agreements must be assigned to the Participating Territory in the United States’ reports to the WCPFC, or that U.S. Participating Territories necessarily determine whether vessels operated under charter are “integral” parts of their domestic fleets. First, paragraph 2 of the CMM states in relevant part, “For the purposes of these measures, vessels operated under

charter, lease or other similar mechanisms by developing islands States and participating territories, as an integral part of their domestic fleet, shall be considered to be vessels of the host island State or territory.”

Accordingly, paragraph 2 does not mandate the implementation of charters, but merely instructs WCPFC members to attribute the catches of vessels operating under charters to the host State if the vessel is operated as an integral part of its domestic fleet, and to the flag State if it is not. Second, all U.S. longline fisheries on the high seas and in the EEZ are federally managed, and are subject to regulations implementing the Fishery Management Plan for the Pelagic Fisheries of the Western Pacific Region (Pelagics FMP). The provisions concerning annual catch limits for U.S. Participating Territories under CMM 2008–01 are not effective until implemented by appropriate regulations, such as regulations under the WCPFC Implementation Act or regulations under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) to implement FMP amendments, and until such time do not give rise to an interest in federally managed fish stocks. In this regard, NMFS notes that the WPFMC is currently evaluating a proposal to establish a charter scheme as an amendment to the Pelagics FMP for the purpose of aiding Participating Territories in the responsible development of their fisheries.

Comment 5: The CNMI strongly recommends that the final rule reflect that the CNMI, under both WCPFC rules and the MSA, has the authority and responsibility to manage its fisheries to ensure that the catch limits are not exceeded. In this context, the CNMI believes it has the right and authority to enter into a “charter, lease or other similar arrangement” for the utilization of the fish catch limit set by the WCPFC. The CNMI is a “State” under the MSA and has authority to regulate its fisheries beyond its waters as long as the regulations do not conflict with Federal regulations. The CNMI is not aware of any provision of law or regulation that impedes this authority. If NMFS has a different position, it must identify in the final rule the provisions of law or regulation that prevent the CNMI from exercising authority over the catch limits set by the WCPFC. The CNMI insists on its rights in this matter and looks forward to working with the U.S. Government and U.S. fishing interests to develop means to utilize its allocations in a manner that furthers the fishery development goals of the CNMI and

benefits the CNMI and other U.S. interests to the maximum extent practicable.

Response: NMFS disagrees that either MSA section 306, which applies to the States’ (including Territories’) authority to regulate vessels registered under their laws outside their boundaries, or the Convention, as applied to Participating Territories, creates enforceable rights in the U.S. Participating Territories to implement charter arrangements under CMM 2008–01. Additionally, NMFS is not aware of any existing CNMI law or regulation that applies to fishing vessels operated under charter or other arrangement. As stated above, however, the WPFMC is currently evaluating a proposal to establish a charter scheme as an amendment to the Pelagics FMP for the purpose of aiding Participating Territories in the responsible development of their fisheries. NMFS will continue to work closely with the WPFMC in evaluating the feasibility of such a proposal, consistent with the Pelagics FMP.

Comment 6: Under paragraphs 32 and 34 of CMM 2008–01, the U.S. Participating Territories have 2,000 mt bigeye tuna catch limits in their longline fisheries in each of the years 2009–2011, and no bigeye tuna catch limits if undertaking responsible fisheries development. This should be clarified in the final rule.

Response: The final rule makes clear that under WCPFC 2008–01 U.S. Participating Territories are not subject to the annual limit applicable to U.S. fisheries, and if undertaking responsible development of their fisheries, are not subject to any WCPFC annual limit. The establishment of annual catch limits for the U.S. Participating Territories is beyond the limited scope of this rule.

Comment 7: In part because it may preclude any realistic, near-term opportunities for U.S. Participating Territories to utilize their international allocations, NMFS should discuss and analyze the ramifications of the catch attribution scheme in the proposed rule specifically, the proposal that all longline-caught bigeye tuna landed in Hawaii, even if caught on the high seas or in the portion of the EEZ around American Samoa, would be assigned to the U.S. longline fishery rather than the longline fishery of the Participating Territory.

Response: NMFS has analyzed the effects of the proposed rule in accordance with the National Environmental Policy Act (NEPA), the Regulatory Flexibility Act, and Executive Order 12866 in the EA, the IRFA, and the RIR, respectively. As more fully described in the response to

comment 9, the catch attribution scheme of the proposed rule has undergone minor modifications in this final rule. The impacts of this modified scheme have been analyzed and are provided in a Supplemental EA prepared for this final rule, in the FRFA, and in a revision to the RIR.

Comment 8: Currently, the major regional U.S. bigeye tuna market is Honolulu, and to attribute all bigeye tuna landings in Hawaii to the catch limit for the United States would prevent U.S. Participating Territories from entering into domestic charter arrangements with Hawaii longline limited access permitted vessels and eliminate needed funding opportunities for responsible fisheries development. NMFS offers no justification as to why it is relying on its current policy practice of attributing all landings in Hawaii in this manner. This major policy decision may be limiting the legitimate rights of the U.S. Participating Territories in the WCPFC, and NMFS is doing so without discussion. NMFS' policy, by default, is having a regulatory effect, and therefore, at a minimum should have been thoroughly analyzed in detail in the draft EA.

Response: Under the proposed rule, bigeye tuna catches would be attributed based upon the place of landing, which closely aligns with the past practice of NMFS in its reporting to the WCPFC. NMFS believes that fish caught by a Hawaii- or West Coast-based vessel on the high seas or in the portion of the EEZ surrounding the Hawaiian Archipelago and subsequently landed in Hawaii acquire little or no nexus with a Participating Territory, and ordinarily are not attributable to that Territory for reporting purposes to the WCPFC. CMM 2008-01 does provide that when a vessel is operating under a charter, lease, or similar arrangement as an "integral part" of a host Participating Territory's domestic fleet, it shall be considered a vessel of the host Participating Territory for example, its catch should be attributed to the host Participating Territory's fishery for WCPFC reporting purposes. Although NMFS does not rule out the possibility that Hawaii- and West Coast-based vessels might operate under charter agreements with U.S. Participating Territories, such arrangements must be consistent with the applicable FMP and U.S. laws and regulations. Moreover, NMFS does not believe that CMM 2008-01 requires NMFS to assign catches to the chartering Participating Territory without regard to where the fish are caught or landed, particularly where the Participating Territory's sole connection

to the vessel and its catch is the contractual relationship established by the charter agreement. Accordingly, a determination would have to be made by NMFS as to whether such vessels are operating as an "integral part" of the U.S. Participating Territory's domestic fleet. To conclude otherwise would allow practices that undercut the important conservation objectives of CMM 2008-01. However, NMFS recognizes that in certain circumstances a Participating Territory may acquire a sufficient nexus to a catch even if it is not landed within its borders please see the response to comment 9 for an example.

As to the sufficiency of the analysis in the draft EA of the proposed catch attribution scheme, please see the Supplemental EA, where responses to this and other comments on the draft EA are provided.

Comment 9: NMFS should modify the proposed rule to be consistent with established practices where catch is attributed to the permit program for the vessel, not the landing location. If a vessel that lands bigeye tuna and other fish species in Hawaii has both a Hawaii Longline Limited Access Permit and an American Samoa Longline Limited Access Permit or any future territorial permits, the catch should be assigned based on a determination of which permit program the vessel was attributing its catches to with respect to the landing involved.

Response: NMFS' practice for the purpose of reporting longline catches (i.e., to U.S. fisheries or to the fisheries of the U.S. Participating Territories) to the WCPFC has been to assign catches according to landing location, not permit type. Under the proposed rule, catches would be assigned based upon the place of landing, since the place of landing acquires the strongest nexus to the catch. However, NMFS acknowledges that in certain cases, considerations other than the landing site may also establish a sufficient nexus with the catch, such that the balance of contacts favors attributing the catch to a place other than where the fish actually has been landed. One such consideration is participation in the American Samoa Longline Limited Access Program. To qualify for a permit, an applicant must establish a documented history of participation in the pelagic longline fishery in the portion of the EEZ around American Samoa, as required by 50 CFR 665.36. NMFS believes that the catch of a vessel with an American Samoa Longline Limited Access Permit may be assigned to the longline fishery of American Samoa for WCPFC reporting purposes,

even though it is not landed in American Samoa, provided certain requirements are met. Accordingly, the proposed rule has been modified in this final rule as follows: a vessel that operates with a valid American Samoa Longline Limited Access Permit and that lands its bigeye tuna catch in Hawaii will have its catch assigned to the longline fishery of American Samoa, provided that the catch was not made in the portion of the EEZ surrounding the Hawaiian Archipelago, and further provided that the fish are landed by a U.S. vessel operated in compliance with one of the permits required under the regulations implementing the Pelagics FMP and the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species that is, a permit issued under 50 CFR 660.707 or 665.21. As for treating "any future territorial permits" similarly, the final rule does not do so. If such permit programs are established during the effective period of this final rule, NMFS would consider whether and how to revise the rule.

Comment 10: In the final rule to implement the provisions of CMM 2008-01 for U.S. purse seine vessels (74 FR 38544, published August 4, 2009), the potential fishing effort of all 40 licenses authorized under the South Pacific Tuna Treaty (SPTT) was included as a basis for setting the effort limit for purse seine vessels [even though 40 licenses were not issued in the base years specified in the CMM]. However, the last clause of paragraph 7 in CMM 2008-01 explicitly prohibits such expansions for bilateral agreements. NMFS argues that the SPTT is not a bilateral agreement, but in reality, the SPTT is a similar arrangement with the primary objective of the U.S. purse seine fleet gaining access to the exclusive economic zones of Pacific Island countries in lieu of a substantial amount of taxpayer money. NMFS argues that the SPTT grandfathers the existing permits when calculating effort limits, so NMFS should apply the same logic to catch limits for the Hawaii-based longline fleet, where participation has been capped at 164 permits since 1991. Using that methodology, the 4,181 mt of bigeye tuna caught by the 125 Hawaii-based longline vessels active in 2004 would be expanded to represent the 5,486 mt catch that would have been caught if all 164 authorized vessels under the Hawaii longline limited access permit program were active. That baseline of 5,486 mt would then be reduced by the 10 percent required in paragraph 35 of CMM 2008-01 to yield a 2009-2011 annual catch limit of 4,936

mt. NMFS should either use this expansion methodology for the U.S. longline fishery or explain its deliberately lopsided allocation of fishery resources among domestic fisheries.

There is further disparity in the way NMFS has applied CMM 2008–01 to the purse seine fishery versus the longline fishery by failing to include an alternative for the latter that would utilize a three-year rolling management period, as proposed for purse seine vessels.

Response: NMFS believes that its implementation of the purse seine fishery-related provisions of CMM 2008–01 (in the final rule published August 4, 2009; 74 FR 38544; hereafter, “WCPFC Purse Seine Rule”) is balanced relative to its implementation of the longline fishery-related aspects of the CMM (in this final rule). The purse seine fishing effort limits established in the WCPFC Purse Seine Rule are fully consistent with CMM 2008–01, which includes a provision (paragraph 7) that states that the determination of levels of fishing effort for the purpose of implementing the CMM shall include, as applicable, fishing rights organized under existing regional arrangements. As explained more fully in the response to comment 7 in the preamble to the WCPFC Purse Seine Rule, the South Pacific Tuna Treaty, the parties to which include the United States and sixteen other States, is one such regional arrangement, and accordingly, the number of U.S. purse seine vessels authorized under that treaty was appropriately used by NMFS as part of the basis for the fishing effort limits established in the WCPFC Purse Seine Rule. In contrast with the purse seine fishery-related provisions of CMM 2008–01, its longline fishery-related provisions, which establish limits on catches, not fishing effort, do not provide for the determination of the required catch limits to include fishing rights organized under existing regional arrangements, or indeed, to include fishing authorizations available under domestic permit programs, as suggested by the commenter. NMFS believes that implementation of the longline bigeye tuna catch limits as suggested by the commenter would not be consistent with CMM 2008–01.

With respect to considering a three-year rolling management period for the purpose of the bigeye tuna catch limits, the purpose of this rule is to make effective a provision of CMM 2008–01 that requires immediate implementation. Although using a three-year rolling management period would be outside the limited scope of

this rule, NMFS is not foreclosed from considering an alternative that includes a multi-year bigeye tuna catch limit as part of a future rulemaking.

Comment 11: The proposed rule reveals an almost willful lack of consideration of the wider perspective in terms of potential impacts of the bigeye tuna catch limit. By counting landings in Hawaii of all fish caught beyond the portion of the EEZ around Hawaii against the limit for U.S. fisheries, NMFS is precluding any realistic chartering arrangements with the U.S. territories and Hawaii longline vessels. There is no text in CMM 2008–01 that requires implementation as in the proposed rule.

Response: As indicated in the response to comment 7, NMFS believes that the potential impacts of the proposed rule have been appropriately assessed, and further information and analyses are provided in the Supplemental EA, the FRFA, and a revision to the RIR.

As recognized in the preamble to the proposed rule, distinguishing the longline fisheries of the U.S. Participating Territories from other U.S. longline fisheries for the purpose of implementing CMM 2008–01 is challenging, but NMFS believes that the proposed rule both offers a reasonable way to resolve those challenges and is fully consistent with CMM 2008–01. Nonetheless, as described in the response to comment 9, the proposed rule has been modified in this final rule with regard to which longline fisheries bigeye tuna catches will be assigned.

NMFS acknowledges that this rule would indeed preclude bigeye tuna catches made in the portion of the EEZ surrounding the Hawaiian Archipelago from being assigned to the longline fishery of American Samoa, regardless of whether the vessel that caught the fish was based in American Samoa, registered for use under an American Samoa Longline Limited Access Permit, or involved in a chartering arrangement with American Samoa. Since under the Pelagics FMP, only vessels issued Hawaii Longline Limited Access Permits may harvest fish within the portion of the EEZ surrounding Hawaii, NMFS believes that the Participating Territories have little or no nexus to those fish for purposes of implementing the limit under WCPFC. NMFS believes that the requirements set forth in this rule are necessary and appropriate to implement the catch limit established by the WCPFC, consistent with the objectives of CMM 2008–01, while preserving opportunities for responsible fisheries development by the U.S. Participating Territories. For the reasons

given in the response to comment 8, NMFS believes this is appropriate.

Comment 12: The proposed regulations are defective in that instead of harmonizing bigeye tuna conservation and the promotion of fisheries of Participating Territories, as is clearly the intent of CMM 2008–01, NMFS seeks to broadly enforce the ten percent reduction in U.S. Pacific longline bigeye tuna catch while establishing insurmountable regulatory barriers to the ability of American Samoa, Guam, and the CNMI to: (1) use their separate 2,000 mt bigeye tuna catch limits; (2) responsibly develop their fisheries subject to no catch limit; and (3) engage vessels by charter, lease, or other similar mechanisms to operate as an integral part of their domestic fleet. Because the proposed regulations are a direct attempt to enforce selected provisions of CMM 2008–01, while rendering useless other applicable provisions of CMM 2008–01, the proposed regulations violate the WCPFC Implementation Act NMFS is not authorized to adopt implementing regulations that circumvent the express provisions of the WCPFC Implementation Act; nor may NMFS pick and choose among those provisions of CMM 2008–01 it likes and dislikes so as to implement one of WCPFC’s laudable purposes (bigeye tuna conservation) while entirely frustrating another clear, important, and laudable purpose (development of bigeye tuna fisheries of Participating Territories through separate or no catch limits).

Response: The objectives of CMM 2008–01, as stated in paragraph 1, include maintaining bigeye tuna and yellowfin tuna stocks at levels capable of producing their maximum sustainable yield, and achieving specific fishing mortality rates for those stocks. The CMM does include provisions specific to small island developing State Members and Participating Territories, but those provisions are simply intended to take into account, in accordance with the Convention, the special requirements of small island developing State Members and Participating Territories, in keeping with the objectives of the CMM, as set forth in paragraph 1.

NMFS is not choosing to implement only select provisions of CMM 2008–01 (but note that the purse seine-related provisions of the CMM have been implemented in a separate rule). NMFS recognizes that CMM 2008–01 contains provisions specifically applicable to the fisheries of Participating Territories, including separate bigeye tuna catch limits in longline fisheries (or no limits at all if the Participating Territory’s

domestic fisheries are being developed responsibly). NMFS has determined that no regulatory action is needed at this time to implement those provisions, so this rule is limited in scope to the U.S. longline fisheries that are not fisheries of American Samoa, Guam, or the CNMI.

NMFS does not agree that the proposed rule (or this final rule) would prevent any of the three U.S. Participating Territories from utilizing the bigeye tuna catches available to their longline fisheries or from developing those fisheries responsibly. Nothing in this rule prohibits U.S. Participating Territories from entering into charter arrangements with other vessels, provided that they operate consistently with applicable laws and regulations, including those implementing the Pelagics FMP. The proposed rule (and this final rule), would include criteria that would serve to clearly differentiate the longline fisheries of the U.S. Participating Territories from other U.S. longline fisheries for the purpose of reporting bigeye tuna catches to the WCPFC. As indicated in the response to comment 8, NMFS recognizes that the criteria used to differentiate the fisheries would preclude bigeye tuna catches made in the portion of the EEZ surrounding the Hawaiian Archipelago from being assigned to the longline fisheries of the U.S. Participating Territories, regardless of whether the vessel that caught the fish was based in one of the U.S. Participating Territories, registered for use under an American Samoa Longline Limited Access Permit, or involved in a chartering arrangement with one of the U.S. Participating Territories. However, NMFS believes that differentiating the longline fisheries in this way is necessary to satisfy the provisions of CMM 2008–01 that are being implemented in this rule.

Comment 13: Discussions have taken place between the Hawaii Longline Association (HLA) and NMFS and the U.S. Department of State regarding American Samoa's intent to enter into a charter agreement to engage longline vessels [that do not necessarily have American Samoa Longline Limited Access Permits and that would not necessarily land their catch in American Samoa] to fish for bigeye tuna as an integral part of American Samoa's domestic fleet. [A copy of this charter agreement, signed by both parties, was submitted to NMFS with this comment.] In these discussions, NMFS has insisted that existing provisions of the MSA and its implementing regulations conflict with and prevent U.S. Participating Territories from exercising their rights under CMM 2008–01 to either fish

under the separate catch limit (or no catch limit) allocated to them by the WCPFC, and to enter into domestic charter agreements under the express provisions of paragraph 2 of CMM 2008–01. However, NMFS has yet to identify any specific provisions of the MSA or its implementing regulations that establish a conflict.

Response: NMFS does not believe that the MSA or its implementing regulations prevent the longline fisheries of the U.S. Participating Territories from catching bigeye tuna within the constraints imposed by CMM 2008–01 or from entering into domestic charter arrangements with U.S. vessels. NMFS, however, acknowledges that the rule would not permit catch to be assigned to the U.S. Participating Territories for WCPFC reporting purposes unless the catch satisfies the nexus requirements established in the rule. As explained above, paragraph 2 of CMM 2008–01 does not mandate the implementation of charters, but merely instructs WCPFC members to attribute the catches of vessels operating under charters to the host State if the vessel is operated as an integral part of its domestic fleet, and to the flag State if it is not. In addition, all U.S. longline fisheries on the high seas and in the EEZ are federally managed, and are subject to regulations implementing the Pelagics FMP. The provisions concerning annual catch limits for U.S. Participating Territories under CMM 2008–01 are not effective until implemented by appropriate regulations, such as regulations under the WCPFC Implementation Act or regulations under the MSA to implement FMP amendments. Until such time, the U.S. Participating Territories do not have an interest in federally managed fish stocks caught on the high seas or in the EEZ that may be assigned by charter agreement or other arrangement. As stated above, the WCPFC is currently evaluating a proposal to establish a charter scheme as an amendment to the FMP for the purpose of aiding Participating Territories in the responsible development of their fisheries.

In establishing a catch limit for the other U.S. longline fisheries, the final rule, by necessity, establishes clear criteria to distinguish those fisheries from the longline fisheries of the U.S. Participating Territories. NMFS recognizes that those distinctions will effectively limit what can be considered the longline fisheries of the U.S. Participating Territories for the purpose of CMM 2008–01. Yet meaningful limits are clearly needed to ensure that the important conservation objectives of

CMM 2008–01 are achieved. For example, a bigeye tuna that is caught on the high seas by a vessel without an American Samoa Longline Limited Access Permit and landed in Hawaii would not be considered a bigeye tuna caught in the American Samoa longline fishery. This is because a vessel operated under such circumstances would have little or no connection to American Samoa, would not be subject to its laws and regulations, and the fish would not be subject to American Samoa's management authority.

Comment 14: It is express and clear that the WCPFC intended to establish separate and different bigeye tuna catch limits, if any, for American Samoa, Guam, and the CNMI. Accordingly, the ten percent reduction catch limit applicable to U.S. Pacific longline fisheries is not applicable to American Samoa, Guam, and the CNMI. Nothing under the MSA addresses how bigeye tuna fishing rights granted under international law to those territories may or must be implemented, or by whom. Additionally, the WCPFC intended to promote longline bigeye tuna fisheries development in Participating Territories, including through the use of charters, leases, and other similar mechanisms. Accordingly, the goal of reducing bigeye tuna catch [sic] is not applicable to Participating Territories, and instead, the WCPFC has established through CMM 2008–01 that bigeye tuna fisheries development is the higher priority and guiding principle for Participating Territories.

Response: NMFS agrees that in its adoption of CMM 2008–01, the WCPFC intended to establish separate and different bigeye tuna catch limits for each Participating Territory, and that the ten percent reduction in longline catches of bigeye tuna applicable to the other U.S. longline fisheries is not applicable to the longline fisheries of American Samoa, Guam, or the CNMI. Indeed, the proposed rule (and this final rule) would not establish any catch limits for the longline fisheries of the three U.S. Participating Territories.

With respect to the intent of the WCPFC as expressed in CMM 2008–01, NMFS does not agree that development of the bigeye tuna fisheries of Participating Territories is an objective of CMM 2008–01, or that the WCPFC intended that such development be accomplished through the use of charter, leases, or other similar mechanisms. As indicated in the response to comment 12, the objectives of CMM 2008–01 are explicit in paragraph 1 of the CMM and are limited to maintaining bigeye tuna and yellowfin tuna stocks at specified levels

and achieving specific fishing mortality rates for those stocks. The provisions of CMM 2008–01 that relate to the use of charters, leases, and similar arrangements relate only to how the activities of vessels operating under such arrangements, such as their catch and fishing effort, are to be accounted for for example, whether their catches should be attributed to the flag State or the host State. The CMM does not in any way require the development or use of such arrangements. Although CMM 2008–01 includes provisions specific to the fisheries of Participating Territories, NMFS does not agree that those provisions establish bigeye tuna fisheries development in the Participating Territories as a priority or guiding principle.

Comment 15: The provisions of CMM 2008–01 are clear and the United States is obligated to either implement all of its provisions or the Secretary of State must take action under the WCPFC Implementation Act to disapprove CMM 2008–01. In the former case, there is nothing in existing U.S. law that impairs or impedes NMFS' ability to fully implement the CMM, and in doing so, to harmonize existing MSA provisions with new requirements necessitated by international convention. The proposed regulations, however, would not achieve such harmony, and instead would establish barriers specifically designed to block American Samoa, Guam, and the CNMI from fishing under their separate bigeye tuna catch limits, developing their bigeye tuna fisheries, and entering into domestic charter agreements to accomplish those purposes. [The commenter included with the comment a copy of a "Domestic Charter Agreement" between American Samoa and Hawaii Longline Association, signed by representatives of both parties.]

Response: See responses to comments 12 and 13.

Comment 16: Under the proposed rule, NMFS proposes to assign bigeye tuna catches based on the area of catch and the area of landing, regardless of the authority under which the vessel was fishing, a proposal that NMFS asserts "closely aligns" with past practice. This proposal, which is specifically designed to block American Samoa, Guam, and the CNMI from exercising their international fishing rights under CMM 2008–01, is contrary to CMM 2008–01, based on factual inaccuracies, and illogical. Specifically, nothing about "past practice" under unrelated provisions of the MSA informs implementation of rights provided for in CMM 2008–01. Nothing remotely suggests that past practices of the

United States were the premise for any provision of CMM 2008–01, nor does the plain language of CMM 2008–01 suggest that the specially negotiated and recognized rights of Participating Territories should be constrained by the location of catch or the landing location of the domestic fleet CMM 2008–01 grants each Participating Territory, at a minimum, the right for its longline fisheries to catch up to 2,000 mt of bigeye tuna within the Convention Area without regard to landing location. Even if past practice were relevant to implementation of CMM 2008–01, which it is not, there is no practice of or logic to attributing catch based on landing location, and there is extensive precedent for ignoring catch location as a determining factor in allocation of catch limits. For example, landings in California by vessels with Hawaii Longline Limited Access Permits have been attributed to the Hawaii fisheries and not to California fisheries, and landings in Cook Islands by vessels with American Samoa Longline Limited Access Permits have been attributed to American Samoa fisheries. Furthermore, if existing MSA regulations are determinative in interpreting unrelated international law, which they are not, what matters is flag or permit under which the vessel was fishing, not just the area of catch or the area of landing.

Response: NMFS believes that past practices of NMFS or the United States are relevant in the implementation of CMM 2008–01 and that they were the premise for certain provisions of CMM 2008–01. The longline bigeye tuna catch limits mandated under CMM 2008–01 refer to specific baseline catches, from which catches in 2009–2012 are to be reduced by specified amounts. In the case of the longline fisheries of the United States, the baseline is the catch in 2004, as specified in Attachment F to the CMM. Attachment F indicates that the baseline catch for the United States is 4,181 mt. Attachment F also indicates that the baseline catch for American Samoa is 185 mt (Attachment F does not include baseline catches for the longline fisheries of Guam or the CNMI because no bigeye tuna catches in those fisheries in the relevant years had been reported to the WCPFC by the United States). These baseline catch levels specified in Attachment F of CMM 2008–01 are as reported by the United States to the WCPFC and were dependent on NMFS' past practice in assigning catches. As indicated in the preamble to the proposed rule, that practice has been to assign catches according to where the fish are landed.

As to whether the expectations of Participating Territories should be

constrained under CMM 2008–01 by the location of catch or the landing location of the domestic fleet, NMFS believes that the issue in question is how the longline fisheries of the U.S. Participating Territories are distinguished from the other longline fisheries of the United States. CMM 2008–01 does not speak to this question. As explained in the preamble to the proposed rule, NMFS proposed to distinguish them based on where the fish are landed, as in NMFS' past practice in reporting longline bigeye tuna catches to the WCPFC, with some modifications. Those modifications were intended to ensure that the rule does not lead to shifts in fishing patterns and practices that would undermine the objectives of CMM 2008–01. With regard to attributing to Hawaii landings made in California by the Hawaii-based longline fleet, NMFS may indeed have counted catches as asserted by the commenter in certain contexts, and may continue to do so. However, in the context of reporting longline bigeye tuna catches of U.S. fishing vessels to the WCPFC, NMFS has only reported longline bigeye tuna catches for the United States as a whole and for each of the Participating Territories it has not attributed catches to specific states within the United States (other than the U.S. Participating Territories), and there is no reason to do so since the WCPFC's conservation and management measures apply to the United States as a whole. In the case of a U.S. vessel landing its catch in a foreign nation, NMFS may or may not assign the catch to the fisheries of the United States (or of a U.S. Participating Territory), depending foremost on the context (e.g., reporting to the WCPFC versus other purposes), and then on such factors as the location of the catch and the status of the vessel with respect to the foreign nation. In short, NMFS assigns catch in context. The attribution scheme established in this rule is solely for the purpose of assigning catches in the context of the WCPFC and particularly for the implementation of the relevant provisions of CMM 2008–01.

With respect to the importance of the type of permit under which a vessel is fishing, NMFS agrees that in the case of an American Samoa Longline Limited Access Permit, it is relevant in the context of WCPFC-mandated catch limits, because the issuance of a permit establishes a connection between the vessel and the longline fishery of American Samoa. That is, only persons with a documented history of fishing for pelagic species with longline gear in the portion of the EEZ around American

Samoa are eligible for American Samoa Longline Limited Access Permits. This documented history establishes a sufficient nexus to American Samoa for purposes of catch attribution. Accordingly, as indicated in the response to comment 8, NMFS has modified the catch attribution scheme in this final rule such that any bigeye tuna captured by a fishing vessel registered for use under a valid American Samoa Longline Limited Access Permit would be assigned to the longline fishery of American Samoa regardless of where the fish are landed, provided that: (1) the fish are not caught in the portion of the EEZ surrounding the Hawaiian Archipelago, and (2) they are landed by a U.S. vessel operated in compliance with one of the permits issued under 50 CFR 660.707 or 665.21.

Comment 17: The reason for the proposed prohibition of transshipments of bigeye tuna caught in the Convention Area by longline gear to any vessel other than a U.S. fishing vessel operated in compliance with a valid permit issued under 50 CFR 660.707 or 665.21 is understood. The Hawaii Longline Association trusts that the United States will ensure that all WCPFC members are equally attentive to controls to prevent transshipments that allow disguising of the flag of the vessel that caught the fish and thereby circumvent the limits of CMM 2008–01. However, there is no reason to control the areas being fished when the bigeye tuna limit is reached. Also, it is not clear that prohibiting fishing in both the Convention Area and the EPO [during the same trip] or that requiring stowing of gear in the Convention Area during a trip in which fishing was done in the EPO enhances the monitoring and enforcement of the WCPFC catch limit. NMFS must more clearly explain what is gained by these proposed measures or eliminate these unnecessary provisions.

Response: As a part of U.S. delegations to meetings of the WCPFC, NMFS will work to ensure that all WCPFC members are implementing the provisions of CMM 2008–01 as required.

On controlling the areas being fished after the limit is reached, under the proposed rule (and this final rule), it would be prohibited to retain, transship, or land bigeye tuna caught by longline gear in the portion of the EEZ surrounding the Hawaiian Archipelago, even by a vessel with an American Samoa Longline Limited Access Permit. This is one part of the criteria to distinguish the longline fishery of American Samoa from the other longline fisheries of the United States. The rationale for this criterion is that fishing in the portion of the EEZ

surrounding the Hawaii Archipelago for which a Hawaii Longline Limited Access Permit is required creates too attenuated a nexus with the longline fishery of American Samoa to be considered part of that fishery.

Once the limit is reached, the provisions to: (1) prohibit fishing in the Convention Area and the EPO during the same trip, and (2) require that fishing gear be stowed while the vessel is in the Convention Area during a trip in which fishing takes place in the EPO, help provide effective mechanisms to enforce this rule. Both would substantially improve the likelihood of compliance with, and the ability to enforce, the more fundamental requirements of the rule. Specifically, both prohibitions are designed to ensure that vessels that are fishing in the EPO do not make any longline sets in the Convention Area and retain bigeye tuna from those sets after the limit established by this rule is reached. However, NMFS acknowledges that these two prohibitions should not apply to two categories of longline vessels, specifically: (1) vessels on declared shallow-setting trips pursuant to pursuant to 50 CFR 665.23(a), since they do not target bigeye tuna and they are subject to 100 percent observer coverage; and (2) vessels operating for the purposes of this rule as part of the longline fisheries of the U.S. Participating Territories, since they are not subject to the fishing restrictions established by this rulemaking once the annual limit is reached. Accordingly, the proposed rule has been slightly modified in this final rule such that the two prohibitions do not apply to these categories of vessels.

Comment 18: The proposed regulations would do far more harm than good by: (1) contravening the intent of the WCPFC, (2) impeding desperately needed economic opportunities in American Samoa, Guam, and the CNMI, (3) seriously damaging the domestic Pacific longline bigeye tuna fishery to the benefit of foreign fisheries without a detectable conservation benefit, (4) seriously impeding the adoption of regulations currently being worked on by the WPFMC that would fully and fairly implement all the provisions of CMM 2008–01, and (5) causing serious conservation harm to other protected species through transferred effects. We recommend that NMFS withdraw the proposed regulations and defer adoption of regulations implementing CMM 2008–01 until the WPFMC has analyzed alternatives and developed implementing fishery management plan amendments pursuant to the MSA.

Response: With regard to the benefits and costs of the proposed rule and to the second, third, and fifth points, NMFS' findings on the benefits, costs, and impacts of the proposed rule and this final rule can be found in the EA and the Supplemental EA, the IRFA and FRFA, and the RIR. NMFS has selected the alternative that NMFS believes appropriately balances benefits and adverse impacts while satisfying the obligations of the United States to implement the relevant longline bigeye tuna catch limits established by the WCPFC in CMM 2008–01.

With regard to the first point the proposed rule contravening the intent of the WCPFC, see the response to comment 12.

NMFS does not agree that adoption of the proposed regulations would impede the adoption of regulations being worked on by the WPFMC the fourth point raised in the comment. This rule will not in any way impede or prevent the WPFMC from evaluating or recommending additional management measures under the MSA process. NMFS believes that this final rule is needed to provide for the timely implementation of the annual catch limit for bigeye tuna established by the WCPFC for longline fisheries, which is effective starting in 2009. NMFS will continue to work with the WPFMC to the extent that it develops and recommends other measures related to implementation of CMM 2008–01.

Comment 19: The EA should consider a bigeye tuna catch limit for the swordfish sector of the longline fishery, which averages about 17 bigeye tuna incidentally caught per set [the commenter subsequently clarified this to mean 17 bigeye tuna per trip], which are brought to shore and sold. Such a catch limit would reduce bycatch, avoid waste, and promote optimum yields.

Response: The bigeye tuna catch limit established by the WCPFC and implemented through this rule applies to bigeye tuna captured by all fishing activities of the Hawaii and west coast-based longline fleets. Bigeye tuna caught and retained in both the shallow-set (swordfish-directed) and deep-set sectors would be counted against the limit, and the activities of both sectors would be similarly restricted after the limit is reached.

NMFS received several comments that questioned the adequacy of the analysis in the draft EA. NMFS prepared a Supplemental EA that contains detailed responses to these comments.

Changes from the Proposed Rule

As explained in the responses to comments 9 and 16, above, and after

giving full consideration to public comments received on the proposed rule, NMFS has decided to make a minor change from the proposed rule such that bigeye tuna caught by longline gear in the Convention Area by fishing vessels with American Samoa Longline Limited Access Permits would not be counted against the bigeye tuna catch limit established in this rule, provided that: (1) the fish are not caught in the portion of the EEZ surrounding the Hawaiian Archipelago, and (2) they are landed by a U.S. vessel operated in compliance with one of the permits issued under 50 CFR 660.707 or 665.21. Accordingly, § 300.224, “Longline fishing restrictions,” is revised to include paragraphs (c) and (e)(iii) that were not included in the proposed rule, and other paragraphs have been renumbered accordingly.

In § 300.224, “Longline fishing restrictions,” paragraphs (e)(3) and (e)(4) are revised to clarify that the two prohibitions intended to help ensure compliance with the main restrictions triggered by the bigeye tuna catch limit being reached no fishing with longline gear both inside and outside the Convention Area during the same fishing trip and the gear stowage requirements for vessels that fish outside the Convention Area and then enter the Convention Area do not apply to: (1) vessels on declared shallow-setting trips pursuant to 50 CFR 665.23(a), since they do not target bigeye tuna and they are subject to 100 percent observer coverage; and (2) vessels operating for the purposes of this rule as part of the longline fisheries of the U.S. Participating Territories, since they are not subject to the main fishing restrictions that would be triggered by the limit being reached, including vessels registered for use under valid American Samoa Longline Limited Access Permits and vessels landing their bigeye tuna catch in one of the three U.S. Participating Territories, so long as these vessels conduct fishing activities in accordance with the provisos necessary for them to be considered part of the longline fisheries of the U.S. Participating Territories. Furthermore, with respect to vessels on declared shallow-setting trips, the requirement that the number of bigeye tuna retained on board, transshipped, or landed not exceed the number on board upon the effective date of the prohibitions, as recorded by the NMFS observer, is no longer deemed necessary and has been removed from paragraph (e)(1)(i) of § 300.224.

In § 300.211, “Definitions,” the definition of “fishing trip” has been omitted because since publication of the

proposed rule, a definition for “fishing trip” has been established in a separate rulemaking (final rule published August 4, 2009; 74 FR 38544). Although the established definition is not identical to the one included in the proposed rule, it is functionally the same, so there is no need to revise the definition in this final rule.

Classification

The NMFS Assistant Administrator has determined that this final rule is consistent with the WCPFC Implementation Act and other applicable laws.

Administrative Procedure Act

There is good cause under 5 U.S.C. 553(d)(3) to establish an effective date less than 30 days after date of publication of this final rule. Compliance with the 30-day requirement would be impracticable and contrary to the public interest, since NMFS would be unable to ensure that the bigeye tuna catch limit mandated by the WCPFC for 2009 is not exceeded, and would consequently be frustrated in promulgating the regulations needed to satisfy the international obligations of the United States under the Convention.

National Environmental Policy Act

Pursuant to the requirement of the National Environmental Policy Act (NEPA), NMFS prepared an EA that analyzed the effects of the proposed rule on the human environment. In the EA, NMFS analyzed the potential environmental effects of the proposed rule, as well as three alternatives to the proposed rule, including the no-action, or baseline, alternative. NMFS issued the EA in draft form for public review and comment in conjunction with the proposed rule. Comments on the draft EA stated that the EA contained insufficient information and inadequate analysis to assess the potential environmental impacts of the proposed rule and suggested that an Environmental Impact Statement (EIS) should be prepared.

The EA also contained analysis of another action a rule implementing provisions of CMM 2008-01 for the U.S. purse seine fishery operating in the WCPFC’s area of competence and a final version of the EA (July 2009 version) was issued in conjunction with the final rule for that other action on August 4, 2009. In order to provide detailed responses to the comments regarding the EA’s analysis of the proposed rule for the bigeye tuna catch limit, NMFS prepared a Supplemental EA. The Supplemental EA also includes analysis of another action alternative, which is

the alternative implemented in this final rule. Overall, the expected impacts on bigeye tuna and other living marine resources from the alternative implemented in this final rule are expected to be minor and generally beneficial, because it would implement a catch limit where one does not currently exist. The alternative implemented in this final rule is similar to the proposed rule in that it would prohibit the retention, landing, and transshipment of bigeye tuna by U.S. longline vessels in the Convention Area once the catch limit is reached.

However, under this alternative, bigeye tuna caught by vessels registered for use under an American Samoa Longline Limited Access Permit would be considered to be fish caught as part of the American Samoa longline fishery regardless of where the fish are landed, and thus, would not be subject to the catch limit established by the rule, so long as they are caught outside the portion of the EEZ surrounding the Hawaiian Archipelago and are landed by a vessel with a valid permit issued under 50 CFR 660.707 or 50 CFR 665.21.

The alternative implemented in this final rule is less restrictive on fishermen than the proposed rule or other action alternatives analyzed in the EA. However, the impacts on the human environment from the final rule would be similar to the impacts from the proposed rule or other action alternatives. The overall impacts would be minor for the following reasons: the duration of the rule would be limited to three years, so unless similar or more restrictive actions are taken in the future, conditions would likely rebound to conditions similar to those under the no-action, or baseline, alternative; and the final rule would likely not cause substantial changes to the fishing practices and patterns of the affected fleets.

However, unlike the proposed rule, the catch of bigeye tuna outside the portion of the EEZ surrounding the Hawaiian Archipelago of vessels with both a Hawaii Longline Limited Access Permit and an American Samoa Longline Limited Access Permit would not be counted against the limit. Thus, vessels with an American Samoa Longline Limited Access Permit that currently fish inside the portion of the EEZ surrounding the Hawaiian Archipelago would likely shift some of their effort to outside the portion of the EEZ surrounding the Hawaiian Archipelago, where their catch would not be counted against the limit. Under the final rule, then, the catch limit would likely be reached later in the year, and the total catch of bigeye tuna

would be greater than under the proposed rule or the other action alternatives. Vessels with both a Hawaii Longline Limited Access Permit and an American Samoa Longline Limited Access Permit may also respond to this final rule by increasing their fishing effort to meet market demand for bigeye tuna landed in Hawaii after the catch limit is reached, when fewer vessels may be landing bigeye tuna in Hawaii, again, leading to greater bigeye tuna catches than under the other action alternatives. So, the final rule would be more similar to the no-action alternative than would the proposed rule or any of the other action alternatives. However, since there would be some operational constraints imposed on the fishing activities of U.S. longline vessels once the catch limit is reached, the final rule would be expected to result in a total annual bigeye tuna catch that is less than the catch that would be expected under the no-action alternative. The final rule could provide a small, beneficial contribution to the cumulative environmental impacts experienced by the affected environment. Other future actions for the conservation and management of HMS could cause similar beneficial effects. Together with the effects of those actions, the cumulative impacts on the affected environment from the final rule could be greater than if the final rule were implemented in isolation. The overall cumulative, or additive, impacts on the affected environment from the final rule, other present actions, and all reasonably foreseeable future actions would likely be beneficial. However, some other reasonably foreseeable future actions that are not a result of this final rule could cause some adverse effects that would counteract these beneficial impacts. These reasonably foreseeable future actions could involve changes in ocean conditions and potential changes to current fishing operations caused by the activities of fishermen.

Based on the analysis in the EA and Supplemental EA, NMFS concluded that there will be no significant impact on the human environment as a result of this rule and an EIS need not be prepared. The economic impacts of the rule are addressed in the EA only insofar as they are related to impacts to the biophysical environment. They are addressed more fully in the RIR, IRFA, and FRFA. Copies of the EA and Supplemental EA are available from NMFS (see ADDRESSES).

Executive Order 12866

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

Regulatory Flexibility Act

NMFS prepared this final regulatory flexibility analysis (FRFA) for the rule, Bigeye Tuna Catch Limits in Longline Fisheries in 2009, 2010, and 2011. The FRFA incorporates the IRFA prepared for the proposed rule (74 FR 32521; July 8, 2009; available from NMFS see ADDRESSES). The analysis provided in the IRFA is not repeated here in its entirety.

The need for, reasons why action by the agency is being considered, and the objectives of the action are explained in the preambles to the proposed rule and final rule and are not repeated here. There are no disproportionate economic impacts between small and large vessels resulting from this rule. Furthermore, there are no disproportionate economic impacts from this rule based on vessel size, gear, or homeport. There are no new recordkeeping or reporting requirements associated with this rule. Other compliance requirements are described in the IRFA. This rule is issued under authority of the WCPFC Implementation Act.

Description of Small Entities to Which the Rule Will Apply

The rule will apply to owners and operators of U.S. vessels used for fishing using longline gear in the Convention Area, except those that are part of the longline fleets of American Samoa, Guam, and the CNMI. The total number of affected vessels is approximated by the number of vessels with Hawaii Longline Limited Access Permits (issued under 50 CFR 665.21). There are 164 such permits available. During the period 2006–2008 the number of vessels permitted ranged from 121 to 140. The number of vessels actually permitted as of October 2009 was 131. Owners and operators of U.S. longline vessels based on the U.S. west coast would also be affected by this proposed rule, but based on the inactivity of that fleet in the Convention Area since 2005, it is expected that very few, if any, such vessels would be affected. The Hawaii longline fleet targets bigeye tuna using deep sets, and during certain parts of the year, portions of the fleet target swordfish using shallow sets. In each of the years 2005 through 2008, the estimated numbers of Hawaii longline vessels that fished were 124, 127, 129, and 128, respectively. Of those vessels, the numbers that engaged in deep-setting were 124, 127, 129, and 127, and

the numbers that engaged in shallow-setting were 31, 35, 27, and 24, respectively. The numbers that did both were 31, 35, 27, and 23, respectively. Most of the fleet's fishing effort has traditionally been in the Convention Area, but fishing has also taken place to the east of the Convention Area. As an indication of the size of businesses in the fishery, average annual fleet-wide ex-vessel revenues during 2005–2007 were about \$60 million. Given the number of vessels active during that period (127, on average), this indicates an average of about \$0.5 million in annual revenue per vessel. Therefore, NMFS has determined that all vessels in the fishery are small entities based on the Small Business Administration's definition of a small fish harvester (i.e., gross annual receipts of less than \$4.0 million).

Statement of any Changes Made to the Proposed Rule as a Result of Public Comment

In response to public comment that fish catches should be assigned among fisheries based on which permit program the vessel was operating under rather than the landing location, NMFS has made a change from the proposed rule such that both landing location and permit type are taken into account when assigning catches. The change is described in more detail in the following section.

Steps Taken To Minimize the Significant Economic Impact on Small Entities

NMFS explored alternatives that would achieve the objective of this action (to satisfy the international obligations of the United States under WCPFC CMM 2008–01 with respect to U.S. longline vessels) while minimizing economic impacts on small entities. Upon publication of the proposed rule, three action alternatives had been identified and considered (in addition to the no-action alternative). One alternative would prohibit longline fishing in the Convention Area once the limit is reached, rather than just prohibiting the retention, landing, and transshipment of bigeye tuna caught by longline in the Convention Area. Another alternative would prohibit deep-set longline fishing once the limit is reached, allowing shallow-set longline fishing in the Convention Area to continue, provided that no bigeye tuna and no yellowfin tuna are retained, landed, or transshipped. The third alternative, which would be implemented under the proposed rule (hereafter, "proposed rule alternative"), would allow both shallow-set and deep-

set longline fishing in the Convention Area to continue after the limit is reached, provided that no bigeye tuna are retained, landed, or transhipped. As described in the IRFA, among those three alternatives, the proposed rule alternative would result in the least adverse economic impacts on small entities, as it would leave open greater alternative fishing opportunities in the event the catch limit is reached. For that reason, the proposed rule alternative was preferred by NMFS over the other two action alternatives. Since publication of the proposed rule, and based in part on public comments received on the proposed rule, NMFS has identified an additional alternative, which is being implemented in this final rule. This new alternative (hereafter, "final rule alternative") is the same as the proposed rule alternative except in the way that the longline fisheries of the U.S. Participating Territories (the catches of which will not be subject to the limit) are distinguished from the other U.S. longline fisheries. Under the final rule alternative, bigeye tuna caught by vessels with American Samoa Longline Limited Access Permits will be considered to be fish caught in the longline fishery of American Samoa, regardless of where the fish are landed (provided they are not caught in the portion of the EEZ surrounding the Hawaiian Archipelago and are landed by a vessel with a valid permit issued under 50 CFR 660.707 or 50 CFR 665.21). Such bigeye tuna catches will not be subject to the limit. Because of the way bigeye tuna catches will be assigned under the final rule alternative, the economic impacts on affected small entities are expected to be less adverse than under the proposed rule alternative or either of the other two action alternatives, as follows:

First, unlike under the proposed rule alternative or either of the other two action alternatives, bigeye tuna catches (outside the portion of the EEZ surrounding the Hawaiian Archipelago) of vessels with both a Hawaii Longline Limited Access Permit and an American Samoa Longline Limited Access Permit ("dual permit vessels") that are landed somewhere other than in one of the U.S. Participating Territories (e.g., Hawaii) will generally not be subject to the limit. Therefore, the likelihood of the limit being reached in a given year is lower, and the likely date of the limit being reached in a given year is later than under the proposed rule alternative or either of the other two action alternatives. The economic impacts on all affected small entities will

consequently be somewhat less adverse in comparison with those of the proposed rule alternative and the other two action alternatives (as described in the IRFA). The degree to which the impacts will be less adverse cannot be determined because of the difficulty in predicting the responses of fishermen to the requirements of the final rule.

Second, under the final rule alternative, businesses that operate dual permit vessels will be impacted substantially less than will other participants in the Hawaii longline fleet, by virtue of their history of participation in the American Samoa Longline Limited Access program. Once the limit is reached in a given year, operators of dual permit vessels would continue to be able to land in Hawaii bigeye tuna that are caught in the Convention Area, provided that they are not caught in the portion of the EEZ surrounding the Hawaiian Archipelago. Their inability to fish in the portion of the EEZ surrounding the Hawaiian Archipelago would constrain their operational flexibility and thus be costly, but those costs would likely be offset by benefits stemming from the fact that no other longline vessels would be able to catch bigeye tuna in the Convention Area that can be landed in Hawaii. Specifically, because the supply of bigeye tuna to the Hawaii market would be constrained after the limit is reached, the price of bigeye tuna would likely respond by increasing, and operators of dual permit vessels would benefit from such increases (as would businesses operating vessels without dual permits that land in Hawaii bigeye tuna caught outside the Convention Area). As of October 2009 there were 11 dual permit vessels. There have been 10–12 dual permit vessels in each of the three full years that the American Samoa Longline Limited Access program has been in place (2006–2008). Since the benefits of owning and operating a dual permit vessel will act as an incentive for fishing businesses to obtain both permits for their vessels, the number of dual permit vessels could increase as a result of the final rule. The maximum possible number of dual permit vessels is 60, which is the maximum number of American Samoa Longline Limited Access Permits that are available. Given the substantial cost of obtaining a Hawaii Longline Limited Access Permit (such permits are transferable on the open market and typically sell for tens of thousands of dollars) and the strict eligibility requirements for obtaining an American Samoa Longline Limited Access Permit (only persons with a documented history of fishing for

pelagic species with longline gear in the portion of the EEZ around American Samoa are eligible for such permits), it is unlikely that the number of dual permit vessels will reach as high as 60 during the period of effectiveness of this final rule. In sum, the economic impacts of this final rule on business entities that own and operate dual permit vessels are expected to be much less adverse than the impacts of the proposed rule alternative or either of the other two action alternatives, and it is possible that they will be beneficial.

The three action alternatives other than the final rule alternative were rejected by NMFS because they would be expected to result in more severe adverse economic impacts on affected entities than would the final rule alternative.

The alternative of taking no action at all was rejected because it would fail to accomplish the objective of the WCPFC Implementation Act or satisfy the international obligations of the United States as a Contracting Party to the Convention.

The final rule alternative would accomplish the objective of the WCPFC Implementation Act and satisfy the international obligations of the United States with respect to implementing WCPFC CMM 2008–01 for U.S. longline vessels, and do so with minimal adverse economic impacts on small entities, and for these reasons was adopted in the final rule.

Comments and Responses

No public comments were received on the IRFA.

Small Entity Compliance Guide

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. As part of this rulemaking process, a small entity compliance guide (the guide) has been prepared. The guide will be sent to all current holders of longline permits issued under 50 CFR 665.21. Copies of this final rule and the guide are available from NMFS (see **ADDRESSES**) and are available at: http://www.fpir.noaa.gov/IFD/ifd_documents_data.html.

List of Subjects in 50 CFR Part 300

Administrative practice and procedure, Fish, Fisheries, Fishing, Marine resources, Reporting and recordkeeping requirements, Treaties.

Dated: December 2, 2009.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR part 300 is amended as follows:

PART 300—INTERNATIONAL FISHERIES REGULATIONS

Subpart O—Western and Central Pacific Fisheries for Highly Migratory Species

■ 1. The authority citation for 50 CFR part 300, subpart O, continues to read as follows:

Authority: 16 U.S.C. 6901 *et seq.*

■ 2. In § 300.211, definitions of “Hawaiian Archipelago” and “Longline gear” are added, in alphabetical order, to read as follows:

§ 300.211 Definitions.

* * * * *

Hawaiian Archipelago means the Main and Northwestern Hawaiian Islands, including Midway Atoll.

* * * * *

Longline gear means a type of fishing gear consisting of a main line that exceeds 1 nautical mile in length, is suspended horizontally in the water column either anchored, floating, or attached to a vessel, and from which branch or dropper lines with hooks are attached; except that, within the protected species zone, longline gear means a type of fishing gear consisting of a main line of any length that is suspended horizontally in the water column either anchored, floating, or attached to a vessel, and from which branch or dropper lines with hooks are attached, where “protected species zone” is used as defined at § 665.12 of this title.

* * * * *

■ 3. In § 300.222, paragraphs (bb), (cc) and (dd) are added to read as follows:

§ 300.222 Prohibitions.

* * * * *

(bb) Use a fishing vessel to retain on board, transship, or land bigeye tuna captured by longline gear in the Convention Area or to fish in contravention of § 300.224(e)(1) or (e)(2).

(cc) Use a fishing vessel to fish in the Pacific Ocean using longline gear both

inside and outside the Convention Area on the same fishing trip in contravention of § 300.224(e)(3).

(dd) Fail to stow longline gear as required in § 300.224(e)(4).

■ 4. A new § 300.224 is added to read as follows:

§ 300.224 Longline fishing restrictions.

(a) For each of the years 2009, 2010, and 2011, there is a limit of 3,763 metric tons of bigeye tuna that may be captured in the Convention Area by longline gear and retained on board by fishing vessels of the United States during the calendar year.

(b) Bigeye tuna landed in American Samoa, Guam, or the Commonwealth of the Northern Mariana Islands will not be counted against the limits established under paragraph (a) of this section, provided that:

(1) The bigeye tuna were not caught in the portion of the EEZ surrounding the Hawaiian Archipelago; and

(2) The bigeye tuna were landed by a fishing vessel operated in compliance with a valid permit issued under § 660.707 or § 665.21 of this title.

(c) Bigeye tuna caught by a vessel registered for use under a valid American Samoa Longline Limited Access Permit issued under § 665.21(c) of this title will not be counted against the limits established under paragraph (a) of this section, provided that:

(1) The bigeye tuna were not caught in the portion of the EEZ surrounding the Hawaiian Archipelago; and

(2) The bigeye tuna were landed by a fishing vessel operated in compliance with a valid permit issued under § 660.707 or § 665.21 of this title.

(d) NMFS will monitor retained catches of bigeye tuna with respect to the limit established under paragraph (a) of this section in each of the calendar years using data submitted in logbooks and other available information. After NMFS determines that the limit in any of the applicable years is expected to be reached by a specific future date, and at least seven calendar days in advance of that specific future date, NMFS will publish a notice in the **Federal Register** announcing that specific prohibitions will be in effect starting on that specific future date and ending at the end of the calendar year.

(e) Once an announcement is made pursuant to paragraph (d) of this section, the following restrictions will apply during the period specified in the announcement:

(1) A fishing vessel of the United States may not be used to retain on board, transship, or land bigeye tuna captured by longline gear in the Convention Area, except as follows:

(i) Any bigeye tuna already on board a fishing vessel upon the effective date of the prohibitions may be retained on board, transshipped, and/or landed, to the extent authorized by applicable laws and regulations, provided that they are landed within 14 days after the prohibitions become effective. The 14-day landing requirement does not apply to a vessel that has declared to NMFS, pursuant to § 665.23(a) of this title, that the current trip type is shallow-setting.

(ii) Bigeye tuna captured by longline gear may be retained on board, transshipped, and/or landed if they are landed in American Samoa, Guam, or the Commonwealth of the Northern Mariana Islands, provided that:

(A) The bigeye tuna were not caught in the portion of the EEZ surrounding the Hawaiian Archipelago;

(B) Such retention, transshipment, and/or landing is in compliance with applicable laws and regulations; and

(C) The bigeye tuna are landed by a fishing vessel operated in compliance with a valid permit issued under § 660.707 or § 665.21 of this title.

(iii) Bigeye tuna captured by longline gear may be retained on board, transshipped, and/or landed if they are caught by a vessel registered for use under a valid American Samoa Longline Limited Access Permit issued under § 665.21(c) of this title, provided that:

(A) The bigeye tuna were not caught in the portion of the EEZ surrounding the Hawaiian Archipelago;

(B) Such retention, transshipment, and/or landing is in compliance with applicable laws and regulations; and

(C) The bigeye tuna are landed by a fishing vessel operated in compliance with a valid permit issued under § 660.707 or § 665.21 of this title.

(2) Bigeye tuna caught by longline gear in the Convention Area may not be transshipped to a fishing vessel unless that fishing vessel is operated in compliance with a valid permit issued under § 660.707 or § 665.21 of this title.

(3) A fishing vessel of the United States, other than a vessel meeting the requirements of paragraphs (e)(1)(ii) or (e)(1)(iii) of this section or a vessel for which a declaration has been made to NMFS, pursuant to § 665.23(a) of this title, that the current trip type is shallow-setting, may not be used to fish in the Pacific Ocean using longline gear both inside and outside the Convention Area during the same fishing trip, with the exception of a fishing trip during which the prohibitions were put into effect as announced under paragraph (d) of this section, in which case the bigeye tuna on board the vessel may be retained on board, transshipped, and/or landed, to the extent authorized by

applicable laws and regulations, provided that they are landed within 14 days after the prohibitions become effective.

(4) If a fishing vessel of the United States, other than a vessel meeting the requirements of paragraphs (e)(1)(ii) or (e)(1)(iii) of this section or a vessel for which a declaration has been made to NMFS, pursuant to § 665.23(a) of this title, that the current trip type is shallow-setting, is used to fish in the Pacific Ocean using longline gear outside the Convention Area and the vessel enters the Convention Area at any time during the same fishing trip, the longline gear on the fishing vessel must, while in the Convention Area, be stowed in a manner so as not to be readily available for fishing; specifically, the hooks, branch or dropper lines, and floats used to buoy the mainline must be stowed and not available for immediate use, and any power-operated mainline hauler on deck must be covered in such a manner that it is not readily available for use.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 0809251266-81485-02]

RIN 0648-XS93

Fisheries of the Northeastern United States; Scup Fishery; Commercial Quota Harvested for 2009 Winter II Period

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS announces the closure of the scup commercial coastwide fishery from Maine through North Carolina for the remainder of the Winter II Period. Regulations governing the scup fishery require publication of this notification to advise the coastal states from Maine through North Carolina that this quota has been harvested and to advise Federal vessel permit holders and Federal dealer permit holders that no commercial quota is available for landing scup in these states. Federally permitted commercial vessels may not land scup in these states for the remainder of the 2009 Winter II quota period.

DATES: Effective 0001 hours December 9, 2009, through December 31, 2009.

FOR FURTHER INFORMATION CONTACT: Sarah Heil, Fishery Management Specialist, (978) 281-9257.

SUPPLEMENTARY INFORMATION: Regulations governing the scup fishery are found at 50 CFR part 648. The regulations at § 648.121 require the Regional Administrator to monitor the commercial scup quota for each quota period and, based upon dealer reports, state data, and other available information, to determine when the commercial quota for a period has been harvested. NMFS is required to publish a notification in the **Federal Register** advising and notifying commercial vessels and dealer permit holders that, effective upon a specific date, the scup commercial quota has been harvested and no commercial quota is available for landing scup for the remainder of the Summer Period. Based upon recent projections, the Regional Administrator has determined that the Federal

commercial quota of 1,349,751 lb (612 mt) for the 2009 Winter II Period will be fully harvested by or before December 31, 2009. To maintain the integrity of the 2009 Winter II Period quota by avoiding or minimizing quota overages, the commercial scup fishery will close for the remainder of the Winter II Period (through December 31, 2009) in Federal waters, effective as of the date specified above (see **DATES**).

Section 648.4(b) provides that Federal scup moratorium permit holders agree, as a condition of the permit, not to land scup in any state after NMFS has published a notification in the **Federal Register** stating that the commercial quota for the period has been harvested and that no commercial quota for scup is available. Therefore, effective 0001 hours, Wednesday, December 9, 2009, further landings of scup by vessels holding Federal scup moratorium permits are prohibited through December 31, 2009. Effective 0001 hours, Wednesday, December 9, 2009, federally permitted dealers are also advised that they may not purchase scup from federally permitted vessels that land in coastal states from Maine through North Carolina for the remainder of the Winter II Period (through December 31, 2009). The 2010 Winter I Period for commercial scup harvest will open on January 1, 2010.

Classification

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866.

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

Dated: December 1, 2009.

Alan D. Risenhoover,

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

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