

## Authors

The primary authors of this notice are the staff members of the Western Colorado Field Office (see **FOR FURTHER INFORMATION CONTACT**).

## Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: June 25, 2009.

**Marvin E. Moriarty,**

*Acting Director, U.S. Fish and Wildlife Service*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 300

[Docket No. 090130102-91070-01]

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:** Proposed rule; request for comments.

**SUMMARY:** NMFS proposes 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 would be prohibited for the remainder of the year, with certain exceptions. The limit would 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:** Comments must be submitted in writing by August 7, 2009.

**ADDRESSES:** You may submit comments on this proposed rule, identified by 0648-AX59, and the regulatory impact review (RIR) prepared for the proposed rule by any of the following methods:

- Electronic submissions: Submit all electronic public comments via the Federal e-Rulemaking portal, at <http://www.regulations.gov>.

- Mail: William L. Robinson, Regional Administrator, NMFS Pacific Islands Regional Office (PIRO), 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814. Include the identifier "0648-AX59" in the comments.

Instructions: All comments received are part of the public record and generally will be posted to <http://www.regulations.gov> without change. All personal identifying information (for example, name and address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. NMFS will accept anonymous comments (if submitting comments via the Federal e-Rulemaking portal, enter "N/A" in the relevant required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

An initial regulatory flexibility analysis (IRFA) prepared under the authority of the Regulatory Flexibility Act (RFA) is included in the Classification section of the **SUPPLEMENTARY INFORMATION** section of this proposed rule.

Copies of the RIR and copies of the environmental assessment (EA) prepared under the authority of the National Environmental Policy Act are available at [http://www.fpir.noaa.gov/IFD/ifd\\_documents\\_data.html](http://www.fpir.noaa.gov/IFD/ifd_documents_data.html) or may be obtained from William L. Robinson, Regional Administrator, NMFS PIRO (see **ADDRESSES**).

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

#### **SUPPLEMENTARY INFORMATION:**

##### **Electronic Access**

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

##### **Background on the Convention and the WCPFC**

The Convention entered into force in June 2004. The full text of the Convention is available at: <http://www.wcpfc.int/convention.htm>. The area of application of the Convention, or the Convention Area, comprises the

majority of the western and central Pacific Ocean (WCPO). In the North Pacific Ocean the eastern boundary of the Convention Area is at 150° W. long. A map showing the boundaries of the Convention Area is available at: <http://www.wcpfc.int/pdf/Map.pdf>. The Convention focuses on the conservation and management of highly migratory species (HMS) and the management of fisheries for HMS, and has provisions related to non-target, associated, and dependent species in such fisheries.

The Western and Central Pacific Fisheries Commission (WCPFC), established under the Convention, is comprised of the Members, including Contracting Parties to the Convention and fishing entities that have agreed to be bound by the regime established by the Convention. Other entities that participate in the WCPFC include Participating Territories and Cooperating Non-Members. Participating Territories participate with the authorization of the Contracting Parties with responsibility for the conduct of their foreign affairs. Cooperating Non-Members are identified by the WCPFC on a yearly basis. In accepting Cooperating Non-Member status, such States agree to implement the decisions of the WCPFC in the same manner as Members.

The current Members of the WCPFC are Australia, Canada, China, Chinese Taipei (Taiwan), Cook Islands, European Community, Federated States of Micronesia, Fiji, France, Japan, Kiribati, Korea, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Philippines, Samoa, Solomon Islands, Tonga, Tuvalu, United States, and Vanuatu. The current Participating Territories are French Polynesia, New Caledonia and Wallis and Futuna (affiliated with France); Tokelau (affiliated with New Zealand); and American Samoa, the CNMI and Guam (affiliated with the United States). The Cooperating Non-Members for 2009 are Belize, El Salvador, Indonesia, Mexico, and Senegal.

##### **International Obligations of the United States under the Convention**

The United States ratified the Convention in 2007 and in doing so became a Contracting Party to the Convention and a Member of the WCPFC. From 2004 until that time, the United States participated in the WCPFC as a Cooperating Non-Member. As a Contracting Party to the Convention and a Member of the WCPFC, the United States is obligated to implement the decisions of the WCPFC in a legally binding manner. The WCPFC Implementation Act (16

U.S.C. 6901 *et seq.*), enacted in 2007, 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 (USCG) 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.

#### **WCPFC Decision Regarding Bigeye Tuna in Longline Fisheries**

At its Fifth Regular Session, in December 2008, the WCPFC adopted Conservation and Management Measure (CMM) 2008–01 related to bigeye tuna and yellowfin tuna (*Thunnus albacares*) in the WCPO. The CMM, available with other decisions of the WCPFC at <http://www.wcpfc.int/decisions.htm>, places certain obligations on the WCPFC's Members, Participating Territories, and Cooperating Non-members (collectively, CCMs). With respect to bigeye tuna, the CMM is based in part on the finding by the WCPFC Scientific Committee that the stock of bigeye tuna in the WCPO is experiencing a fishing mortality rate greater than the rate associated with maximum sustainable yield. The Convention calls for the WCPFC to adopt measures designed to maintain or restore stocks at levels capable of producing maximum sustainable yield, as qualified by relevant environmental and economic factors. Accordingly, CMM 2008–01 has the stated objective of reducing, over the period 2009–2011, the fishing mortality rate for bigeye tuna in the WCPO by at least 30 percent from a specified historical baseline. Among other provisions, the CMM establishes specific catch limits for bigeye tuna captured in CCMs' longline fisheries for the years 2009, 2010, and 2011. The limits do not apply to Participating Territories or small island developing States undertaking responsible development of their domestic fisheries. The limits are prescribed relative to catches made during specified baseline periods, which for the United States is 2004. For fleets of WCPFC Members with bigeye tuna catch baselines of less than 5,000 mt and that land exclusively fresh fish, the specified limit is the baseline level less 10 percent, and is the same for each of the years 2009, 2010, and 2011.

#### **Proposed Action**

This proposed rule would provide for the timely implementation of the annual catch limit for bigeye tuna established

by the WCPFC for U.S. longline fisheries for each of the years 2009 through 2011. This proposed rule would not apply to the longline fisheries of American Samoa, Guam, or the CNMI, as described further below.

The U.S. longline fisheries in the WCPO are generally regulated in accordance with the Fishery Management Plan for the Pelagic Fisheries of the Western Pacific Region (WP Pelagics FMP) developed by the Western Pacific Fishery Management Council (WPFMC) and the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species (West Coast HMS FMP) developed by the Pacific Fishery Management Council (PFMC), pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (MSA; 16 U.S.C. 1801 *et seq.*). As stated above, the WCPFC Implementation Act authorizes the Secretary of Commerce, who has delegated that authority to NMFS, to promulgate such regulations as may be necessary to implement the decisions of the WCPFC. The regulations may, in cases where the Secretary of Commerce has discretion in implementing the decisions of the WCPFC and where the regulations would govern fisheries under the authority of a Regional Fishery Management Council, be developed in accordance with the procedures established by the MSA to the extent practicable within the implementation schedule of the WCPFC. Accordingly, the MSA process could potentially serve to implement certain provisions of CMM 2008–01 that apply to the U.S. longline fisheries. The MSA process involves the development of management recommendations by the Regional Fishery Management Councils, which are then subject to the approval of, and implementation by, NMFS. The process also involves formal time periods for deliberation by the Councils and subsequent review, approval, and implementation by the Secretary of Commerce, through NMFS.

To comply with the international obligations of the United States under the Convention, NMFS is issuing a proposed rule under the WCPFC Implementation Act pertaining to the U.S. longline fleets in the Pacific Ocean for the discrete and limited purpose of implementing the bigeye tuna catch limit. Based on the longline fleet's fishing patterns in recent years, the proposed limit could be reached or exceeded in the third quarter of 2009. The WPFMC may wish to evaluate and recommend additional management measures under the MSA process.

The bigeye tuna limits established in CMM 2008–01 are termed “catch”

limits. However, the baseline amount of bigeye tuna specified for the United States in the CMM, from which the limit is derived, is from information provided to the WCPFC by the United States. That information is expressed in terms of bigeye tuna that are retained on board, not captured, *per se*. Accordingly, the proposed rule would establish a limit on retained catches (as a proxy for catches) of bigeye tuna. The limit would have the purpose of reducing fishing mortality of WCPO bigeye tuna.

#### **Establishment of the Limit**

The annual limit for the United States would be established as 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 would be 3,763 mt. In accordance with CMM 2008–01, the limit would not apply to the longline fisheries of American Samoa, Guam, or the CNMI. For the purpose of this proposed rule, the longline fisheries of these three Participating Territories would be distinguished from the other longline fisheries of the United States as described below.

Under CMM 2008–01, the specified bigeye tuna catch limits do not apply to the fisheries of Participating Territories, including American Samoa, Guam, and the CNMI, provided that they are undertaking responsible development of their domestic fisheries. Because fisheries operated out of American Samoa, Guam, and the CNMI continue to be subject to U.S. fisheries laws and regulations, and since these Participating Territories generally do not exercise management authority over fishery resources found beyond their submerged lands, applying the longline bigeye tuna catch limit provisions of CMM 2008–01 raises a number of challenging considerations. For the purpose of implementing the bigeye tuna catch limits of CMM 2008–01, NMFS proposes to distinguish the longline fisheries of the three Participating Territories from the other longline fisheries of the United States primarily based upon where the bigeye tuna are landed. That is, NMFS proposes to treat bigeye tuna landed in the three Participating Territories, with certain exceptions, as fish that are harvested in support of the development of their domestic fisheries. Assigning catches in this manner closely aligns with current practice.

In reporting catches of longline-caught bigeye tuna to the WCPFC, NMFS' practice has been to attribute catches according to where the fish are landed. For example, fish that are landed in American Samoa are attributed to the American Samoa fisheries, and fish that are landed in Hawaii or on the U.S. west coast are attributed to the "U.S. fisheries". Under this proposed rule, NMFS would continue this practice, with some modifications. NMFS proposes that any bigeye tuna landed in one of the three Participating Territories that was caught by longline in the U.S. exclusive economic zone (EEZ) surrounding the Hawaiian Archipelago would be attributed to the "U.S. fisheries" and counted against the limit. As a general practice, tuna taken within the EEZ around Hawaii have been landed in Hawaii, and have acquired no direct or indirect connection to the fisheries of any of the three Participating Territories. Under these historic circumstances, treating bigeye tuna caught in the EEZ around Hawaii and landed in one of the three Participating Territories as being associated with the longline fisheries of that Participating Territory would potentially circumvent the conservation objectives of CMM 2008–01. However, bigeye tuna caught on the high seas of the Convention Area or within the EEZ surrounding the Participating Territories or the Pacific Island possessions, if landed in one of the three Participating Territories, would not be subject to the limit, provided that the fish are landed by a U.S. fishing vessel operated in compliance with one of the permits required under the regulations implementing the WP Pelagics FMP and the West Coast HMS FMP; specifically, a permit issued under 50 CFR 660.707 or 665.21. NMFS finds these modifications to current practices necessary in order to ensure that this proposed rule and the fishing patterns that result from it are consistent with the objectives of CMM 2008–01.

#### *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 would 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 would publish the notice at least seven calendar days before the effective date of the restrictions to provide fishermen advance notice of the restrictions. NMFS would also endeavor

to make publicly available, such as on a web site, regularly updated estimates and/or projections 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 would 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. In the case of a vessel that has declared to NMFS pursuant to 50 CFR 665.23(a) that the current trip type is shallow-setting, the 14-day limit would be waived, but the number of bigeye tuna retained on board, transshipped, or landed must not exceed the number on board the vessel upon the effective date of the restrictions, as recorded by the NMFS observer on board the vessel. Furthermore, for the same reasons described above in establishing the proposed limit, 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 CNMI, provided that they were not caught in the portion of the EEZ surrounding the Hawaiian Archipelago, and that they are 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 would 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 would 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, there would be two additional, related, prohibitions that would be in effect starting on the announced date and extending through the last day of that calendar year. First, it would 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, unless on a declared shallow-setting trip, would 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 would have to be stowed in a manner so as not to be readily available for fishing while the vessel is in the Convention Area.

#### **Classification**

The NMFS Assistant Administrator has determined that this proposed rule is consistent with the WCPFC Implementation Act and other applicable laws, subject to further consideration after public comment.

NMFS prepared an EA that analyzes the effects of the proposed rule on the human environment. In the EA, NMFS compared the effects of the proposed rule and three alternatives to the proposed rule, including the no-action or baseline alternative and two action alternatives. Overall, the expected impacts on bigeye tuna and other living marine resources from the proposed rule or either of the two action alternatives are expected to be generally beneficial, because they would implement a catch limit where one does not currently exist. One of the action alternatives would prohibit longline fishing once the limit is reached, rather than just prohibiting the retention, transshipment, and landing of bigeye tuna. The other action 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, transshipped, or landed. Both of these alternatives would likely have slightly greater beneficial impacts than the proposed rule on bigeye tuna and other living marine resources in the WCPO, but like the proposed rule, both alternatives would have only minor impacts. The impacts on the human environment from the proposed rule 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 proposed rule would likely not cause substantial changes to the fishing practices and

patterns of the affected fleets. However, other present and reasonably foreseeable 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 of the proposed action could be greater than if the proposed rule were implemented in isolation. Specifically, implementation by the United States of the provisions of CMM 2008-01 applicable to purse seine vessels (which NMFS intends to do via a separate rulemaking) and implementation by other CCMs of the provisions of the CMM would enhance the beneficial impacts to bigeye tuna and other living marine resources. If the WCPFC adopts (and CCMs implement) similar or more restrictive measures after the three-year duration of CMM 2008-01, the beneficial impacts would be further enhanced (e.g., there could be a greater likelihood of attaining the objective of the CMM). In addition, should the Inter-American Tropical Tuna Commission (IATTC) adopt catch limits or other fishery restrictions for bigeye tuna, any shift in fishing effort to the eastern Pacific Ocean (EPO) from the proposed rule would be reduced and the beneficial effects on bigeye tuna would be increased. The stock structure of bigeye tuna in the Pacific Ocean is not well known, but there is some degree of mixing between fish in the EPO and fish in the WCPO, so any fishing mortality in the EPO would likely affect the status of the stock in the WCPO. The economic impacts of the proposed rule are addressed in the EA only insofar as they are related to impacts to the biophysical environment. Economic impacts are addressed more fully in the RIR and IRFA. A copy of the EA is available from NMFS (see **ADDRESSES**).

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

An IRFA was prepared, as required by section 603 of the RFA. The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. The analysis follows:

The proposed rule would 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 February 2009 was 132. 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 described further below. 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).

The proposed rule would not establish any new reporting or recordkeeping requirements. The new compliance requirement would be for affected vessel owners and operators to cease retaining, landing, and transshipping bigeye tuna caught with longline gear in the Convention Area when the limit is reached in any of the years 2009, 2010, and 2011, for the remainder of the calendar year (with the exceptions and provisos described at the beginning of this section in the preamble). Fulfillment of this requirement is not expected to require any professional skills that the vessel owners and operators do not already possess.

Complying with the proposed rule could cause foregone fishing opportunities and associated economic losses in the event that the bigeye tuna

limit is reached and the restrictions on retaining, landing, and transshipping bigeye tuna are imposed. These costs cannot be projected with any quantitative certainty. For the purpose of projecting baseline conditions under no action, this analysis relies on fishery performance from 2005 through 2008, since prior to 2005 the regulatory environment underwent major changes (the swordfish-directed shallow-set longline fishery was closed in 2001 and reopened in 2004 with limits on fishing effort and turtle interactions). Bigeye tuna catches (here and in the remainder of this IRFA, "catches" means fish that are caught and retained on board) from 2005 through 2008 suggest that there is a high likelihood of the proposed limit being reached in any of the years during which the limit would be in effect (2009, 2010, and 2011). The proposed limit, by prescription, is 10 percent less than the amount caught in the Convention Area in 2004. The proposed limit of 3,763 mt is less than the amount caught in any of the years 2005-2008, and it is 20 percent less than the annual average amount caught in that period. Furthermore, there has been an upward trend in annual bigeye tuna catches in the years 2005 through 2008.

If the bigeye tuna limit is reached in a given year, it can be expected that affected vessels would shift to the next most profitable fishing opportunity (which might be not fishing at all). Revenues from that alternative activity reflect the opportunity costs associated with longline fishing for bigeye tuna in the Convention Area. Therefore, the economic cost of the proposed rule is assumed to be less than the nominal losses incurred by the bigeye tuna limit and associated restrictions.

Upper bounds on potential economic costs can be estimated by examining the projected value of longline landings from the Convention Area that would not be made as a result of reaching the limit. Two no-action scenarios are used for the purpose of this analysis. In the more conservative scenario, it is assumed that fishing patterns in 2009-2011 would not depart from recent patterns; specifically, annual catches in 2009-2011 would be equal to the averages observed during 2005-2008. In the less conservative no-action scenario, it is assumed that the increasing trend in bigeye tuna catches in 2005-2008 would continue in 2009-2011 (there may be factors that inhibit continuation of the trend, such as the limit on vessel numbers, or the possibility of the size of the exploitable stock decreasing; nonetheless, continuation of the trend appears to be plausible). Average annual catches of bigeye tuna from the longline

fishery in the Convention Area in 2005–2008, as estimated by NMFS based on numbers of fish caught by date of capture from vessel logbook data, and average fish weights derived from landings data, were 4,712 mt. The upward trend in bigeye tuna catches in 2005–2008 (for the entire fishery, not limited to catches in the Convention Area), was an average annual increase of about 8 percent. If this rate continued, catches of bigeye tuna from the Convention Area in 2009, 2010, and 2011 would be about 5,300, 5,700, and 6,200 mt, respectively. Thus, with respect to the first no-action scenario, imposition of a catch limit of 3,763 mt would be expected to result in 20 percent less bigeye tuna being caught in 2009–2011 than under no action. With respect to the second no-action scenario, the limit would be expected to result in 29, 34, and 39 percent less bigeye tuna being caught in 2009, 2010, and 2011, respectively, than under no action (and over the entire 2009–2011 period, 34 percent less). In the deep-set fishery, catches of marketable species other than bigeye tuna would likely be affected in a similar way. After the limit is reached and landings are restricted, prices of bigeye tuna (e.g., that are caught in the EPO), as well as of other species landed by the fleet, could increase and thereby mitigate (to the extent vessels continue to fish and make landings) economic losses. Assuming no effects on prices, over the years 2009–2011, revenues to entities that participate exclusively in the deep-set fishery under the proposed rule would be, under the first no-action scenario, about 20 percent less than under no action, and under the second no-action scenario, about 34 percent less. If, under the more conservative no-action scenario, average annual ex-vessel revenues during 2005–2007 (about \$0.5 million per vessel) are a good indicator of future revenues under no action, average per-vessel annual revenues under the proposed rule would be about \$0.1 million less than under no action. Under the less conservative no-action scenario, if ex-vessel revenues under no action were to increase in proportion to bigeye tuna catches (8 percent annually), average per-vessel annual revenues under the proposed rule would be about \$0.2 million less than under no action. Again, these estimates are for the purpose of estimating upper bounds on potential economic losses and do not account for revenues from alternative activities, some of which are discussed further below.

Impacts on profits would be less than impacts on revenues, because operating

costs would be lower if a vessel ceases fishing after the catch limit is reached. Variable costs can be expected to be affected roughly in proportion to revenues, as both would stop accruing once a vessel stops fishing. But operating costs also include fixed costs, which are borne regardless of whether or not a vessel is used to fish. Thus, profits would be dampened proportionately more than revenues.

In addition to leading to lost revenues due to landing less fish, a prohibition on landing bigeye tuna could cause a decrease in ex-vessel prices paid for bigeye tuna and other products landed by affected entities. An interruption in supply of bigeye tuna and other species from the Hawaii longline fleet could result in the Hawaii market shifting to alternative sources of bigeye tuna. If such a shift were temporary; that is, limited to the duration of the prohibition on bigeye tuna landings, which would likely be a matter of weeks or months, then prices (once the prohibition is lifted) would probably not be affected. If, on the other hand, it leads to a more permanent change in the market (e.g., as a result of buyers wanting to mitigate the uncertainty in the continuity of supply from the Hawaii longline fishery), then locally caught bigeye tuna could face stiffer competition with bigeye tuna sourced elsewhere and consequently be subject to less demand (volume) and fetch lower prices than it would under the no-action scenario. In that event, revenues earned by affected entities would be impacted accordingly. It is not possible to predict the likelihood of this occurring or predict the magnitude of the economic effects.

As stated previously, actual compliance costs for a given entity might be less than the upper bounds described above because ceasing fishing would not necessarily be the most profitable opportunity in the event of the catch limit being reached. Alternative opportunities that would appear to be relatively attractive to affected entities include: (1) deep-set longline fishing for bigeye tuna and other species to the east of 150 W. long. boundary line of the Convention Area (the EPO), where there is currently no limit on bigeye tuna catches; (2) shallow-set longline fishing for swordfish in the Convention Area or the EPO; and (3) deep-set longline fishing in the Convention Area for species other than bigeye tuna. A fourth opportunity is also identified, but because its economic viability appears marginal at this time, it is discussed only briefly. This is deep-set longline fishing for bigeye tuna in the Convention Area and

landing the bigeye tuna in American Samoa, Guam, or the CNMI (instead of Hawaii, the traditional landing point and main market). This would be permissible provided that the bigeye tuna were not caught in the portion of the EEZ around the Hawaiian Islands and they are landed by a U.S. vessel operated in compliance with a permit issued under the WP Pelagics FMP or the West Coast HMS FMP.

Before examining each of these potential opportunities in detail, it is important to note that under the proposed rule, it would be prohibited to fish with longline gear both inside and outside the Convention Area during the same trip (with the exception of a fishing trip that is in progress when the limit is reached and the restrictions go into effect). For example, after the restrictions go into effect, during a given fishing trip, a vessel could be used for longline fishing for bigeye tuna in the EPO or longline fishing for species other than bigeye tuna in the Convention Area, but not both. This reduced operational flexibility would bring costs, since it would constrain the potential profits from alternative opportunities collectively. Those costs cannot be quantified.

(1) With respect to deep-set fishing in the EPO, the proportion of the fishery's annual bigeye tuna catches that were captured in the EPO from 2005 through 2008 ranged from 2 percent to 22 percent, and averaged 11 percent. In 2005–2007, that proportion, which ranged from 2 percent to 11 percent, may have been constrained by the bigeye tuna catch limits established by NMFS to implement the decisions of the IATTC, the counterpart of the WCPFC in the EPO. By far most of the U.S. annual EPO bigeye tuna catch has typically been made in the second and third quarters of the year: in the period 2005–2008 the percentages caught in the first, second, third, and fourth quarters were 9, 25, 62, and 4 percent, respectively. These two historical patterns that relatively little of the bigeye tuna catch in the longline fishery has typically been made in the EPO (2–22 percent in 2005–2008) and that most EPO bigeye tuna catches have been made in the second and third quarters, with relatively few catches in the fourth quarter, when the catch limit would most likely be reached, suggest it would be relatively costly for at least some affected entities to shift to deep-set fishing in the EPO in the event of the limit being reached in the Convention Area. Furthermore, if the IATTC adopts bigeye tuna catch limits for the EPO for any of the years 2009–2011, the ability of business entities affected by this

proposed rule to shift fishing effort to the EPO would, of course, be constrained accordingly.

(2) With respect to the opportunity of shallow-set longline fishing for swordfish, entities that already engage in this component of the fishery and that would do so under the no-action scenario would bear little cost in the event of the limit being reached. The cost would be approximately equal to the revenues lost from not being able to retain or land bigeye tuna captured while shallow-setting in the Convention Area, or the cost, taking into account opportunity costs, of shifting to shallow-setting in the EPO, whichever is less. In the fourth quarters of 2005–2008, almost all shallow-setting effort took place in the EPO, and 96 percent of bigeye tuna catches were made there, so the opportunity cost would appear to be very little. During 2005–2008, the shallow-set fishery caught an annual average of 55 mt of bigeye tuna from the Convention Area. If the bigeye tuna catch limit is reached on September 30 (or even as early as July 31) in a given year, the WCPO shallow-set fishery at that point would be, on average, based on 2005–2008 data, 99 percent through its average annual bigeye tuna catches. Thus, imposition of the landings prohibition on September 30 could result in the loss of revenues from approximately 0.6 mt (1 percent of 55 mt) of bigeye tuna, which, based on recent ex-vessel prices, would be worth about \$5,000. Expecting about 29 vessels to engage in the shallow-set fishery (the annual average in 2005–2008), the average value of those potentially lost annual revenues would be about \$170 per vessel. These potential impacts are relatively small, but one additional effect could lead to greater costs to entities that engage in the shallow-set fishery.

Entities that have not historically participated in the shallow-set fishery would, in the event of the limit being reached, have a greater incentive to engage in shallow-setting than they otherwise would, so participation in the shallow-set fishery could be greater as a result of the catch limit being reached. Participation and fishing effort would be constrained, however, by the existing annual limits on the number of sets that may be made (2,120) and on the number of interactions that may occur with loggerhead (17) and leatherback (16) turtles. In the four full years that these limits have been in place, the fishery has been closed once (2006) as a result of reaching one of the turtle interaction limits. In the remaining three years (2005, 2007, and 2008), 76 percent, 76 percent, and 77 percent, respectively, of

the 2,120-set limit on fishing effort was used. To the extent that participation and fishing effort in the shallow-set fishery are greater as a result of this proposed rule, traditional participants would bear costs associated with the greater competition for the available fishing effort. Those costs cannot be projected, but they are likely to be reflected in the price of shallow-set certificates, which each year are distributed free of charge and in equal shares to all holders of Hawaii Longline Limited Access Permits and subsequently traded among fishery participants. Increased competition in the shallow-set fishery could also lead to lower prices for swordfish as a result of greater supply, and consequently lower returns to entities engaged in the shallow-set fishery. The costs could also be reflected in a higher likelihood of the turtle interaction limits being reached and the shallow-set fishery being closed (at all or earlier in the year than it otherwise would). It should be noted that the WPFMC has recommended that the shallow-set effort limit be removed and that the loggerhead interaction limit be increased. NMFS, which is responsible for approving and implementing (in this case, via rulemaking) recommendations of the WPFMC, has not yet acted on the WPFMC recommendations. If the recommendations are approved and implemented, there would be more potential for fishing effort to shift to the shallow-set fishery.

(3) The opportunity of deep-setting in the Convention Area for species other than bigeye tuna would seem, based on the lack of such fishing activity in the past, to be the least attractive and costliest of the three alternative opportunities examined here. Nonetheless, it is possible that affected entities could find it economically viable to place greater emphasis on targeting yellowfin tuna, albacore and other species that have in the past contributed relatively little to ex-vessel revenues in the fishery. Next to bigeye tuna, yellowfin tuna has been the most valuable species in the deep-set fishery, but the catch per unit of effort (CPUE) for yellowfin tuna has been considerably less than for bigeye tuna. The average annual CPUE for yellowfin tuna during 2005–2007 was 0.84 fish per 1,000 hooks, as compared to 3.73 fish per 1,000 hooks for bigeye tuna. Thus, unless fishing methods can be adjusted in ways to substantially increase catch rates (and/or weights) of species other than bigeye tuna, revenues per unit of effort would be substantially less during a bigeye tuna landings

prohibition period. The extent to which such adjustments could be made is not known. Even if deep-set fishing is not an economically attractive opportunity without the ability to land bigeye tuna, it might be worthwhile for trips during which the limit is reached. In other words, after bigeye tuna restrictions become effective, it would allow vessels at sea to continue fishing to top off their holds with species other than bigeye tuna and thereby have the potential to lessen the adverse impacts of the restrictions.

Finally, with respect to deep-set longline fishing for bigeye tuna in the Convention Area and landing the fish in American Samoa, Guam, or the CNMI, there are three potentially critical constraints to this opportunity. First, whether the fish are landed by the vessel that caught the fish or by a vessel to which the fish were transshipped, the costs of a vessel steaming from the traditional fishing grounds in the vicinity of Hawaii to one of the territories would be substantial. Second, none of these three locales has large markets to absorb additional fresh sashimi-grade bigeye tuna. Third, transporting the bigeye tuna from these locales to larger markets, such as in Hawaii or Japan, would bring substantial costs. These cost constraints suggest that this opportunity has little potential to mitigate the economic impacts of the proposed rule on affected small entities.

The potential economic effects identified above would vary among individual business entities, but it is not possible to predict the range of variation.

All affected entities are believed to be small entities, so small entities would not be disproportionately affected relative to large entities.

NMFS has not identified any Federal rules that duplicate, overlap or conflict with the proposed rule.

NMFS has identified two alternatives to the proposed rule (in addition to the no-action alternative). One 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. The other 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. Both alternatives would result in greater economic impacts, relative to those of the proposed rule, on small entities, as they would narrow the

available opportunities in the event the catch limit is reached. NMFS prefers the proposed action over the two action alternatives because it would result in lesser adverse economic impacts. NMFS also considered the no-action alternative. Among all the alternatives, no action would have the least adverse economic impacts on affected entities in the short term, but NMFS has determined that it would fail to accomplish the objectives of the WCPFC Implementation Act, including satisfying the international obligations of the United States as a Contracting Party to the Convention.

#### List of Subjects in 50 CFR Part 300

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

Dated: July 1, 2009.

**John Oliver,**

*Deputy Assistant Administrator For Operations, National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 300, subpart O, which was proposed to be added on May 22, 2009 (74 FR 23965) and was proposed to be further amended on June 1, 2009 (74 FR 26160), is proposed to be further 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 “Fishing trip”, “Hawaiian Archipelago” and “Longline gear” are added, in alphabetical order, to read as follows:

#### § 300.211 Definitions.

\* \* \* \* \*

*Fishing trip* means a period of time during which a fishing vessel is used for fishing, beginning when the vessel leaves port and ending when the vessel lands fish.

\* \* \* \* \*

*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(d)(1) or (d)(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(d)(3).

(dd) Fail to stow longline gear as required in § 300.224(d)(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 by longline gear in the Convention Area by fishing vessels of the United States during the calendar year and retained on board.

(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 exclusive economic zone 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) 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.

(d) Once an announcement is made pursuant to paragraph (c) 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. In the case of a vessel that has declared to NMFS, pursuant to § 665.23(a) of this title, that the current trip type is shallow-setting, the 14-day limit is waived, but the number of bigeye tuna retained on board, transshipped, or landed must not exceed the number on board the vessel upon the effective date of the prohibitions, as recorded by the NMFS observer on board the vessel.

(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 exclusive economic zone 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 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 (c) of this section, in which case the provisions of paragraphs (d)(1)(i) and (d)(1)(ii) of this section still apply.

(4) If a fishing vessel of the United States 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.

[FR Doc. E9-16094 Filed 7-7-09; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 622

[Docket No. 0906241088-91089-01]

RIN 0648-AX92

#### Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Commercial Sector of the Reef Fish, Queen Conch, and Spiny Lobster Fisheries of Puerto Rico and the U.S. Virgin Islands; Control Date

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

**ACTION:** Advance notice of proposed rulemaking; consideration of a control date.

**SUMMARY:** NMFS announces that it is establishing a control date that may be used to control future access to the commercial sector of the reef fish, queen conch, and spiny lobster fisheries operating in the exclusive economic zone (EEZ) of the U.S. Caribbean. If changes to the management regime are developed and implemented under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), a control date could be used to limit the number of participants in these fisheries. This announcement is intended, in part, to promote awareness of the potential eligibility criteria for future access so as to discourage speculative entry into the fisheries while the Caribbean Fishery Management Council (Council) and NMFS consider whether and how access to the commercial sector of the reef fish, queen conch, or spiny lobster fishery should be controlled.

**DATES:** Comments must be received by August 7, 2009.

**ADDRESSES:** Comments, identified by RIN 0648-AX92, may be submitted by any one of the following methods:

- Electronic submissions: Submit all electronic public comments via the Federal eRulemaking Portal <http://www.regulations.gov>.
- Mail: Jason Rueter, NMFS Southeast Regional Office, Sustainable Fisheries Division, 263 13th Avenue South, Saint Petersburg, Florida 33701.

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

To submit comments through the Federal eRulemaking Portal: <http://www.regulations.gov> enter "NOAA-NMFS-2009-0137" in the keyword search, then select "Send a Comment or Submission." NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

**FOR FURTHER INFORMATION CONTACT:** Jason Rueter; phone 727-824-5305; fax 727-824-5308; or Graciela Garcia-Moliner; phone 787-766-5927; fax 787-766-6239.

**SUPPLEMENTARY INFORMATION:** The commercial sector of the U.S. Caribbean reef fish fishery is managed under the Fishery Management (FMP) Plan for the Reef Fish Resources of Puerto Rico and the U.S. Virgin Islands, the commercial sector of the U.S. Caribbean queen conch fishery is managed under the FMP for the Queen Conch Resources of Puerto Rico and the U.S. Virgin Islands, and the commercial sector of the U.S. Caribbean spiny lobster fishery is managed under the FMP for the Spiny Lobster Resources of Puerto Rico and the U.S. Virgin Islands. The FMPs were prepared by the Council, and implemented under the authority of the Magnuson-Stevens Act.

This notice would inform participants in the U.S. Caribbean reef fish, queen conch, and spiny lobster fisheries of the Council's intentions to consider limiting access within the commercial sector of

the U.S. Caribbean reef fish, queen conch, or spiny lobster fisheries. Specifically, the Council may consider requiring a permit that would limit fishing in the EEZ to only those participants that have catch histories in excess of some minimum landings threshold or to those participants who possess a valid Territorial/Commonwealth Permit. Should the Council take such future action to further restrict participation in the commercial sector of the U.S. Caribbean reef fish, queen conch, or spiny lobster fishery, it intends to use March 24, 2009, as a possible control date regarding the eligibility of catch histories. This date was announced at the Council's March 2009 meeting. Publication of the control date in the **Federal Register** informs participants of the Council's considerations, and gives notice to anyone entering the fisheries after the control date they would not be assured of future access should a management regime be implemented using the control date as a means to restrict participation. Implementation of any such program would require preparation of an amendment to the FMPs and subsequent rulemaking with appropriate public comment periods.

Consideration of a control date does not commit the Council or NMFS to any particular management regime or criteria for eligibility in the commercial sector of the U.S. Caribbean reef fish, queen conch, or spiny lobster fishery. The Council may or may not make use of this control date as part of the qualifying criteria for participation in that sector of the fisheries. Fishermen are not guaranteed future participation in a fishery regardless of their entry date or intensity of participation in the fishery before or after the control date under consideration. The Council subsequently may choose a different control date or management regime that does not make use of a control date. The Council also may choose to take no further action to control entry or access to the fisheries, in which case the control date may be rescinded.

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

Dated: July 1, 2009.

**John Oliver,**

*Deputy Assistant Administrator For Operations, National Marine Fisheries Service.*

[FR Doc. E9-16069 Filed 7-7-09; 8:45 am]

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