



BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 150817722-6304-01]

RIN 0648-BF10

Atlantic Highly Migratory Species; Archival Tag Management Measures

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS is proposing to revise the regulations that currently require persons surgically implanting archival tags in Atlantic highly migratory species (HMS) or externally affixing archival tags to such species to obtain written authorization from NMFS and that require fishermen to report their catches of Atlantic HMS with such tags to NMFS. Archival tags are tags that record scientific information about the migratory behavior of a fish and include tags that are surgically implanted in a fish and tags that are externally affixed, such as pop-up satellite (PSAT) and smart position and temperature tags (SPOT). Specifically, this rule would remove the requirement for researchers to obtain written authorization from NMFS to implant or affix an archival tag but would continue to allow persons who catch a fish with a surgically implanted archival tag to retain the fish while requiring them to return the tag to the person indicated on the tag or to NMFS. The regulation would no longer require the person retaining the fish to submit to NMFS a landing report or make the fish available for inspection and tag recovery by a NMFS scientist, enforcement agent, or other person designated in writing by NMFS. Any persons who

land an Atlantic HMS with an externally affixed archival tag would be encouraged to follow the instructions on the tag to return the tag to the appropriate research entity or to NMFS. This action could affect any researchers wishing to place archival tags on Atlantic HMS and any fishermen who might catch such a tagged fish.

DATES: Written comments must be received by [*insert date 30 days after date of publication in the FEDERAL REGISTER*].

ADDRESSES: You may submit comments on this document, identified by NOAA-NMFS-2016-0017, by any of the following methods:

- **Electronic Submission:** Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2016-0017, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.
- **Mail:** Submit written comments to Margo Schulze-Haugen, Chief, Atlantic HMS Management Division at 1315 East-West Highway, Silver Spring, MD 20910.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Larry Redd, Craig Cockrell, or Karyl Brewster-Geisz by phone at 301-427-8503.

SUPPLEMENTARY INFORMATION: Atlantic HMS are managed under the 2006 Consolidated HMS Fishery Management Plan (FMP). Implementing regulations at 50 CFR part 635 are issued under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1801 *et seq.*, and Atlantic Tunas Convention Act (ATCA), 16 U.S.C. 971 *et seq.* ATCA authorizes the Secretary of Commerce (Secretary) to promulgate regulations, as may be necessary and appropriate to implement ICCAT recommendations.

“Archival tags” are defined at § 635.2 as “a device that is implanted or affixed to a fish to electronically record scientific information about the migratory behavior of that fish.” Scientists use such tags because they offer a powerful tool for tracking the movements, geolocation, and behavior of individual tunas, shark, swordfish, or billfishes. Data recovery from some archival tags, particularly those that are surgically implanted into the fish, requires that fish be re-caught. Other archival tags, such as PSAT and SPOT, which are externally affixed to the fish, are able to transmit the information remotely and do not require the fish to be re-caught nor do researchers expect the tags to be returned, as generally no additional data is gained from their return. Data from archival tags are used to ascertain HMS life history information such as migratory patterns and spawning site fidelity.

The current regulations under 50 CFR 635.33 regarding archival tags have three parts. First, the regulation requires that any person seeking to affix or implant an archival tag into Atlantic HMS submit an application for an exempted fishing permit (EFP) or scientific research permit (SRP) with details about the research. The applications ask for details concerning the research objectives, the type and number of tags used, the species and approximate size of the tagged fish, and the location and method of capture of the tagged fish. Second, if a fisherman

catches an HMS with an archival tag, the fisherman may land the HMS, regardless of the other regulatory requirements for that fish (e.g., size limit, season, etc.), if the fisherman complies with the third part of the regulations. The third and last part, called a “landing report,” requires fishermen landing an HMS with an archival tag to contact NMFS at the time or prior to the time of landing, furnish all requested information, and either make the fish available for inspection or return the tag to NMFS. The information provided by Atlantic HMS fishermen in a landings report could include the archival tag itself, location of capture, and the captured fish.

These regulations were implemented in the late 1990s at a time when archival tag technology was new, most of the archival tags had to be surgically implanted into the fish, and the mortality associated with surgically implanting such tags was unknown. Archival tags have been in use for almost 20 years and the mortality associated with the activity, whether it is surgically implanting the tag or affixing it externally to the fish, is now known to be negligible.

NMFS has issued authorizations to only two researchers for the surgical implantation of an archival tag in the last 5 years. Those researchers have placed a small number of surgically implanted archival tags only in bluefin tuna, and generally only in those fish that measure less than 40 inches curved fork length; in larger fish, the researchers prefer to affix external archival tags. Given the limited battery and data storage capacity of archival tags, NMFS expects that there are few continuously functioning implanted archival tags currently in any Atlantic HMS. Researchers have communicated to NMFS that implanted archival tag recovery has decreased over the last 4 years. Presently, PSAT, SPOT, and other externally-affixed archival tags are more commonly used and, as previously mentioned, this is perhaps in part because the data recovery does not depend on re-catching the fish and extricating the tag. Furthermore, while the information that could be provided in the landings report such as location of landing and length

of Atlantic HMS may be helpful in assisting scientists, NMFS rarely hears of any archival tagged fish being recaptured. A few times a year, a fisherman may call NMFS to ask where to return a tag (most often these calls are about non-archival tags) they obtained from an Atlantic HMS in their possession. If a fisherman is indeed calling about returning an archival tag, any information collected about the fish is given directly to the scientists or entities noted on the tag and not necessarily to NMFS. Given that scientists continue to place externally-affixed archival tags and are not notifying NMFS that the lack of enforcement of the landings report is resulting in a loss of needed scientific data, NMFS assumes that both scientists and fishermen would not object to the removal of the landing report requirement, but invites comments on this provision.

NMFS is considering revisions to the regulatory requirements because the original conservation and management concern about affixing tags to highly migratory species (i.e., the potential for high mortality) is now commonly accepted as non-problematic. The goal of this proposed rule is to reduce administrative and regulatory burden given the outdated conservation concern, while maintaining appropriate conservation and management regulatory requirements.

NMFS, in one non-preferred alternative, considered removing all authorization and reporting requirements in the regulations regarding archival tags. Under this alternative, researchers would no longer need to apply for authorization to implant or affix archival tags to Atlantic HMS, and fishermen who catch an Atlantic HMS with an archival tag would no longer be required to make a landing report or make the fish available to a NMFS scientist, enforcement agent, or other person designated in writing by NMFS. Additionally, under this alternative, in order to land an HMS with any type of archival tag, fishermen would need to meet the other regulatory requirements applicable to that fish. Under this alternative, the return of any archival tag by a fisherman who retains a tagged Atlantic HMS to NMFS or the tag's originating

researcher would be voluntary. For surgically implanted tags, any information collected by the tag would be lost unless the tag is voluntarily returned to either NMFS or the originating researcher. Externally affixed archival tags, such as PSAT and SPOT, are able to remotely transmit their data, making the information collected by the tag available to researchers whether the tag is returned to them or not. However, data about the landings and ultimate disposition of the fish would potentially be lost if the fisherman did not contact NMFS or the researcher. Thus, while this non-preferred alternative would reduce the administrative cost for researchers and for fishermen who catch a fish with any type of archival tag, removing the regulatory incentive to return surgically implanted tags could result in the loss of valuable life history and biological data, the loss of any physical tags currently in the field, and a loss of investment for researchers with such tags currently in the field. Removing the regulatory incentive to contact NMFS or the researcher could also potentially result in a loss of data including data about the landing and ultimate disposition of the fish, although as previously discussed, such reporting for externally affixed tags typically does not currently occur under the regulations.

Data collected from returned surgically-implanted tags are important to the tagging program. Without the regulatory requirement to return surgically implanted tags, the scientific contributions and value of surgically implanted archival tagging programs to Atlantic HMS management and conservation may not be realized. Further, uncertainty about tag and data recovery could dissuade the future use of surgically implanted tags.

NMFS' preferred alternative would modify all parts of the regulation. Specifically, regarding the first part of the regulation, the alternative would remove the requirement for researchers to obtain written authorization from NMFS to implant or affix an archival tag. Regarding the second and third parts of the regulations, the preferred alternative would remove

the landings report requirement while maintaining the regulatory incentive that Atlantic HMS caught with a surgically implanted archival tag could be retained, regardless of the other regulations, on the condition that the surgically implanted tag is returned to either the originating researcher or to NMFS. The regulation would no longer require the person retaining the fish to submit a landing report to NMFS or make the fish available for inspection and tag recovery by a NMFS scientist, enforcement agent, or other person designated in writing by NMFS. Rather, anyone catching a fish that could not otherwise be landed, but that has a surgically-implanted archival tag, can land the fish if the fisherman returns the tag to the originating researcher or NMFS. In all other cases, NMFS would encourage the fisherman to return the tag and any information requested directly to the scientist or entity noted on the tag itself. As described above, NMFS believes fishermen already work directly with scientists when returning tags.

NMFS prefers this alternative because it maintains appropriate management and conservation requirements while eliminating certain administrative burdens to make the archival tagging process more efficient. This alternative would reduce any time and delay cost to researchers associated with the applying for a permit to place tags on Atlantic HMS. It would not change the effort or cost to fishermen who catch an Atlantic HMS with a surgically implanted archival tag, although the cost associated with returning the tag to the researcher is minimal.

Additionally, the preferred alternative would offer more certainty that, for those rare surgically-implanted tags, recollection and data recovery would take place by maintaining regulatory incentives for the return of implanted tags. This would afford some assurance to researchers that current or future archival tag research activity with surgically implanted tags would not operate at a loss in investment due to discarded tags and would continue to contribute

to the collection of Atlantic HMS life history and biological data. For all the reasons above, NMFS prefers this alternative.

Request for Comments

NMFS is requesting comments on the proposed action, which would remove the requirement for researchers to obtain written authorization to implant or affix archival tags, to continue to require fishermen who land a fish with a surgically implanted archival tag to return the tag to the researcher or NMFS, to encourage fishermen who land a fish with an externally affixed archival tag to return the tag to the researcher or NMFS, and to remove the landing report requirement.

Additionally, at the September 2015 HMS Advisory Panel meeting in Silver Spring, MD, NMFS received a request to prohibit the retention of any Atlantic HMS caught with an externally affixed archival or electronic tag. The Advisory Panel member who suggested this change noted that archival tags are expensive and that the tagged live fish in the wild allows scientists to collect biological data and other information that cannot be collected by other means. Given this request, NMFS is requesting comments on whether fishermen who catch a fish with an externally affixed archival tag, such as a PSAT or SPOT, should be required to release the fish even if the fish is otherwise legal to land (e.g., meets the minimum size restrictions and caught with appropriate gear). While this proposed rule focuses on the more limited issue of easing the regulatory burden associated with regulations that have over time become outdated because of changes in tagging technology, we are interested in public comments on the Advisory Panel member's request, as a preliminary first step in exploring future related responsive action through separate rulemaking, as appropriate.

Public Hearings

Public hearings on this proposed rule are not currently scheduled. If you would like to request a public hearing, please contact Larry Redd, Craig Cockrell, or Karyl Brewster-Geisz by phone at 301-427-8503.

Classification

The NMFS Assistant Administrator has determined that the proposed rule is consistent with the 2006 Consolidated HMS FMP and its amendments, the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

This proposed action is not significant for the purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule to revise Atlantic HMS archival tag management measures, if adopted, would not have a significant economic impact on a substantial number of small entities under Section 605(b) of the Regulatory Flexibility Act (RFA).

As described above, this proposed rule would modify the regulations so that researchers would no longer need to obtain written authorization from NMFS before implanting or affixing archival tags. Thus, this proposed rule would reduce any time and delay costs to researchers because they would not need to apply for a permit to place tags on Atlantic HMS. Also, the proposed rule would no longer require the person retaining the fish to submit a landing report to NMFS or make the fish available for inspection and tag recovery by a NMFS scientist, enforcement agent, or other person designated in writing by NMFS. Given that scientists continue to place externally-affixed archival tags and are not notifying NMFS that the lack of enforcement of the landings report is resulting in a loss of needed scientific data, NMFS assumes that both scientists and fishermen would not object to the removal of the landing report

requirement but are requesting comments on this provision. Fishermen would be relieved of the obligation to file a landings report with NMFS if they caught and retained an HMS with an externally affixed archival tag and thus would have less regulatory obligation and delay in bringing the fish to market. The cost to fisherman associated with returning the tag to the researcher are minimal and, for surgically implanted tags in recent years, uncommon, particularly since NMFS has issued authorizations to only two researchers for the surgical implantation of an archival tag in the last 5 years. However, if a fish with a surgically implanted archival tag were caught, this proposed rule would offer some certainty that tag recollection and data recovery would take place by maintaining the regulatory incentive for the return of implanted tags to NMFS or the originating research.

For the last five years, NMFS has issued an average of 12 permits for externally affixing archival tags (e.g., pop-up satellite archival tags and smart position and temperature tags), and in the same time frame, NMFS has issued authorizations to only 2 researchers for the surgical implantation of an archival tag. Therefore, NMFS estimates that this rule would apply to approximately 14 research entities. The rule would also apply to any fisherman who caught a fish that has a surgically implanted archival tag. At this time, NMFS does not know how many fishermen might encounter this situation but, because NMFS has issued permits to only two researchers in the last five years that would allow for the surgical implantation of archival tags and those researchers have surgically implanted only a limited number of archival tags, NMFS estimates minimal fishermen would be affected -- perhaps less than five per year. The action does not contain any new collection of information, reporting, record-keeping, or other compliance requirements. Rather, this rule would relieve approximately 14 research entities from the need to apply for a permit to place archival tags on Atlantic HMS. For the reasons

above, the archival tag management measures proposed in this rule would not have a significant impact on a substantial number of small entities.

List of Subjects in 50 CFR Part 635

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

Dated: April 8, 2016.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

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

PART 635- ATLANTIC HIGHLY MIGRATORY SPECIES

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

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

2. Revise § 635.33 to read as follows:

§ 635.33 Archival tags.

(a) *Landing an HMS with a surgically implanted archival tag.* Notwithstanding other provisions of this part, persons may catch, possess, retain, and land an Atlantic HMS in which an

archival tag has been surgically implanted, provided such persons return the tag to the research entity indicated on the tag or to NMFS at an address designated by NMFS and report the fish as required in § 635.5.

(b) *Quota monitoring.* If an Atlantic HMS landed under the authority of paragraph (a) of this section is subject to a quota, the fish will be counted against the applicable quota for the species consistent with the fishing gear and activity which resulted in the catch. In the event such fishing gear or activity is otherwise prohibited under applicable provisions of this part, the fish shall be counted against the reserve or research quota established for that species, as appropriate.

3. In § 635.71, revise paragraph (a)(20) to read as follows

§ 635.71 Prohibitions.

* * * * *

(a) * * *

(20) Fail to return a surgically implanted archival tag of a retained Atlantic HMS to NMFS or the research entity and report such retention, as specified in § 635.33.

* * * * *

[FR Doc. 2016-08535 Filed: 4/13/2016 8:45 am; Publication Date: 4/14/2016]