

objective of restoring natural aquatic or riparian habitat conditions or processes.
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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 285

[Docket No. 960816226-7172-05; I.D. 061897C]

RIN 0648-AJ04

Atlantic Tuna Fisheries; Regulatory Adjustments

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to amend the regulations governing the Atlantic tuna fisheries to prohibit the use of aircraft to assist fishing vessel operators in the location and capture of Atlantic bluefin tuna (ABT), with the exception of vessels permitted in the Purse Seine and Harpoon categories, and to establish a deadline for permit category changes for 1997 only. These regulatory amendments are necessary to achieve the domestic management objectives for the Atlantic tuna fisheries. **DATES:** Effective July 14, 1997.

ADDRESSES: Copies of supporting documents, including an Environmental Assessment and Regulatory Impact Review (EA/RIR), are available from, Rebecca Lent, Chief, Highly Migratory Species Management Division, Office of Sustainable Fisheries (F/SF1), NMFS, 1315 East-West Highway, Silver Spring, MD 20910-3282.

FOR FURTHER INFORMATION CONTACT: John Kelly, 301-713-2347.

SUPPLEMENTARY INFORMATION: The Atlantic tuna fisheries are managed under the authority of the Atlantic Tunas Convention Act (ATCA). The ATCA authorizes the Secretary of Commerce (Secretary) to issue regulations as may be necessary to carry out the recommendations of the International Commission for the Conservation of Atlantic tunas (ICCAT). The authority to issue these regulations has been delegated from the Secretary to the Assistant Administrator for Fisheries, NOAA (AA).

Background information about the need for revisions to the Atlantic tunas fishery regulations was provided in the preamble to the proposed rule (62 FR 9726, March 4, 1997) and is not

repeated here. All measures in the proposed rule, except for the prohibition on the use of aircraft, were addressed in an earlier final rule (62 FR 30741, June 5, 1997). Additionally, NMFS issued an interim final rule that suspended the May 15 deadline for switching permit categories for calendar year 1997 until the remaining regulatory issues which could influence category selection were resolved and a new deadline set. Final quotas were published on June 30, 1997 (62 FR 35107) and the spotter aircraft issue is addressed by this final rule. As there are no remaining regulatory issues to be resolved that would influence category selection, vessel owners now have sufficient information to select an appropriate permit category for 1997. The deadline for switching permit categories for calendar year 1997 is set as July 28, 1997. After 1997, the deadline will revert to May 15.

Relation to Proposed Consolidation

The regulatory amendments contained in this final rule, when proposed, were drafted to be consistent with a proposed rule to consolidate all of the regulations for Atlantic highly migratory species (HMS) fisheries, published on November 6, 1996 (61 FR 57361). The proposed consolidation would group all regulations pertaining to Atlantic HMS under 50 CFR part 630. The final consolidated regulations have not yet been issued. Accordingly, the regulatory amendments contained in this final rule were revised to make the appropriate changes to the existing text at 50 CFR part 285. The regulatory amendments contained in this final rule will eventually be incorporated into the final consolidated regulations at 50 CFR part 630. Copies of the proposed consolidation rule may be obtained by writing (see **ADDRESSES**) or calling the contact person (see **FOR FURTHER INFORMATION CONTACT**).

Spotter Aircraft Prohibition

Since the mid-1980's, fishery participants have raised concerns that the use of spotter aircraft in the ABT fishery accelerates catch rates and compromises conservation, equal opportunity and safety. In 1996, a voluntary agreement was signed by the majority of active tuna aircraft spotters that would limit their activity in the General category to harpoon vessels. NMFS recognized that the voluntary agreement warranted a trial period but also indicated that the agency would continue to monitor the situation and would take appropriate action if necessary. Fishery management concerns continue to be expressed,

anecdotal information suggests that the number of spotter aircraft has increased, and vessel safety issues continue to be raised. Accordingly, NMFS has reconsidered the need to take action. By this final rule, the use of aircraft to assist fishing vessel operators in the location and capture of ABT, with the exception of vessels operating in the Harpoon and Purse Seine categories, is prohibited. These regulatory changes will improve NMFS' ability to achieve domestic management objectives for the Atlantic tuna fisheries.

Comments and Responses

NMFS conducted several public hearings on the proposed rule and received written and oral comments over a 30-day comment period. Nearly two thousand comments (letters and comments) were received regarding the proposed ban on spotter aircraft. Responses to the comments on the spotter aircraft issue are provided below.

Comment: Those in favor of the prohibition commented that it would restore equal opportunity for vessels of different categories and lengthen the Harpoon and General category seasons without the use of further effort controls.

Response: Although data on the use and effects of spotter aircraft on the ABT fishery are not sufficient for a quantitative analysis of impacts, it is undeniable that there is a decrease in search time when spotter aircraft are used. Data regarding recent closures in the General and Harpoon categories support the conclusion that seasons are shortened. The International Commission for the Conservation of Atlantic Tunas (ICCAT) has recognized the effect of spotter aircraft on catch rates; in 1996, ICCAT adopted a recommendation that the use of spotter aircraft by purse seine vessels in the Mediterranean be prohibited due to the aircrafts' effect of accelerating catch rates. NMFS agrees that the use of spotter aircraft accelerates catch rates. Accelerated catch rates are inconsistent with the regulatory goal of extending the ABT season for the General and Angling categories, and with actions taken this year and in previous years to accomplish that goal. Extending the season for the rod-and-reel fisheries in these two categories helps improve scientific monitoring of the stock by allowing catch-per-unit-effort (CPUE) data collection over a wider geographical area and a longer period of time. Extending the season also provides fishing opportunities over a wider area. Data from the Harpoon and Purse Seine categories have not been

incorporated into any of the currently usable CPUE indices, therefore the effect of spotter aircraft accelerating catch rates in these categories is less significant for scientific monitoring.

Comment: Some commenters questioned why the Purse Seine category is exempted from the prohibition on the use aircraft to locate and capture ABT.

Response: The purse seine fishery in the United States is managed under an individual vessel quota program; therefore, the Purse Seine category allocation cannot be exceeded. It is within each vessel's discretion to use aircraft that may have the effect of accelerating catch rates by assisting in locating schools of large fish. The Purse Seine category does not provide CPUE data for stock assessment. Likewise, Harpoon category CPUE data are not currently used to assess the ABT stock. The harpoon fishery is managed under a quota program which is monitored on a real-time basis through landing cards. Accordingly, accelerated catch rates would not likely cause the quota to be exceeded.

Comment: Some constituents indicated that spotter aircraft aid in aerial surveys and enforcement, and in the provision of emergency assistance for boats and marine mammals. Constituents argued that a ban would affect stock assessments, potentially increase undersized discards and mortality, and be impossible to enforce. Some argued that the use of aircraft is historical and should be considered as another type of fishing gear. Others noted that the banning of spotter aircraft would compromise the safety of vessels at sea.

Response: NMFS will continue to work with spotter pilots, industry members and organizations, and scientific researchers to develop an aerial index of abundance that can be used in stock assessments. The comments on the effects of a spotter aircraft ban with respect to the harpoon fishery are noted. Exempting the Harpoon category preserves the status quo for that category. Regarding enforcement, there is a commitment by industry members to work with NMFS enforcement by providing information on potential violations of fishery regulations. NMFS enforcement agents are special investigators and have been trained to collect the necessary evidence to build a successful case. Information suggests near collisions of spotter aircraft due to multiple aircraft flying at low altitude, and near collisions of fishing vessels due to aircraft attracting too many vessels to the same area.

Comment: Some General and Harpoon category permit holders expressed concern that NMFS would not decide the spotter aircraft issue until after May 15, the last day to change categories.

Response: Given the significance of spotter aircraft use in making a permit category selection, NMFS extended indefinitely the deadline for category selection for 1997 (62 FR 27518, May 20, 1997). With the publication of this final rule, NMFS establishes a deadline for selecting a permit category in 1997 of July 28, 1997.

Comment: Comments were received noting that the proposed ban on spotter aircraft would have a significant impact on a substantial number of small entities in that 83 percent of the fish spotters would be forced out of business.

Response: These commenters submitted no data to NMFS which would justify this claim. The greater part of the spotter aircraft activity currently occurs in the Purse Seine and Harpoon categories. By exempting these two categories from the prohibition on the use of spotter aircraft, the impact of the prohibition on aerial fish spotters is substantially lessened.

Further, the aerial fish spotting business is only a small portion of the small business aviation sector. While some spotter pilots will likely suffer revenue losses, no evidence is available to NMFS that the majority of small aviation businesses derive all or most of their income from services provided to ABT fishing vessels.

Comment: The proposed rule would have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act and NMFS should prepare a Regulatory Flexibility Analysis.

Response: See discussion of Regulatory Flexibility Act in the Classification section below.

Changes from the Proposed Rule

For the reasons stated above, NMFS exempts Harpoon category vessels from the prohibition on spotter aircraft use. Other than that exemption, the final rule remains as proposed. All measures in the proposed rule, except for the prohibition on the use of aircraft, were addressed in an earlier final rule (62 FR 30741, June 5, 1997). Additionally, NMFS issued an interim final rule that suspended the May 15 deadline for switching permit categories for calendar year 1997 until the remaining regulatory issues which could influence category selection were resolved and a new deadline set. Final quotas were published on June 30, 1997 (62 FR 35107) and the spotter aircraft issue is

addressed by this final rule. As there are no remaining regulatory issues to be resolved that would influence category selection, vessel owners now have sufficient information to select an appropriate permit category for 1997. The deadline for switching permit categories for calendar year 1997 is set as July 28, 1997.

Classification

This rule is published under the authority of ATCA, 16 U.S.C. 971 *et seq.* The Assistant Administrator has determined that the regulations in this final rule are necessary for management of the Atlantic tuna fisheries.

NMFS prepared an EA for this final rule with a finding of no significant impact on the human environment. In addition, an RIR was prepared with a finding of no significant impact.

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that the proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities, therefore no Regulatory Flexibility Analysis was prepared. That certification covered not only the proposed spotter aircraft prohibition, but the other provisions of the rule published in an earlier final rule (62 FR 30741, June 5, 1997).

During the comment period, NMFS received comments from the public that the proposal to ban the use of spotter aircraft in all but the Purse Seine category exceeded the threshold for significant impact on a substantial number of small entities. The aerial fish spotting business is only a small portion (less than 2 percent) of the small businesses in the ABT fishing sector, and for that matter, the aerial fish spotting business is only a very small portion of the small business aviation sector. While there may be some loss of revenue to small aircraft businesses that engage in fish spotting activities, no evidence is available to NMFS that the majority of revenues to these businesses is from ABT fish spotting. Further, the greater part of the spotter aircraft activity currently occurs in the Purse Seine and Harpoon categories. By exempting these two categories from the prohibition on the use of spotter aircraft, the impact of the prohibition on aerial fish spotters is substantially lessened.

Accordingly, there is no basis to change the conclusion of that the spotter aircraft prohibition provision of the rule will not have a significant economic impact on a substantial number of

businesses. Thus, a Final Regulatory Flexibility Analysis was not prepared.

This final rule has been determined to be not significant for purposes of E.O. 12866.

The AA has determined that there is good cause to waive partially the 30-day delay in the effective date normally required by 5 U.S.C. § 553(d). The fishery is currently underway and further delay in implementing the prohibition on the use of spotter aircraft in assisting ABT vessels in other than the Harpoon and Purse Seine categories would be contrary to the public interest by reducing the likelihood of achieving the desired effects of this rule. The desired effects of the rule are to extend the season to provide improved scientific monitoring and fishing opportunities for the rod-and-reel fisheries. Further, providing a 30-day delay in the effective date is unnecessary since the only act necessary to come into compliance with the prohibition is to cease ABT aircraft spotting activity. Therefore the ban is effective July 14, 1997. A two-week period for changing permit categories is necessary for vessel operators to gather relevant information, decide on the appropriate category, and submit an application for the category change. Given NMFS' ability to rapidly communicate these rule changes to fishing interests through the FAX network and NOAA weather radio, NMFS feels it is sufficient to implement the spotter aircraft prohibition immediately and allow fourteen days in

which to make requests for permit category changes.

List of Subjects in 50 CFR Part 285

Fisheries, Fishing, Penalties, Reporting and recordkeeping requirements, Treaties.

Dated: July 14, 1997.

Rolland A. Schmitten,
Assistant Administrator for Fisheries,
National Marine Fisheries Service.

For the reasons set out in the preamble 50 CFR part 285 is amended as follows:

PART 285—ATLANTIC TUNA FISHERIES

1. The authority citation for part 285 continues to read as follows:

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

2. In § 285.2, definition for "Aircraft" is added to read as follows:

§ 285.2 Definitions.

Aircraft means any contrivance used for flight in air.

3. In § 285.21, paragraph (b)(7) is revised to read as follows:

§ 285.21 Vessel Permits.

(b) * * *

(7) Except for purse seine vessels for which a permit has been issued under this section, an owner may change the category of the vessels's Atlantic tunas permit to another category by

application on the appropriate form to NMFS or by dialing 1-888-USA-TUNA before the specified deadline. After the deadline, the vessel's permit category may not be changed to another category for the remainder of the calendar year, regardless of any change in the vessel's ownership. For 1997, the deadline is July 28, 1997. In years after 1997, the deadline for category changes is May 15.

4. In § 285.31, paragraph (a)(40) is added to read as follows:

§ 285.31 Prohibitions.

(a) * * *

(40) Fish for, catch, possess or retain, or attempt to fish for, catch, possess or retain Atlantic bluefin tuna by means, aid, or use of any aircraft, unless holding a valid permit in the Harpoon or Purse Seine category under § 285.21.

5. In § 285.33, the heading is revised, the existing paragraph is designated as paragraph (a), and paragraph (b) is added to read as follows:

§ 285.33 Gear restrictions.

(b) *Aircraft.* Other than for a vessel

holding a valid permit in the Harpoon or Purse Seine category under § 285.21(a), locating, fishing for, catching, taking, retaining or possessing ABT by means, aid, or use of any aircraft is prohibited.

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