

§ 384.301 Substantial compliance—general requirements.

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(f) A State must come into substantial compliance with the requirements of subpart B of this part in effect as of July 8, 2011, as soon as practical but, unless otherwise specifically provided in this part, not later than July 8, 2014.

Issued on: June 27, 2011.

William Bronrott,

Deputy Administrator.

[FR Doc. 2011-16683 Filed 7-1-11; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 635**

[Docket No. 110210132-1275-02]

RIN 0648-BA65

Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Quotas and Atlantic Tuna Fisheries Management Measures

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

ACTION: Final rule.

SUMMARY: NMFS is modifying Atlantic bluefin tuna (BFT) base quotas for all domestic fishing categories; establishing BFT quota specifications for the 2011 fishing year; reinstating pelagic longline target catch requirements for retaining BFT in the Northeast Distant Gear Restricted Area (NED); amending the Atlantic tunas possession-at-sea and landing regulations to allow removal of Atlantic tunas tail lobes; and clarifying the transfer-at-sea regulations for Atlantic tunas. This action is necessary to implement recommendations of the International Commission for the Conservation of Atlantic Tunas (ICCAT), as required by the Atlantic Tunas Convention Act (ATCA), and to achieve domestic management objectives under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

DATES: The amendments to § 635.27 are effective July 5, 2011. The 2011 quota specifications are effective July 5, 2011 through December 31, 2011. The amendments to §§ 635.23, 635.29, and 635.30 are effective August 4, 2011.

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 Web site at <http://www.nmfs.noaa.gov/sfa/hms/>.

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

SUPPLEMENTARY INFORMATION: Atlantic bluefin tuna, bigeye tuna, albacore tuna, yellowfin tuna, and skipjack tuna (hereafter referred to as “Atlantic tunas”) are managed under the dual authority of the Magnuson-Stevens Act and ATCA. ATCA authorizes the Secretary of Commerce (Secretary) to promulgate regulations, as may be necessary and appropriate, to implement ICCAT recommendations. The authority to issue regulations under the Magnuson-Stevens Act and ATCA has been delegated from the Secretary to the Assistant Administrator for Fisheries, NMFS.

Background

Background information about the need for modification of the BFT base quotas for all domestic fishing categories, the 2011 BFT quota specifications, and amendment of the Atlantic tuna fisheries management measures was provided in the preamble to the proposed rule (76 FR 13583, March 14, 2011) and is not repeated here.

Changes From the Proposed Rule

The total amount of available annual quota is determined by the ICCAT-recommended U.S. baseline BFT quota after consideration of overharvest/underharvest from the previous fishing year and any accounting for estimated dead discards of BFT. At the time the proposed rule was prepared, NMFS used the 2009 estimate of 160 mt as a proxy for potential 2011 dead discards because the BFT dead discard estimate for 2010 was not yet available. The 2010 dead discard estimate, 122.3 mt, became available from the NMFS Southeast Fisheries Science Center during the comment period. Estimates of dead discards are only available for the Longline category at this time. Estimates from other BFT gear types and fishing sectors that are not observed at sufficient levels for estimation and that do not report via a logbook are not included in this calculation. Use of the

2010 estimate as a proxy for estimated 2011 dead discards in the final rule is appropriate because it is the best available and most complete information NMFS currently has regarding dead discards.

In the proposed rule, under each baseline quota alternative, NMFS also set out its calculation of “available” annual quota and its proposed allocation of that available quota among the commercial and recreational domestic fishing categories (*i.e.*, quota specifications), and its proposed methodology for handling dead discards. NMFS proposed a calculation and allocation methodology consistent with the 2006 Consolidated HMS FMP and implementing regulations, but different than the methodology used for the past 4 years. NMFS received comments on the proposed allocation methodology both at public hearings and in writing during the public comment period. NMFS considered the comments (summarized in the Response to Comments section below) and the updated (2010) dead discard estimate, and after public discussion and input has decided to account for dead discards in a different manner to establish the 2011 BFT quota specifications as described below. Note that these considerations are for the 2011 quota specifications only.

To set the final 2011 BFT quota specifications, NMFS has decided to account up front (*i.e.*, at the beginning of the fishing year) for half of the estimated dead discards, using the recent 2010 estimate rather than the 2009 estimate used at the proposed rule stage. In the proposed rule, NMFS had proposed to subtract from the overall quota all of the estimated dead discards up front and then allocate the remaining quota among the fishery categories, even though the United States is not required by ICCAT or current regulations to account for the total amount of dead discards until the end of the fishing season. In the final rule, NMFS is accounting for half of the estimated pelagic longline dead discards up front and deducting that portion of expected longline discards directly from the Longline category quota. Accounting for dead discards in the Longline category in this way may provide some incentive for pelagic longline fishermen to reduce those interactions that may result in dead discards. Also in response to public comment, NMFS is applying half of the 94.9 mt of 2010 underharvest that is allowed to be carried forward to 2011 to the Longline category and maintaining the other half in the Reserve category. NMFS intends to maintain this underharvest in the

Reserve category as needed until later in the fishing year for maximum flexibility in accounting for 2011 landings and dead discards.

NMFS took into consideration a broad range of public comment on the quota specification methodology and allocations in designing this final action. NMFS considers this action to be a transitional approach from the method used over the past 4 fishing years. Current regulations provide that the dead discard estimate may, but is not required to be, subtracted from the annual U.S. quota, and NMFS previously opted to deduct that estimate at the beginning of the year when the quota specifications were established. These final specifications are consistent with HMS regulations, are a logical outgrowth of the originally proposed calculation methodology, and would not affect the base quotas analyzed in Alternatives A1 and A2 of the EA/RIR/FRFA. For the directed fishing categories, this final rule maintains the directed categories at their baseline quotas, which reflect application of the allocation scheme established in the Consolidated Atlantic Highly Migratory Species Fishery Management Plan (Consolidated HMS FMP) to the 2011 baseline U.S. BFT quota (923.7 mt). All landings and dead discards will be accounted for and reported to ICCAT, and NMFS will make any ICCAT-required adjustments to future U.S. BFT quotas, as necessary.

Specifically, to set the final 2011 BFT quota specifications, NMFS first applies the percentages in the Consolidated HMS FMP allocation scheme to the overall U.S. quota of 923.7 mt to obtain the baseline category quotas for the different categories (*i.e.*, the General, Harpoon, Purse Seine, Angling, Longline, Trap, and Reserve categories). NMFS then deducts half of the 2010

dead discard estimate of 122.3 mt (*i.e.*, 61.2 mt) from the 2011 baseline Longline category quota of 74.8 mt and applies half of the 94.9 mt allowed to be carried forward to 2011 to the Longline category, *i.e.*, 74.8 – 61.2 + 47.5 = 61.1 mt adjusted Longline subquota (not including the 25-mt allocation set aside by ICCAT for the NED). NMFS will add the remainder of the 2010 underharvest that can be carried forward to 2011 (47.4 mt) to the Reserve category’s baseline allocation of 23.1 mt, for an adjusted Reserve category quota of 70.5 mt. For the directed fishing categories, NMFS is not making any adjustments to the allocations that result from applying the scheme established in the Consolidated HMS FMP to the 2011 baseline U.S. BFT quota. Quota specifications for 2012 would be addressed in a separate, future action using information on 2011 BFT landings and the best available dead discard estimate at that time.

Regarding the Atlantic tunas transfer-at-sea regulations, and in response to public comment, NMFS adds the words “or other gear” to further clarify that “transfer” includes moving a tuna from fishing gear or other gear in the water from one vessel to another.

2011 Quota Specifications

NMFS establishes final 2011 quota specifications as follows (and as shown in Table 1): General category—435.1 mt; Harpoon category—36 mt; Purse Seine category—171.8 mt; Angling category—182 mt; Longline category—61.1 mt; and Trap category—0.9 mt. The amount allocated to the Reserve category for inseason adjustments, and potential quota transfers, scientific research collection, and accounting for potential overharvest in any category except the Purse Seine category, would be 70.5 mt.

The General category quota of 435.1 mt would be divided further into the

time-period allocations established in the Consolidated HMS FMP. Thus, 23.1 mt (5.3 percent) would be allocated to the General Category for the period beginning January 1, 2011, and ending January 31, 2011; 217.6 mt (50 percent) for the period beginning June 1, 2011, and ending August 31, 2011; 115.3 mt (26.5 percent) for the period beginning September 1, 2011, and ending September 30, 2011; 56.6 mt (13 percent) for the period beginning October 1, 2011, and ending November 30, 2011; and 22.6 mt (5.2 percent) for the period beginning December 1, 2011, and ending December 31, 2011.

The Angling category quota of 182 mt would be further divided, pursuant to the area subquota allocations established in the Consolidated HMS FMP, as follows: School BFT—94.9 mt, with 36.5 mt to the northern area (north of 39°18’ N. latitude), 40.8 mt to the southern area (south of 39°18’ N. latitude), plus 17.6 mt held in reserve; large school/small medium BFT—82.9 mt, with 39.1 mt to the northern area and 43.8 mt to the southern area; and large medium/giant BFT—4.2 mt, with 1.4 mt to the northern area and 2.8 mt to the southern area.

The Longline category would be further divided in accordance with the North/South allocation percentages (*i.e.*, no more than 60 percent to the south of 31° N. latitude) in the Consolidated HMS FMP. Thus, the Longline category quota of 61.1 mt would be subdivided as follows: 24.4 mt to pelagic longline vessels landing BFT north of 31° N. latitude, and 36.7 mt to pelagic longline vessels landing BFT south of 31° N. latitude. NMFS would account for landings under the 25-mt NED allocation separately from other Longline category landings.

TABLE 1—ATLANTIC BLUEFIN TUNA QUOTAS AND QUOTA SPECIFICATIONS (IN METRIC TONS) FOR THE 2011 FISHING YEAR (JANUARY 1–DECEMBER 31, 2011)

Category (% share of baseline quota)	Baseline allocation for 2011 and 2012 (per 2010 ICCAT recommendation and consolidated HMS FMP allocations)	2011 Quota specifications		
		Dead discard deduction (½ of 2010 proxy of 122.3 mt)	2010 Under- harvest to carry forward to 2011 (94.9 mt total)	Adjusted 2011 fishing year quota
Total (100)	923.7			957.4
Angling (19.7)	182.0 SUBQUOTAS: School 94.9 Reserve 17.6 North 36.5 South 40.8 LS/SM 82.9 North 39.1 South 43.8 Trophy 4.2	.....	.....	182.0 SUBQUOTAS: School 94.9 Reserve 17.6 North 36.5 South 40.8 LS/SM 82.9 North 39.1 South 43.8 Trophy 4.2

TABLE 1—ATLANTIC BLUEFIN TUNA QUOTAS AND QUOTA SPECIFICATIONS (IN METRIC TONS) FOR THE 2011 FISHING YEAR (JANUARY 1–DECEMBER 31, 2011)—Continued

Category (% share of baseline quota)	Baseline allocation for 2011 and 2012 (per 2010 ICCAT recommendation and consolidated HMS FMP allocations)	2011 Quota specifications		
		Dead discard deduction (½ of 2010 proxy of 122.3 mt)	2010 Under- harvest to carry forward to 2011 (94.9 mt total)	Adjusted 2011 fishing year quota
	North 1.4 South 2.8	..... .....	..... .....	North 1.4 South 2.8
General (47.1)	435.1 SUBQUOTAS: Jan 23.1 Jun–Aug 217.6 Sept 115.3 Oct–Nov 56.6 Dec 22.6			435.1 SUBQUOTAS: Jan 23.1 Jun–Aug 217.6 Sept 115.3 Oct–Nov 56.6 Dec 22.6
Harpoon (3.9)	36.0	.....	.....	36.0
Purse Seine (18.6)	171.8	.....	.....	171.8
Longline (8.1)	74.8 SUBQUOTAS: North (-NED) 29.9 NED 25.0* South 44.9	– 61.2	+47.5	61.1 SUBQUOTAS: North (-NED) 24.4 NED 25.0* South 36.7
Trap (0.1)	0.9	.....	.....	0.9
Reserve (2.5)	23.1	.....	+47.4	70.5

* 25-mT ICCAT set-aside to account for bycatch of BFT in pelagic longline fisheries in the NED. Not included in totals at top of table.

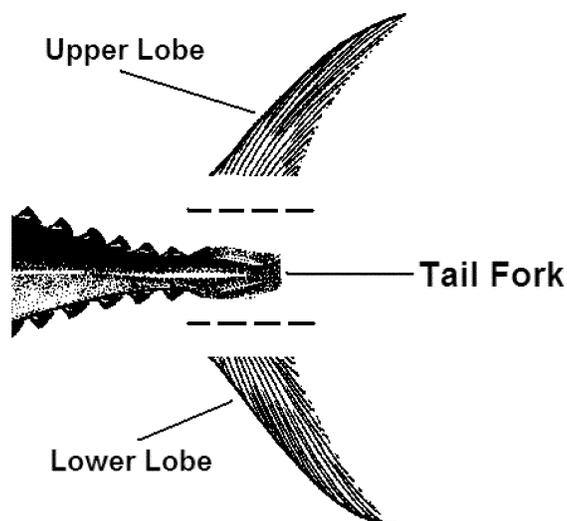
Reinstatement of NED Target Catch Requirements

NMFS reinstates target catch requirements for pelagic longline vessels fishing in the NED. This action removes the exemption from target catch requirements that effectively has applied in the NED since November 2003. NMFS is removing the provision that allows unlimited retention of commercial-sized BFT taken incidental to fishing for other species in the NED up to the amount allocated for the NED (currently 25 mt). Instead, the same target catch limits apply in all areas (*i.e.*, both inside and outside of the NED) as follows: One large medium or giant BFT

(*i.e.*, measuring 73 inches (185 cm) or greater) per vessel per trip may be landed, provided that at least 2,000 lb of species other than BFT are legally caught, retained, and offloaded from the same trip and are recorded on the dealer weighout slip as sold; two large medium or giant BFT may be landed incidentally to at least 6,000 lb of species other than BFT; and three large medium or giant BFT may be landed incidentally to at least 30,000 lb of species other than BFT.

Atlantic Tunas Possession at Sea and Landing Form

NMFS clarifies the regulations regarding Atlantic tunas possession at sea and landing to specify that as long as the fork of the tail remains intact, the upper and lower lobes of the tail may be removed (as shown in Figure 1). This change balances the need for maintaining a standardized method of measuring Atlantic tunas with the request to allow Atlantic tunas to be stored at sea in a more efficient manner. This rulemaking does not affect the measurement methodology or requirements for species other than Atlantic tunas.



Atlantic Tunas Transfer at Sea

NMFS clarifies the intent of the Atlantic tunas transfer-at-sea regulations and prohibitions by adding a sentence to the regulatory text regarding transfer at sea of Atlantic tunas that would read: "Notwithstanding the definition of 'harvest' at § 600.10, for the purposes of this part, 'transfer' includes, but is not limited to, moving or attempting to move an Atlantic tuna that is on fishing or other gear in the water from one vessel to another vessel." In the future, NMFS may make similar clarifications regarding transfer at sea for other Atlantic highly migratory species via separate actions pertaining to those species.

Comments and Responses

NMFS received approximately 2,000 written comments representing approximately 4,000 individuals or organizations, and oral comments were received from the approximately 400 participants who attended the six public hearings (in Barnegat, NJ; Manteo, NC; Gloucester, MA; Silver Spring, MD; Portland, ME; and Fairhaven, MA). The majority of the comments received opposed the 2011 BFT quota specifications as proposed. Below, NMFS summarizes and responds to all comments made specifically on the proposed rule. In addition, NMFS received comments on issues that were not part of this rulemaking. These comments are summarized under "Other Issues" below.

A. BFT Base Quota

Comment 1: NMFS should implement the ICCAT-recommended U.S. quota.

Response: NMFS agrees. Implementing the ICCAT-recommended baseline U.S. BFT quota is necessary for the United States to be in compliance

with the current ICCAT western BFT Recommendation, consistent with ATCA. The western Atlantic BFT Total Allowable Catch (TAC), which includes the U.S. quota, is expected to allow for continued BFT stock growth under the both the low and high stock recruitment scenarios considered by ICCAT's Standing Committee on Research and Statistics (SCRS).

Comment 2: It is arbitrary and capricious for NMFS to adopt quotas relying on the ICCAT western BFT recommendation. A 2008 independent review found ICCAT ineffective at controlling catch and that ICCAT management objectives have not been met. By relying entirely on ICCAT recommendations to set quotas, NMFS has "spurned its legal obligations under the Magnuson-Stevens Act," specifically violating National Standard 1, which requires that conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery, and National Standard 2, which requires that conservation and management measures shall be based upon the best scientific information available. NMFS should not rely solely on ICCAT stock assessments.

Response: NMFS disagrees that adoption of the ICCAT-recommended quota for western BFT is arbitrary and capricious or violates National Standards 1 and 2. NMFS considers the information considered by SCRS in the BFT stock assessments to constitute the best information currently available on which to make BFT fishery management decisions.

The United States is working with other ICCAT Contracting Parties to prevent BFT overfishing and overfished conditions for both stocks while providing reasonable opportunities to

fish. At its 2010 annual meeting, ICCAT adopted TACs and other conservation and management measures that are within the range of scientific advice that SCRS provided to ICCAT for both the western and eastern Atlantic stocks. Over the past several years, ICCAT has taken steps to strengthen its control of the eastern Atlantic bluefin tuna fishery, including a shorter fishing season, further reductions in fishing capacity, and stronger monitoring and compliance measures. ICCAT's 2010 assessment of the eastern BFT stock indicated that maintaining catches at the current TAC will likely allow biomass to increase if compliance with the current management measures continues. The latest stock assessment concluded that the current western Atlantic TAC should allow spawning stock biomass to increase under both high and low productivity scenarios. The western Atlantic fishery has also had a long history of compliance. In addition, the current ICCAT BFT recommendations for both the western and eastern stocks have a provision that would suspend all bluefin fisheries if SCRS detects a serious threat of stock collapse.

Further, NMFS manages BFT under the dual authority of the Magnuson-Stevens Act and ATCA. ATCA mandates that no regulation promulgated may have the effect of increasing or decreasing any allocation or quota of fish to which the United States agreed pursuant to an ICCAT recommendation.

Comment 3: NMFS should reduce significantly, or eliminate, quotas for fisheries targeting BFT and take immediate measures to reduce incidental mortality.

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. NMFS allocates the U.S. quota among categories to ensure that available fishing opportunities are distributed over as wide a range as possible with regard to time of year, geographic area, and type of participation while maintaining consistency with BFT conservation and management measures. Both the recent action to require the use of weak hooks by pelagic longline vessels fishing for HMS in the Gulf of Mexico and the action in this final rule to reinstate target catch requirements in the NED are consistent with the agency's efforts to address bycatch issues and manage BFT catch and landings within available quotas.

Comment 4: NMFS must consider the scientific information presented in the petition to list BFT as endangered or threatened under the Endangered Species Act (ESA), and CBD's comments on the 90-day finding, before issuing final conservation and management measures, including quotas, for BFT.

Response: Much of the information that was considered in the BFT listing petition status review was also considered by ICCAT and by NMFS in setting the BFT TAC and category quotas, respectively. NMFS proposed and is finalizing these management measures to be effective for June 2011, when ICCAT Recommendation 10-03 enters into force. Although the two efforts were conducted in parallel, the agency's fishery management obligations, including establishing the 2011 quota specifications, continued under ATCA and the Magnuson-Stevens Act during the status review process.

On May 27, 2011, NOAA announced that listing BFT as endangered or threatened is not warranted at this time (76 FR 31556, June 1, 2011). NOAA has committed to revisit this decision by early 2013, when more information will be available about the effects of the Deepwater Horizon BP oil spill, the 2012 SCRS BFT stock assessment, and the 2012 ICCAT BFT recommendations. NOAA also announced on May 27, 2011, that it is formally designating both the western Atlantic and eastern Atlantic and Mediterranean stocks of BFT as "species of concern" under the ESA. This places the species on a watch list for concerns about its status and threats to the species.

B. 2011 BFT Quota Specifications

Comment 5: NMFS should not deduct the dead discard estimate from the base quota. To account for pelagic longline BFT dead discards off the U.S. base quota is unfair as it would result in

reduced quotas for the more selective, directed fishing categories, and be a de facto reallocation of quota shares from those established in the Consolidated HMS FMP. It would also be economically damaging to the directed fisheries and support industries, and likely would result in shorter seasons and lower retention limits. NMFS is not managing for optimum yield when it allows the Longline category's landings and dead discards to total approximately 28 percent of the U.S. quota.

Response: The United States must account for dead discards, regardless of which fishery they occur in, to comply with ICCAT recommendations. The only dead discard data currently available comes from the longline fishery. Existing BFT quota regulations state that NMFS may subtract dead discards from the U.S. quota and make the remainder available to vessels subject to U.S. jurisdiction. This is an allowable methodology under existing regulations, and was not a new proposal in this rulemaking.

However, as described above, following consideration of public comment and the availability of updated dead discard estimates, NMFS has decided to account for one half of the dead discard estimate up front and directly off the Longline category quota, which will mitigate potential economic impacts commenters associated with adjusting the baseline quota for dead discards. For the directed fishing categories, NMFS is applying the allocation scheme established in the Consolidated HMS FMP to the 2011 baseline U.S. BFT quota with no further adjustments.

It is important to consider that the BFT quota allocations in the Consolidated HMS FMP were based on historic landings and were established initially in 1992. Baseline quotas were modified in 1995 and 1997 but have remained the same since implementation of the 1999 FMP when a separate discard allowance was provided for in the ICCAT BFT recommendation. Following ICCAT's elimination of the dead discard allowance and change to include dead discards within TACs in 2006, NMFS has not modified the allocation scheme to include dead discards into the baseline quotas. The United States has accounted for this mortality as part of the domestic specification calculation process for the last several years and reports dead discard estimates to ICCAT annually. This is one of many issues the agency intends to consider in its review of BFT management in the near future. Regarding the concern about this

accounting method creating shorter fishing seasons and lower retention limits, specifically for the recreational BFT fishery in 2011, the inseason actions implemented in April (*i.e.*, retention limit adjustment and closure of the southern area BFT trophy fishery) were based on recent changes in the fishery and size of bluefin tuna available to fishermen, not the proposed quota specifications. Finally, NMFS would like to clarify that accounting for dead discards as proposed or as finalized does not alter the Longline category's allocation of the U.S. quota. As proposed and finalized, the Longline category's allocation per the Consolidated HMS FMP is 8.1 percent to allow for landings of BFT, not dead discards. The pelagic longline fleet does not benefit economically from the BFT they must discard dead.

Comment 6: NMFS should not deduct the dead discard estimate from the overall quota (*i.e.*, "off the top") because it would provide no incentive for the pelagic longline fishery to reduce BFT interactions and dead discards. NMFS should account for these dead discards within the Longline category quota, and, generally, should hold each category accountable for its overharvests.

Response: As discussed above, in these final quota specifications, NMFS is accounting for half of the estimated dead discards within the Longline category up front. This action may provide some incentive for pelagic longline fishermen to reduce BFT interactions that may result in dead discards. Reinstating target catch requirements in the NED also may serve as a disincentive to fish in areas where BFT interactions could be high.

As discussed below, the pelagic longline fishery is currently the only fishery for which sufficient data is collected to estimate dead discards. However, an unknown level of dead discards occurs in directed BFT fishing fisheries as well and NMFS will consider how best to modify data collection programs to provide dead discard estimates in the future.

Comment 7: NMFS should consider implementing a 25-percent to 50-percent reduction of the allocated quota to the Longline category for one or more years. The longliners know there need to be some changes, although it would not be appropriate to cut out the pelagic longline fishery entirely.

Response: NMFS does not eliminate the quota for the Longline category in the final rule, although some of the approaches recommended in the comments on the proposed rulemaking would have had that effect. As discussed above, NMFS is accounting

for half of the estimated pelagic longline dead discards up front and deducting that portion of expected longline discards directly from the Longline category quota. Accounting for dead discards in the Longline category in this way may provide some incentive for pelagic longline fishermen to reduce those interactions that may result in dead discards. Reinstating pelagic longline target catch requirements for retaining BFT in the NED may also have a similar effect.

Comment 8: The proposed quota specifications are not consistent with the ICCAT provision that Contracting Parties shall minimize dead discards to the extent practicable. Allocating a disproportionate share of the BFT quota to the sector (pelagic longline) that causes the most discards is inconsistent with ICCAT mandates. The proposed quota specifications also ignore the obligations of the 1982 United Nations Convention on the Law of the Sea, the 1995 United Nations Fish Stocks Agreement, and the 1995 Food and Agriculture Organization Code of Conduct, which call for minimizing catch of non-target species.

Response: The U.S. quota finalized in this action is consistent with ICCAT Recommendation 10–03, the Magnuson-Stevens Act, and ATCA. The U.S. pelagic longline fleet fishes directly for swordfish and Atlantic tunas such as yellowfin tuna and catches BFT incidentally. Dead discards are the result of domestic and international restrictions on the size of BFT that may be retained and requirements that certain amounts of target species (*e.g.*, swordfish and other tunas) be landed in order to keep any BFT. If small BFT are caught, or if insufficient target species have been caught, BFT must be discarded, and some are discarded dead. The agency has historically implemented a series of management measures designed to regulate the incidental catch of BFT in non-directed Atlantic fisheries. Additionally, NMFS currently imposes a time and area closure for the month of June to prevent BFT longline interactions off the mid-Atlantic coast. As discussed above, NMFS recently finalized a rule requiring the use of weak hooks in the Gulf of Mexico pelagic longline fishery to minimize BFT interactions, is reinstating target catch requirements in the NED through this action, and also will consider options for further regulatory changes to reduce dead discards in the future. Regarding the 1982 United Nations Convention on the Law of the Sea, the 1995 United Nations Fish Stocks Agreement, and the 1995 Food and Agriculture Organization

Code of Conduct for Responsible Fisheries, NMFS does not consider this action to be inconsistent with those instruments.

Comment 9: Under ATCA, NMFS is authorized to adopt regulations necessary and appropriate to carry out the purposes and objectives of ICCAT. NMFS has been violating ATCA by allowing a de facto “incidental catch” fishery in the Gulf of Mexico, in violation of the ICCAT recommendation to prohibit directed fishing targeting BFT in that area.

Response: NMFS prohibits directed fishing for BFT in the Gulf of Mexico. However, some level of BFT catch is unavoidable during directed fishing for yellowfin tuna and swordfish. NMFS has historically implemented a series of management measures designed to regulate and limit the incidental catch of BFT in non-directed Atlantic fisheries.

Comment 10: Allocating a disproportionate portion of the BFT quota to the Longline category, which catches BFT only as bycatch, violates National Standard 4, which prohibits discrimination in the allocation of fishing privileges.

Response: National Standard 4 includes provisions that measures shall not discriminate between residents of different states and that allocations shall be fair and equitable to all fishermen. NMFS is allocating the baseline U.S. BFT quota consistent with the Consolidated HMS FMP allocation scheme. The action does not discriminate between residents of different states in the allocation of fishing privileges. It is important to note that the directed fishing categories currently do not have the same monitoring requirements as the pelagic longline fleet (*e.g.*, for logbooks and observers) and that improvements in directed fishery data collection could result in changes to the dead discard estimate and to the future management of those fisheries.

In the proposed 2011 quota specifications, NMFS’ goal was to balance the objectives of accounting for dead discards proactively, distributing fishing opportunities in a manner consistent with the Consolidated HMS FMP allocation scheme, and allowing continued operation of commercially valuable fisheries for swordfish and other tunas while controlling the landings of the incidental BFT catches. Through the final action, as described above, NMFS has used an approach that accounts for a portion of the dead discard estimate up front, holds a portion of the unharvested 2010 BFT quota that is allowed to be carried

forward to 2011 in the Reserve category for maximum flexibility for end-of-year accounting, and maintains directed fishing categories at their baseline quotas, which reflect application of the allocation scheme established in the Consolidated HMS FMP to the 2011 baseline U.S. BFT quota.

Comment 11: Perpetuating BFT dead discards does not serve the primary values of the BFT resource—food production and recreational opportunities—and thus violates National Standard 5, which requires that conservation and management measures consider efficiency in the utilization of fishery resources.

Response: NMFS considers efficiency in the utilization of the BFT resource across user groups, consistent with National Standard 5. To meet the multiple goals for the BFT fishery, NMFS considers the importance of all of the national standards when making fishery management decisions, including those intended to provide reasonable fishing opportunities to a wide range of users and gear types, coastwide, throughout the calendar year. Due to restrictions on size and retention limits, some amount of discards is inevitable and some amount of the BFT released are already dead or do not survive.

Comment 12: Because the proposed rule did not propose that bycatch be avoided or reduced, it violates National Standard 9, which requires that conservation and management measures minimize bycatch.

Response: The main purpose of the proposed rule was to implement the 2010–ICCAT recommended baseline U.S. BFT quota. The quota specifications were proposed to account for underharvest allowed to be carried forward to 2011 and to account for dead discards. The Consolidated HMS FMP and its implementing regulations minimize bycatch and bycatch mortality to the extent practicable in several ways. Most recently, on April 5, 2011, NMFS published a final rule to require weak hook use in the Gulf of Mexico pelagic longline fishery (76 FR 18653). That action and the action in this final rule to reinstate target catch requirements in the NED are part of the agency’s efforts to address bycatch issues and manage BFT catch and landings within available quotas. In addition, the accounting for half of the anticipated dead discards up front from the Longline category in this action may provide some incentive for pelagic longline fishermen to reduce those interactions that may result in dead discards. NMFS may identify additional measures to be taken in the

future resulting from further management review.

Comment 13: NMFS should account for dead discards as proposed. This approach is consistent with the method used for the last several years and would allow continued participation in the fishery by all user groups. The 8.1-percent Longline category allocation established in the FMP was based only on historical landings, not catch (*i.e.*, landings and discards). NMFS should continue to explore ways to convert dead discards to landings. Furthermore, NMFS should refer to dead discards as "regulatory discards" since it is domestic regulations that force pelagic longline fishermen to waste BFT bycatch.

Response: From 2007 through 2010, NMFS deducted the estimate of dead discards up front, but directly from the Longline category. In those years, NMFS was able to follow this approach while also providing a landings quota for the Longline category because of large underharvests and the fact that ICCAT allowed an amount equal to half of the U.S. quota to be carried forward to the following year. At the time the proposed rule was prepared, NMFS determined that the same approach would be impracticable given the change in the amount of underharvest that could be carried forward to 2011 (*i.e.*, from 50 percent of the U.S. quota to 10 percent, or from approximately 475 mt to 95 mt). NMFS considers the approach used for these final 2011 quota specifications to be a transitional approach from the method used over the past four fishing years. NMFS acknowledges the implications of the change in the ICCAT western BFT recommendation in 2006 for the pelagic longline fishery, and is attempting to balance the needs of the pelagic longline fleet to continue operations for the directed swordfish and Atlantic tunas fisheries with the needs of directed BFT fishery participants.

Comment 14: The pelagic longline fleet is critical in providing domestic swordfish and Atlantic tunas product and catch data used in highly migratory species stock assessments, and has contributed to scientific sampling efforts. Curtailing longline effort based on BFT bycatch could result in the loss of U.S. swordfish quota (if not used) to other ICCAT Contracting Parties that do not use safe handling and release practices, consequently having negative impacts to sea turtles and mammals, as well as billfish.

Response: NMFS acknowledges the role of the pelagic longline fishery in providing domestic fish products and important data for HMS stock

assessments, such as indices of abundance on the high seas. NMFS recognizes the conservation efforts of the U.S. longline fleet as well as the concerns about potential loss of quota to countries with less protective measures for protected species. Through these final specifications, NMFS is accounting for half of the estimated dead discards against the Longline category up front but also is providing half of the available underharvest to the Longline category to balance the need for continued directed longline operations for swordfish and Atlantic tunas with the need to account for dead discards within the U.S. BFT quota.

Comment 15: Use of the 2009 pelagic longline dead discard estimate as a proxy for 2011 dead discards is inappropriate, in part because the estimate is nearly two years old, and in part because 2009 may have been an anomalous year for pelagic longline BFT catches.

Response: Since the proposed rule was published, NMFS has received and is now using the 2010 dead discard estimate. NMFS considers the 2010 dead discard estimate to be the best information available. By maintaining a portion of the 2010 BFT underharvest (allowed to be carried to 2011) in the Reserve category rather than allocating that amount now, NMFS is maximizing its flexibility regarding accounting for total 2011 landings and dead discards. As the season progresses, NMFS will have more 2011 information to use in making inseason transfer decisions as well as more data on pelagic longline BFT interactions, including dead discards.

Comment 16: In considering a proxy for the 2011 estimate, NMFS should calculate the anticipated reduction in dead discards from required use of weak hooks in the Gulf of Mexico.

Response: NMFS agrees that the recent implementation of the weak hook requirement for pelagic longline vessels in the Gulf of Mexico should reduce BFT bycatch and dead discards in the Gulf of Mexico. However, because the weak hook requirement was not effective until May 5, 2011, mid-way through the BFT spawning season (April through June), NMFS currently lacks the data appropriate to make such calculations. This, combined with uncertainties regarding post-release mortality, makes it difficult to quantify now the effect of the weak hook requirement on incidental BFT catch in the Gulf of Mexico. Therefore, the 2010 dead discards estimate is the best available proxy at this time. NMFS will continue to examine this issue and take appropriate action to account for any

reductions in dead discards that result from the weak hook rule implementation.

Comment 17: The dead discard estimation methodology is unclear, and there are concerns that the extrapolation method may be amplifying the level of discards.

Response: The United States applies the SCRS-approved methodology to calculate and report dead discards for both stock assessment purposes and quota compliance purposes. The amount of dead discards is generated by estimating discard rates from data collected by NMFS' Pelagic Observer Program and extrapolating these estimates using the effort (number of hooks) reported in the Pelagic Logbooks. This methodology is applied within each time/area stratum (*e.g.*, catch rates from the Gulf of Mexico are used to estimate discards from the Gulf of Mexico, not the NED). Estimates of dead discards from other gear types and fishing sectors that do not use the pelagic longline vessel logbook are unavailable at this time and thus are not included in this calculation. Changes to the approved method likely would require consideration and approval by the SCRS prior to U.S. implementation.

Comment 18: It is not mandatory for NMFS to project and account for U.S. dead discards at the start of year. ICCAT requires accounting for 2011 landings and dead discards in 2012.

Response: The ICCAT requirement is for countries to report total annual catch (landings and dead discards) in the year following the subject fishing year, *i.e.*, report in the summer of 2012 the 2011 total. Since the change in the ICCAT recommendation to eliminate the dead discard allowance, NMFS has taken a precautionary approach in proactively deducting the estimate of dead discards up front when establishing the final quota specifications for each year. NMFS must also balance its obligation to provide reasonable opportunity to harvest the U.S. quota with the fact that the ICCAT western BFT recommendation includes a provision for reduction of a Contracting Party's quota by 100 percent of the amount in excess of the quota and by 125 percent if overharvest occurs for a second year. As described above, in this final action, NMFS is taking the proactive measure of accounting for half of the estimated pelagic longline dead discards up front and deducting that portion of expected longline discards directly from the Longline category quota. Regardless of the specifications details in the final rule, the total 2011 U.S. BFT landings and pelagic longline dead discards will be accounted for and reported to ICCAT,

and NMFS would make any ICCAT-required adjustments to future U.S. BFT quotas, if necessary.

Comment 19: NMFS should find a way to account for at least some portion of the dead discard estimate using the 285 mt of 2010 underharvest that the United States is unable to carry forward under the current ICCAT BFT Recommendation.

Response: In the 2010 BFT final quota specifications, NMFS deducted 172.8 mt (the 2008 dead discard estimate, used as a proxy for estimated 2010 dead discards) up front from the 2010 Longline category baseline quota. It would be inappropriate and inconsistent with the ICCAT BFT Recommendation to account for 2011 estimated dead discards with the amount of 2010 adjusted BFT quota that was unharvested and cannot be carried forward to 2011.

Comment 20: The Massachusetts Division of Marine Fisheries commented that the proposed quota allocation (*i.e.*, providing each quota category its FMP-based share of a quota that has been adjusted up front to account for anticipated dead discards in the pelagic longline fishery) attempts to maintain traditional FMP-based allocations without accounting for the changing nature of the BFT fisheries. The Purse Seine category, which has been allocated 18.6-percent of the U.S. quota, has not landed its full quota since 2003 and has had virtually no landings since 2005. Therefore, strict adherence to allocations based on the FMP-based allocations makes little sense, in the short-term, given the unlikelihood that this category will land its quota share. NMFS should use inseason management authority to temporarily reallocate unused quota to address discards.

Response: Under the current quota regulations, NMFS is obligated, regardless of their recent inactivity, to make equal allocations of the available Purse Seine category BFT subquota among the Purse Seine category vessels that have requested their 2011 allocations. However, within a fishing year, NMFS may transfer quotas among categories using determination criteria based on consideration of the regulatory determination criteria regarding inseason adjustments and other relevant factors provided under § 635.27(a)(8), such as: 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; review of dealer reports, daily landing trends, and the availability of the BFT on the fishing grounds; 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; and the effects of the adjustment on accomplishing the objectives of the fishery management plan. Thus, if the Purse Seine subquota is not used, NMFS has the option to transfer that quota allocation to other categories, if appropriate.

Comment 21: The directed BFT fishery participants have successfully avoided dead discards and should not be adversely affected, through reduced quotas and fishing opportunities, in the process of accounting for dead discards for the incidental pelagic longline fishery.

Response: Although NMFS recognizes that commercial fishermen and recreational anglers generally attempt to avoid discarding BFT, some amount of discards is inevitable due to restrictions on size and retention limits, and some amount of the BFT released are already dead or do not survive. As discussed above, the pelagic longline fishery is currently the only fishery for which sufficient data is collected to estimate dead discards. Data collection programs may need to be modified to provide more accurate dead discard estimates in the future. The topic of post-release mortality received substantial attention at the 2010 ICCAT meeting and NMFS anticipates that the issue will be a focus at the 2012 ICCAT meeting when the western BFT Recommendation is renegotiated. Regarding the potential impact of the proposed action on inseason BFT management, see response to Comment 5.

Comment 22: All user groups have discards, some of which are dead, and NMFS should initiate or expand studies to examine dead discard and release mortality rates in the all fishing categories. We should have our own national estimates rather than becoming subject to estimates from other BFT fisheries that may not be comparable to U.S. BFT fisheries.

Response: NMFS agrees that examination of dead discard and release mortality estimates rates in all fishing categories is warranted and will explore methods to account for this mortality in the near future.

Comment 23: Transfers of U.S. quota to other ICCAT Contracting Parties should be out of the question, particularly since the United States may be quota limited in 2011. Transferring quota would decrease opportunities to U.S. fishermen and may have negative impacts on protected species.

Response: The United States has not received any request for transfer of BFT quota from another ICCAT Contracting Party. At this point, NMFS is allocating fully the U.S. baseline and adjusted

quotas, including to the Reserve category, for domestic management purposes. Although no transfers are anticipated at this time, if NMFS were later to consider a transfer of U.S. quota to another ICCAT Contracting Party, NMFS would publish a separate action in the **Federal Register**, which would provide the details of the proposed transaction, including factors such as the amount of quota to be transferred, the projected ability of U.S. vessels to harvest the total U.S. BFT quota before the end of the fishing year, the potential benefits of the transfer to U.S. fishing participants (such as access to the EEZ of the receiving Contracting Party for the harvest of a designated amount of BFT), potential ecological impacts, and the Contracting Party's ICCAT compliance status. Additional NEPA analysis would be prepared, as appropriate, to analyze any additional action.

C. Reinstatement of Target Catch Requirements in the NED

Comment 24: NMFS should implement target catch requirements for pelagic longline vessels fishing in the NED. Limiting the number of BFT that may be retained and landed would serve as a disincentive to target BFT or to fish in areas where interactions could be high.

Response: NMFS agrees and is reinstating target catch requirements in the NED in this final rule.

Comment 25: NMFS should not implement the target catch requirements that apply coastwide for pelagic longline vessels within the NED. The 25-mt quota that ICCAT allocated for bycatch during pelagic longline fishing in the vicinity of the management area boundary was intended to be managed and accounted for distinctly from the U.S. share of the western BFT TAC. Pelagic longline vessels do not target BFT; there are sets on swordfish where the bycatch of BFT cannot be avoided. Furthermore, 2009 was an anomaly with regard to BFT landings in the NED, which generally have been under 10 mt annually. Implementing the target catch requirements that apply coastwide could have the unintended result of increasing BFT dead discards. NMFS should instead consider multi-year accounting for NED landings or a higher trip limit, such as 10 fish.

Response: NMFS must implement ICCAT management measures as they are presented in the formal ICCAT recommendations, including the western BFT recommendation. NMFS acknowledges that the 2009 level of BFT interactions in the NED may have been abnormally high and that the pelagic longline fleet is not targeting BFT.

Nonetheless, NMFS maintains that reinstating target catch requirements in the NED may serve as a disincentive for a vessel owner or operator to fish in areas where BFT interactions could be high, or to extend a fishing trip in order to retain additional BFT. NMFS expects that implementing the same target catch requirements in all areas will decrease the likelihood that the Longline category quota is harvested prematurely, which could have economic impacts particularly on those vessels that do not fish in the NED. It also would be consistent with ongoing agency efforts to better align pelagic longline catch with Consolidated HMS FMP objectives and quota allocations.

D. Allowing Removal of Atlantic Tunas Tail Lobes

Comment 26: Allowing for Atlantic tuna tails to be trimmed as NMFS proposed is an easy, common-sense measure that will make handling and storage of tunas in fish holds more efficient.

Response: NMFS' proposal to allow removal of the upper and lower lobes of the tail was intended to balance the need to preserve the sole method for measuring Atlantic tunas, *i.e.*, Curved Fork Length, which is taken by measuring to the fork of the tail, with the need for both commercial and recreational participants to store these fish as efficiently as possible. Therefore, NMFS is finalizing the measure as proposed.

Comment 27: It is important that vessels be able to properly store the fish to preserve fish quality, and trimming the lobes would not help for giant BFT that may not fit in the hold. NMFS should allow the tail to be cut but require that the skin be left intact. The tail could then be folded for slushing purposes but be folded back to allow for a proper measurement.

Response: NMFS acknowledges the importance to properly store fish to preserve their quality and also recognizes that allowing the removal of the upper and lower tail lobes may not assist storage in all instances, especially for giant BFT. However, to facilitate enforcement of size limits and to preserve the sole method for measuring Atlantic tunas, NMFS has opted not to allow the tail to be cut prior to being offloaded at this point in time.

E. Clarification of Atlantic Tunas Transfer at Sea

Comment 28: The proposed clarification is necessary to close a regulatory loophole. NMFS should further clarify that transfer includes

moving a tuna from fishing or other gear in the water from one vessel to another.

Response: NMFS agrees with this comment and has clarified the regulatory text accordingly. The intent of this clarification is to ensure that fishermen are informed that transferring Atlantic tunas at sea, either by transferring the actual fish, or by transferring fish that remain in water, is prohibited. This also includes moving an Atlantic tuna using some sort of other gear, *e.g.*, using a poly ball to transfer a fish.

Comment 29: NMFS should not overburden itself with further regulations like this that are very difficult to enforce.

Response: NMFS acknowledges that some regulations may be more difficult to enforce than others. However, this change in the regulations is intended to clarify, and enhance the enforceability of, existing regulations controlling effort, including daily retention limits. These effort controls are vital to ensuring all fishery participants have a reasonable opportunity to harvest Atlantic tunas regardless of their geographic or temporal engagement with the fishery. This clarification is also intended to preserve the allocation percentages, both within and across the various quota categories, by constraining landings to individual category quotas. As this change does not impose a new requirement, but merely clarifies and enhances the enforceability of existing regulations, NMFS does not consider it overly burdensome.

F. Other Issues

NMFS received comments on the issues outlined under the eight subheadings below. These suggestions are beyond the scope of this rulemaking. However, in light of the issues involving U.S. quotas and domestic allocations, pelagic longline dead discards, the need to account for dead discards that result from fishing with other gears, and bycatch reduction objectives, as well as public comment, NMFS intends to undertake a comprehensive review of BFT management in the near future to determine whether existing management measures need to be adjusted to meet the multiple goals for the BFT fishery.

(1) Bycatch of BFT

NMFS received comments requesting implementation of various actions to address pelagic longline BFT bycatch, including: establish bycatch caps or other incentives to reduce bycatch, such as those based on U.S. northeast species management (*e.g.*, closure of directed fishery when a "choke species" limit is

met) or Canadian highly migratory species management (*e.g.*, exclusion zones and quota transfers); establish time/area closures in the Gulf of Mexico; implement dynamic area management; expand the weak hook requirement beyond the Gulf of Mexico (although many expressed this step would not be effective or appropriate); require the fleet to use buoy gear or greensticks in the Gulf of Mexico; increase observer coverage and/or real-time monitoring of landings and dead discards, including via VMS; prohibit retention of BFT for sale by pelagic longline vessels; change the FMP allocation to reflect both landings and dead discards; change the allocation scheme to one that promotes fishing with selective fishing gears; adjust the minimum size for BFT retention and implement other regulatory changes that would allow conversion of BFT dead discards to landings, including in the NED. The Massachusetts Division of Marine Fisheries commented that allocation schemes that result in the failure of U.S. fishermen to land the U.S. quota while discarding dead BFT will negatively impact domestic interests in the future. Several commenters recognize the challenge of maximizing swordfish quota utilization with minimizing BFT discards. Many commenters expressed concern that without a bycatch cap and with expected BFT stock growth, pelagic longline BFT interactions would increase. Dead discards could grow without limit, potentially representing a majority of the U.S. quota, thereby compromising the directed fisheries.

(2) Permit Issues

NMFS received comment that, as the BFT quota is small, NMFS should change all BFT permits from open access to limited access. Regarding swordfish revitalization, NMFS received comment that implementation of an HMS handgear permit would help increase swordfish quota utilization by gears more selective than pelagic longline, thus reducing potential BFT bycatch and dead discards.

(3) Inseason Quota Transfers

NMFS received numerous comments that it should use "inseason quota transfers" that were actually recommendations to reallocate quota in a matter inconsistent with the Consolidated HMS FMP.

(4) Recreational Fishery Monitoring

NMFS received comments that recreational landings must be tracked in a more timely fashion. Programs like the Massachusetts landing census pilot

program, currently under development, should be implemented in all states as soon as possible.

(5) ICCAT Negotiations

NMFS received comments that the U.S. delegation should further consider domestic BFT fishery needs (for all HMS fisheries) when setting the U.S. position at ICCAT, that the U.S. delegation should renegotiate the BFT Recommendation, including quotas and the amount of underharvest allowed to be carried forward from one year to the next, should pursue two-year balancing periods for the base quota and NED allocation, and, wherever possible, maximize its ability to fully use the quota over a given period.

(6) Consideration of Petition to List BFT as Threatened or Endangered

NMFS received comments that the current management system, which allows a substantial portion of the U.S. quota to be discarded dead, contradicts agency consideration of the petition to list BFT as threatened or endangered under the Endangered Species Act.

(7) BFT Boycott

NMFS received a petition from the Center for Biological Diversity, with the names of more than 22,000 people who have pledged not to eat Atlantic and Southern BFT (fished around Australia) and to boycott restaurants with BFT on the menu in order to reduce consumer demand for and conserve both species. The Center for Biological Diversity launched the boycott following the November 2010 ICCAT meeting.

(8) November 2009 BFT Regulatory Amendment

The North Carolina Division of Marine Fisheries encourages NMFS to (1) implement the 2009 proposed BFT management measure that would allow the General category season to extend past January 31 if January General category subquota remains available, and (2) establish a separate subquota for the months of February and March, potentially assigning unused prior year quota to that period. This would allow for greater utilization of available U.S. BFT quota.

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.

There is good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effective date for the BFT quotas and 2011 BFT quota specifications in this action, because delaying this rule's effectiveness is both impracticable and unnecessary. ICCAT Recommendation 10-03 entered into force on June 14, 2011, and the United States at the November 2010 meeting of ICCAT agreed to establish the baseline annual U.S. quota of 923.7 mt by that date. Because the recommended effective date has already passed, it is critical that the quota be implemented immediately upon publication of the final rule, in order that NMFS and the United States comply with our international obligations. Furthermore, without the waiver for the 30-day delayed effectiveness period, the codified baseline annual U.S. BFT quota of 952.4 mt and related subquotas (allocated per quota allocations established in the Consolidated HMS FMP) would remain in effect, and thus the required reduction in quota would not be implemented for BFT, which has recently been listed as a species of concern. Delaying the effective date is also unnecessary. This rule does not add or modify any regulatory requirements for the affected entities. Because the entities affected by this rule need not undertake any modifications to their property or practices in order to come into compliance with this rule, it is unnecessary to delay this rule's effectiveness to allow entities to modify their practices to come into compliance with the rule.

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, consistent with the Consolidated HMS FMP objectives, the Magnuson-Stevens Act, and other applicable law, is to implement and allocate the ICCAT-recommended U.S. quota for 2011 and 2012; adjust the 2011 U.S. quota and subquotas to account for unharvested 2010 quota allowed by

ICCAT to be carried forward to 2011, and to account for a portion of the estimated 2011 dead discards up front; reinstate pelagic longline target catch requirements for retaining BFT in the Northeast Distant Gear Restricted Area; amend the Atlantic tunas possession-at-sea and landing regulations to allow removal of tail lobes; and clarify the transfer-at-sea regulations for Atlantic tunas.

Section 604(a)(2) of the RFA requires agencies to summarize significant issues raised by the public in response to the IRFA, 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 (75 FR 13582, March 14, 2011) during the comment period. A summary of these comments and NMFS' responses are included in Chapter 14 of the EA/RIR/FRFA and are included above. Although NMFS did not receive comment specifically on the IRFA, NMFS received some comments expressing concern about the economic impact of the 2011 BFT quota specifications, as proposed.

Several commenters stated that the proposed deduction of the dead discard estimate from the U.S. BFT baseline quota would result in a de facto reallocation of quota shares from those established in the Consolidated HMS FMP, which would be economically damaging to the directed fisheries. As described above, following consideration of public comment and the availability of updated (2010) dead discard estimates, NMFS has decided to account for one half of the dead discard estimate up front and directly against the Longline category quota, through the specifications process, which will mitigate some of the economic impacts associated with adjusting the baseline quota for dead discards. For the final 2011 quota specifications, this rule maintains the directed categories at their baseline quotas, which reflect application of the allocation scheme established in the Consolidated HMS FMP to the 2011 baseline U.S. BFT quota. For the Longline category, NMFS deducts half of the 2010 dead discard estimate of 122.3 mt from the 2011 baseline Longline quota and applies half of the underharvest allowed to be carried forward to 2011 (*i.e.*, $74.8 - 61.2 + 47.5 = 61.1$ mt). This resulting 61.1 mt quota for the Longline category does not include the 25-mt allocation for the NED. NMFS holds the remainder of the 2010 underharvest allowed to be carried forward to 2011 (47.4 mt) within the Reserve category, for an adjusted Reserve category quota of 70.5 mt. NMFS intends to maintain this

underharvest in the Reserve category until later in the fishing year for maximum flexibility in accounting for 2011 landings and dead discards.

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 by the Small Business Administration, 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. As shown in Table 5, there are over 32,000 vessels that held an Atlantic HMS Charter/Headboat, Atlantic HMS Angling, or an Atlantic tunas permit as of October 2010. These permitted vessels consist of commercial, recreational, and charter vessels as well as headboats.

Reinstatement of target catch requirements in the NED would affect those Longline category permitted vessels that fish in the NED. As shown in Table 9, over the last 5 years, an annual total ranging from 6 to 10 vessels have reported trips in the NED and an annual total ranging from 4 to 8 vessels have landed BFT from the NED. However, to the extent that this action could avoid the need for fishery interruption due to insufficient BFT quota availability, it could affect all 248 Longline category permitted vessels.

Clarification of the Atlantic tunas landing-form and transfer-at-sea regulations would be informative to owners and operators of Atlantic-tunas permitted vessels and Atlantic HMS-permitted vessels fishing for tunas, although material impacts are not expected to occur from the related changes in this action.

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 RFA (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 compliance requirements for small entities or exempt small entities from compliance requirements. Thus, there are no alternatives discussed that fall under the first 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.

NMFS has estimated the average impact that the alternative to establish the 2011 and 2012 BFT quota for all domestic fishing categories would have on individual categories and the vessels within those categories. As mentioned above, the 2010 ICCAT recommendation reduced the U.S. baseline BFT quota for 2011 and 2012 to 923.7 mt and provides 25 mt for incidental catch of BFT related to directed longline fisheries in the NED. This action would distribute the baseline quota of 923.7 mt to the domestic fishing categories based on the allocation percentages established in the Consolidated HMS FMP.

In 2010, the annual gross revenues from the commercial BFT fishery were approximately \$8.9 million. As of October 2010, there were 8,311 vessels permitted to land and sell BFT under four commercial BFT quota categories (including HMS Charter/Headboat vessels). The commercial categories and their 2010 gross revenues are General (\$7.8 million), Harpoon (\$202,643), Purse Seine (\$0), and Longline (\$878,908).

For the allocation of BFT quota among domestic fishing categories, NMFS analyzed a no action alternative and Alternative A2 (preferred alternative)

which would implement the 2010 ICCAT recommendation. NMFS considered a third alternative (A3) that would have allocated the 2010 ICCAT recommendation in a manner other than that designated in the Consolidated HMS FMP. Alternative A3 would result in quota reallocation among categories. The Consolidated HMS FMP addressed several aspects of the changing BFT fishery and included modification to time period subquotas and authorized gear for use in BFT fisheries, among other things. Further consideration of the information provided by the 2010 BFT stock assessment, international deliberations during and after the 2010 ICCAT meeting, and observed changes in the fishery (*e.g.*, relative year class strength and fish availability) may provide further insight into the larger fishery issues raised by this alternative, and could result in future regulatory or FMP amendments. For the purpose of this analysis, modifications to domestic management of BFT outside the limitations of the Consolidated HMS FMP and current ICCAT recommendations do not satisfy the purpose and need for the action. Additionally, preparation of an FMP amendment would not be possible in the brief period of time between receipt of the ICCAT recommendation, which occurred in late November 2010, and the start of the 2011 fishing year, the bulk of which begins in June.

Therefore, Alternative A3 was considered but not analyzed. But, if an FMP amendment were feasible, positive economic impacts would be expected to result on average for vessels in any permit categories that would receive a greater share than established currently in the FMP, and negative economic impacts would be expected to result on average for vessels in permit categories that would receive a lesser share than established in the FMP. Impacts per vessel would depend on the temporal and spatial availability of BFT to participants.

As noted above, Alternative A2 would implement the 2010 ICCAT recommendation in accordance with the Consolidated HMS FMP and consistent with ATCA, under which the United States is obligated to implement ICCAT-approved quota recommendations, as necessary and appropriate. The preferred alternative would implement this quota and have slightly positive impacts for fishermen. The no action alternative would keep the quota at pre-2010 ICCAT recommendation levels (approximately 29 mt more) and would not be consistent with the purpose and need for this action, the Consolidated HMS FMP, and ATCA. The economic

impacts to the United States and to local economies would be similar in distribution and scale to 2010 (*e.g.*, annual commercial gross revenues of approximately \$8.9 million, as described above), or recent prior years, and would provide fishermen additional fishing opportunities, subject to the availability of BFT to the fishery, in the short term. In the long term, however, stock growth may be hindered and negative impacts would result.

It is difficult to estimate average potential ex-vessel revenues to commercial participants, largely because revenues depend heavily on the availability of large medium and giant BFT to the fishery. Section 6 of the EA/RIR/FRFA describes potential revenue losses per commercial quota category based on each category's baseline quota reduction and price-per-pound information from 2010 (*i.e.*, \$206,251 for the General category, \$13,944 for the Harpoon category, \$25,150 for the Longline category, and \$1,093 for the Trap category); although the Purse Seine category had no BFT landings in 2010, potential revenue losses of \$69,639 were estimated. As described in Section 4 of the EA/RIR/FRFA, because the directed commercial categories have underharvested their subquotas in recent years, particularly 2004–2008, the potential decreases in ex-vessel revenues above overestimate the likely actual economic impacts to those categories relative to recent conditions. Additionally, there has been substantial interannual variability in ex-vessel revenues per category in recent years due to recent changes in BFT availability and other factors. Generally, the interannual differences in ex-vessel revenues per category have been larger than the potential impacts described above.

Data on net revenues of individual fishermen are lacking, so the economic impact of the alternatives is averaged across each category. This is an appropriate approach for BFT fisheries, in particular because available landings data (weight and ex-vessel value of the fish in price-per-pound) allow NMFS to calculate the gross revenue earned by a fishery participant on a successful trip. The available data do not, however, allow NMFS to calculate the effort and cost associated with each successful trip (*e.g.*, the cost of gas, bait, ice, *etc.*) so net revenue for each participant cannot be calculated. As a result, NMFS analyzes the average impact of the alternatives among all participants in each category.

Success rates vary widely across participants in each category (due to extent of vessel effort and availability of commercial-sized BFT to participants

where they fish) but for the sake of estimating potential revenue loss per vessel, category-wide revenue losses can be divided by the number of permitted vessels in each category (see Table 5). Because HMS Charter/Headboat vessels may fish commercially under the General category quota and retention limits, Charter/Headboat permitted vessels are considered along with General category vessels when estimating potential General category ex-vessel revenue changes. Potential ex-vessel revenue losses (per vessel) as a result of this rule's implementation are estimated as follows: General category (including HMS Charter/Headboat vessels): \$26; Harpoon category: \$480; Longline category (incidental): \$101; Trap category (incidental): \$182; and Purse Seine category: \$13,928. Section 6 describes potential revenue losses per commercial quota category based on each category not having access to quota that would be available through the carrying forward of 2010 underharvest, were it not for the ICCAT recommendation that limits the amount of underharvest that may be carried forward to 10 percent of a Contracting Party's total quota beginning effective for 2011. Potential ex-vessel revenue losses (per vessel) resulting from this change are estimated as follows: General category (including HMS Charter/Headboat vessels): \$107; Harpoon category: \$4,808; Longline category (incidental): \$1,014; Trap category (incidental): \$519; and Purse Seine category: \$139,278. These values likely overestimate potential revenue losses for vessels that actively fish and are successful in landing at least one BFT.

The reinstatement of target catch requirements for pelagic longline vessels in the NED could, as described in Section 6.6.2, would result in a potential loss to the Longline category fishery of \$341,228. If this reduction is calculated for the universe of vessels participating in the NED over the last 5 years (range of 6–10 vessels), it would represent average potential ex-vessel reductions of \$34,123–\$56,871 per vessel. If the reduction is calculated across Longline category vessels, it would be \$1,376 per vessel. In Section 6.6.2, acknowledging that the 2009 number of BFT taken in the NED in 2009 may have been anomalous, NMFS also provided a figure for potential revenue loss of \$42,408. This would represent average potential ex-vessel reductions of \$4,241–\$7,068 per vessel. If the reduction is calculated across Longline category vessels, it would be \$171 per vessel.

However, the preferred alternative is expected to result in the most positive

short and long-term economic impacts for the majority of BFT fishery participants, including Longline category participants, as it would increase the likelihood that the Longline category quota will be available through the end of the year, without interruption, and decrease the potential need for reallocation from directed quota categories or quota reductions in subsequent years to cover Longline category excesses.

The other considered alternative was a no action alternative (maintaining the de facto exemption from target catch requirements for pelagic longline vessels fishing in the NED). The no action alternative risks exceeding the available Longline category quota, particularly in years where availability of commercial-sized BFT is high in the NED during directed pelagic longline activity for target species.

The modifications to the regulations concerning Atlantic tunas possession at sea and landing and Atlantic tunas transfer at sea are intended to facilitate Atlantic tunas storage and provide clarification, respectively. While these changes would apply to all vessels holding Atlantic tunas, HMS Charter/Headboat, and HMS Angling category permits (totaling approximately 33,000 vessels), they are not expected to have significant economic impacts. Therefore, NMFS has not analyzed alternatives beyond the preferred alternatives and no action. Specific estimates of economic impacts of these preferred alternatives are not quantifiable.

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, NMFS has prepared a brochure summarizing fishery information and regulations for Atlantic tuna fisheries for 2011. This brochure also serves as the small entity compliance guide. 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: June 29, 2011.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

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

PART 635—ATLANTIC HIGHLY MIGRATORY SPECIES

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

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

§ 635.23 [Amended]

■ 2. In § 635.23, remove paragraph (f)(3).

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

§ 635.27 Quotas.

(a) *BFT*. Consistent with ICCAT recommendations, and with paragraph (a)(10)(iv) of this section, NMFS may subtract the most recent, complete, and available estimate of dead discards from the annual U.S. BFT quota, and make the remainder available to be retained, possessed, or landed by persons and vessels subject to U.S. jurisdiction. The remaining baseline annual U.S. BFT quota will be allocated among the General, Angling, Harpoon, Purse Seine, Longline, Trap, and Reserve categories. BFT may be taken by persons aboard vessels issued Atlantic Tunas permits, HMS Angling permits, or HMS Charter/Headboat permits. The baseline annual U.S. BFT quota is 923.7 mt, not including an additional annual 25 mt allocation provided in paragraph (a)(3) of this section. The baseline annual U.S. BFT quota is divided among the categories as follows: General—47.1 percent (435.1 mt); Angling—19.7 percent (182.0 mt), which includes the school BFT held in reserve as described under paragraph (a)(7)(ii) of this section; Harpoon—3.9 percent (36.0 mt); Purse Seine—18.6 percent (171.8 mt); Longline—8.1 percent (74.8 mt), which does not include the additional annual 25 mt allocation provided in paragraph (a)(3) of this section; and Trap—0.1 percent (0.9 mt). The remaining 2.5 percent (23.1 mt) of the baseline annual U.S. BFT quota will be held in reserve for inseason or annual adjustments based on the criteria in paragraph (a)(8) of this section. NMFS may apportion a quota allocated to any category to specified fishing periods or to geographic areas and will make annual adjustments to quotas, as specified in

paragraph (a)(10) of this section. BFT quotas are specified in whole weight.

(1) * * *

(i) Catches from vessels for which General category Atlantic Tunas permits have been issued and certain catches from vessels for which an HMS Charter/Headboat permit has been issued are counted against the General category quota in accordance with § 635.23(c)(3). The amount of large medium and giant BFT that may be caught, retained, possessed, landed, or sold under the General category quota is 47.1 percent (435.1 mt) of the baseline annual U.S. BFT quota, and is apportioned as follows:

(A) January 1 through January 31—5.3 percent (23.1 mt);

(B) June 1 through August 31—50 percent (217.6 mt);

(C) September 1 through September 30—26.5 percent (115.3 mt);

(D) October 1 through November 30—13 percent (56.6 mt); and

(E) December 1 through December 31—5.2 percent (22.6 mt).

* * * * *

(2) *Angling category quota*. In accordance with the framework procedures of the Consolidated HMS FMP, prior to each fishing year, or as early as feasible, NMFS will establish the Angling category daily retention limits. The total amount of BFT that may be caught, retained, possessed, and landed by anglers aboard vessels for which an HMS Angling permit or an HMS Charter/Headboat permit has been issued is 19.7 percent (182 mt) of the baseline annual U.S. BFT quota. No more than 2.3 percent (4.2 mt) of the annual Angling category quota may be large medium or giant BFT. In addition, over each 2-consecutive-year period (starting in 2011, inclusive), no more than 10 percent of the annual U.S. BFT quota, inclusive of the allocation specified in paragraph (a)(3) of this section, may be school BFT. The Angling category quota includes the amount of school BFT held in reserve under paragraph (a)(7)(ii) of this section. The size class subquotas for BFT are further subdivided as follows:

(i) After adjustment for the school BFT quota held in reserve (under paragraph (a)(7)(ii) of this section), 52.8 percent (40.8 mt) of the school BFT Angling category quota may be caught, retained, possessed, or landed south of 39°18' N. lat. The remaining school BFT Angling category quota (36.5 mt) may be caught, retained, possessed or landed north of 39°18' N. lat.

(ii) An amount equal to 52.8 percent (43.8 mt) of the large school/small medium BFT Angling category quota

may be caught, retained, possessed, or landed south of 39°18' N. lat. The remaining large school/small medium BFT Angling category quota (39.1 mt) may be caught, retained, possessed or landed north of 39°18' N. lat.

(iii) An amount equal to 66.7 percent (2.8 mt) of the large medium and giant BFT Angling category quota may be caught, retained, possessed, or landed south of 39°18' N. lat. The remaining large medium and giant BFT Angling category quota (1.4 mt) may be caught, retained, possessed or landed north of 39°18' N. lat.

(3) *Longline category quota*. The total amount of large medium and giant BFT that may be caught incidentally and retained, possessed, or landed by vessels that possess Longline category Atlantic Tunas permits is 8.1 percent (74.8 mt) of the baseline annual U.S. BFT quota. No more than 60.0 percent (44.9 mt) of the Longline category quota may be allocated for landing in the area south of 31°00' N. lat. In addition, 25 mt shall be allocated for incidental catch by pelagic longline vessels fishing in the Northeast Distant gear restricted area.

(4) * * *

(i) The total amount of large medium and giant BFT that may be caught, retained, possessed, or landed by vessels that possess Purse Seine category Atlantic Tunas permits is 18.6 percent (171.8 mt) of the baseline annual U.S. BFT quota. The directed purse seine fishery for BFT commences on July 15 of each year unless NMFS takes action to delay the season start date. Based on cumulative and projected landings in other commercial fishing categories, and the potential for gear conflicts on the fishing grounds or market impacts due to oversupply, NMFS may delay the BFT purse seine season start date from July 15 to no later than August 15 by filing an adjustment with the Office of the **Federal Register** prior to July 1. The Purse Seine category fishery closes on December 31 of each year.

* * * * *

(5) *Harpoon category quota*. The total amount of large medium and giant BFT that may be caught, retained, possessed, landed, or sold by vessels that possess Harpoon category Atlantic Tunas permits is 3.9 percent (36.0 mt) of the baseline annual U.S. BFT quota. The Harpoon category fishery commences on June 1 of each year, and closes on November 15 of each year.

* * * * *

(7) * * *

(i) The total amount of BFT that is held in reserve for inseason or annual adjustments and fishery-independent

research using quotas or subquotas is 2.5 percent (23.1 mt) of the baseline annual U.S. BFT quota. Consistent with paragraph (a)(8) of this section, NMFS may allocate any portion of this reserve for inseason or annual adjustments to any category quota in the fishery.

(ii) The total amount of school BFT that is held in reserve for inseason or annual adjustments and fishery-independent research is 18.5 percent (17.6 mt) of the total school BFT Angling category quota as described under paragraph (a)(2) of this section. This amount is in addition to the amounts specified in paragraph (a)(7)(i) of this section. Consistent with paragraph (a)(8) of this section, NMFS may allocate any portion of the school BFT Angling category quota held in reserve for inseason or annual adjustments to the Angling category.

* * * * *

■ 4. In § 635.29, paragraph (a) is revised to read as follows:

§ 635.29 Transfer at sea.

(a) Persons may not transfer an Atlantic tuna, blue marlin, white marlin, roundscale spearfish, or swordfish at sea in the Atlantic Ocean, regardless of where the fish was harvested. Notwithstanding the definition of “harvest” at § 600.10, for the purposes of this part, transfer includes, but is not limited to, moving or attempting to move an Atlantic tuna that is on fishing or other gear in the water from one vessel to another vessel. However, an owner or operator of a vessel for which a Purse Seine category Atlantic Tunas category permit has been issued under § 635.4 may transfer large medium and giant BFT at sea from the net of the catching vessel to another vessel for which a Purse Seine category Atlantic Tunas permit has been issued, provided the amount transferred does not cause the receiving vessel to exceed its currently authorized vessel

allocation, including incidental catch limits.

* * * * *

■ 5. In § 635.30, paragraph (a) is revised to read as follows:

§ 635.30 Possession at sea and landing.

(a) *Atlantic tunas.* Persons that own or operate a fishing vessel that possesses an Atlantic tuna in the Atlantic Ocean or that lands an Atlantic tuna in an Atlantic coastal port must maintain such Atlantic tuna through offloading either in round form or eviscerated with the head and fins removed, provided one pectoral fin and the tail remain attached. The upper and lower lobes of the tuna tail may be removed for storage purposes as long as the fork of the tail remains intact.

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[FR Doc. 2011-16769 Filed 6-30-11; 11:15 am]

BILLING CODE 3510-22-P