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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 150817722-6703-02]

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: Final rule.

SUMMARY: This final rule revises the regulations that currently require persons surgically implanting or externally affixing archival tags on Atlantic highly migratory species (HMS) 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 movement and behavior of a fish and include tags that are surgically implanted in a fish, as well as tags that are externally affixed, such as pop-up satellite archival tags (PSAT) and smart position and temperature tags (SPOT). Specifically, this final rule removes 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 only if they return the tag to the person indicated on the tag or to NMFS. Persons retaining such fish would no longer be required to submit to NMFS an archival tag 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, but not

required, to follow the instructions on the tag to return the tag to the appropriate research entity or to NMFS. This action will affect any researchers wishing to place archival tags on Atlantic HMS and any fishermen who might catch such a tagged fish.

DATES: Effective on [*insert date 30 days after date of publication in the FEDERAL REGISTER*].

ADDRESSES: NMFS Highly Migratory Species Management Division, 1315 East-West Highway, Silver Spring, MD 20910.

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

SUPPLEMENTARY INFORMATION:

Background

Atlantic HMS are managed under the 2006 Consolidated HMS Fishery Management Plan (FMP) and its amendments. 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 necessary and appropriate to implement ICCAT recommendations.

On April 14, 2016 (81 FR 22044), NMFS published a proposed rule regarding the regulatory requirements for the placement of “archival tags.” An “archival tag” is 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.” The comment period on the proposed rule ended on May 16, 2016.

Researchers use archival tags because they are a powerful tool for tracking the movements, geolocation, and behavior of individual tunas, sharks, swordfish, and 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 are gained from their return. Data from archival tags are used to ascertain HMS life-history information, such as migratory patterns and spawning site fidelity.

In addition to archival tags, researchers may place conventional tags, such as spaghetti or roto tags, acoustic tags, or passive integrated transponder (PIT) tags on HMS. These types of tags do not record or store any information, and thus are not “archival” tags. Furthermore, there are some tags, such as some SPOTs, that may be archival or may be more acoustic in nature, depending on the needs of the researcher. For Atlantic HMS, NMFS does not regulate the placement or the collection of these non-archival tags, and this final rule does not affect any tags other than archival tags.

This final rule removes the requirement for researchers to obtain written authorization from NMFS to implant or affix an archival tag. Additionally, this final rule maintains the regulatory requirement that Atlantic HMS caught with a surgically implanted archival tag may be retained only on the condition that the surgically implanted tag is returned to either the originating researcher or to NMFS. Maintaining this regulatory provision creates an incentive to return the surgical tags, which need to be physically retrieved to retrieve the data. This would afford some assurance to researchers that they would be able to retrieve the surgically implanted tags and would not lose their investment due to discarded tags, and that the tags would continue

to contribute to the collection of Atlantic HMS life history and biological data. In all other cases (i.e., the fisherman catches an HMS with an externally placed archival tag, a conventional tag, an acoustic tag, or a PIT tag), NMFS encourages, but does not require, the fisherman to return the tag and any information requested directly to the researcher or entity noted on the tag itself. All other reporting requirements for HMS would still apply. Finally, under this final rule, the person retaining an HMS with either an externally affixed or surgically implanted archival tag would no longer be required to submit an archival tag 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.

This final rule maintains appropriate management and conservation requirements, such as requiring the return of the surgically implanted archival tag if the fish is retained, for HMS while making the archival tagging process more efficient by reducing any time and delay cost to researchers associated with the applying for a permit to place archival tags on Atlantic HMS. This final rule would reduce the regulatory burden for researchers, and allow researchers the opportunity to place archival tags on Atlantic HMS during periods of time in which they usually would be waiting for NMFS to process their annual permits, typically in January or February. NMFS does not expect this action to result in increased fishing mortality or increased interactions with listed species.

Response to Comments

During the proposed rule stage, NMFS received 31 written comments. The comments received on the proposed rule during the public comment period can be found at <http://www.regulations.gov/> by searching for NOAA-NMFS-2016-0017. A summary of the relevant comments on the proposed rule are shown below with NMFS' response.

Comment 1: NMFS received some comments in support of removing the requirement for researchers to obtain written authorization from NMFS to implant or affix archival tags. Commenters supporting the removal of the written authorization requirement stated that the authorization was unnecessary for the application of archival tags on HMS because advancements in tagging techniques have resulted in low mortality rates and that removing the requirement would maximize opportunities to deploy archival tags.

Response: NMFS agrees that researchers no longer need written authorization to implant or affix archival tags. The requirement to receive written authorization for placement of archival tags was implemented in the 1990s to monitor fish mortality, at a time when archival tag technology was fairly new, and most of the archival tags had to be surgically implanted into the fish. The mortality rates associated with surgically implanting such tags into fish was unknown at that time. Currently, researchers primarily use externally affixed archival tags because the data collected from those tags are received via satellite (in other words, you do not need to re-catch the fish in order to collect the data). Furthermore, research has shown negligible mortality rates as a result of implanting or affixing archival tags. Additionally, NMFS believes that allowing researchers the opportunity to place archival tags without written authorization should maximize tagging opportunities for researchers, allowing them to fish at times of the year when NMFS is processing permit applications the months of January and February, and minimize any administrative burden associated with applying for such authorization.

Comment 2: Some commenters opposed removal of the written authorization requirement, stating that the change would increase fishing pressure on HMS, protected, and endangered species. Those individuals felt that the proposed rule would remove the current fishing regulations for protected and endangered species, allowing fishermen the opportunity to

target these species. Some commenters expressed concern that removing the requirement for written authorization would remove accountability for researchers, fishermen, and both state and Federal officials to follow standard scientific and regulatory practices. Commenters also expressed a belief that reducing the administrative burden on NMFS staff was not an appropriate reason to remove the requirement. Commenters further noted that requiring written authorization ensures that the party taking part in the research is qualified or could be given instructional education on handling and tagging techniques.

Response: As described in the proposed rule, after 20 years of use, the mortality rate as a result of placement of archival tags is negligible and most research projects are of relatively limited scope both in terms of the number of individual fish affected and the number of species involved. As such, given the low mortality from placing archival or other tags, the large number of alternative tags available for use by researchers, and the high cost of obtaining an archival tag (approximately \$5,000 per tag), NMFS does not agree that removal of the requirement to obtain written authorization for archival tags would increase fishing pressure on HMS or cause additional mortality. The removal of the requirement to obtain written authorization to place a tag on HMS in itself is not expected to have any impact on protected resources. If researchers are interacting with listed species, they are responsible for obtaining appropriate permit coverage under the Endangered Species Act (ESA) to ensure that any incidental take during research operations is authorized. Additionally, while removal of the requirement to obtain written authorization to place archival tags on HMS would reduce some administrative burden on NMFS staff, the main reduction of administrative burden will be with researchers who would no longer need to apply and wait for written authorization before tagging fish with archival tags. This is a desirable outcome because researchers would have more flexibility to tag in different areas and

on a greater variety of species during the times they otherwise would be waiting for NMFS to issue a permit.

In regard to continuing to ensure accountability of scientists and other researchers, most HMS research activities would likely still require authorization under an exempted fishing permit (EFP) or scientific research permit (SRP) because other research activities, such as sampling gear or possession of HMS, continue to require authorization (see 50 CFR 635.32). While researchers could place archival tags without written authorization, other research activities would likely still need written authorization. Furthermore, there is no evidence or apparent incentive for researchers or fishermen to circumvent established scientific or regulatory practices when tagging HMS or reporting recaptures.

Comment 3: Several commenters expressed concern that the proposed rule could potentially be abused by any fisherman who wishes to apply tags, and that the level of enforcement on the responsible application of tags would be reduced.

Response: This final rule is designed to reduce regulatory burdens on researchers and is not expected to have impacts on fishermen beyond the requirement to return the archival tag. To our knowledge, no Atlantic HMS fishermen have ever applied archival tags without collaboration with researchers, nor are they likely to do so because archival tags are costly and the data they provide require scientific expertise and infrastructure to analyze and interpret. Neither commercial fishermen nor recreational fishermen are likely to realize benefits from buying and then applying archival tags and releasing HMS. Both recreational and commercial fishermen have been assisting scientists for years by placing conventional tags on HMS that are released, and returning tags and providing information on tagged HMS that are landed.

Comment 4: Commenters stated that NMFS should continue to encourage but not require the return of archival tags to researchers or NMFS and that the regulations requiring tag returns are not needed since the fishermen understand the importance and value of archival tags.

Response: NMFS will continue to encourage the return of any archival or other tags to researchers or NMFS by noting the importance of tag return in the compliance guides and other outreach materials. Furthermore, researchers note in their comments that many fishermen already voluntarily return archival tags to researchers. Monetary rewards are often offered by researchers for the return of their tags, but many fishermen also acknowledge the scientific value of the data provided by archival tags, and are generally supportive of fish-tagging research. While NMFS is removing the non-surgically implanted archival tag landing report requirement under this final rule, the regulations will still require fishermen to return surgically implanted archival tags from recaptured HMS to the appropriate research entity or NMFS.

Comment 5: NMFS should not remove the archival tag landing report requirement, as it would reduce fishermen accountability allowing them to capture HMS without documentation and could have a negative impact on scientific data. Removing the landing report could potentially result in illegal fishing practices under the blanket of “scientific research.”

Response: Removing the requirement to report landing a tagged HMS to NMFS is not expected to impact reporting rates of these tags between fishermen and scientists. Fishermen often voluntarily return tags and related information about the recaptured HMS directly to the researchers identified on a tag, and researchers have not raised any concerns that they may be losing scientific data due to non-reporting by fishermen. While NMFS will continue to encourage reporting and returns of archival tags from fishermen to researchers by noting the

importance of tag return in the compliance guides and other outreach materials, there is no need to maintain a separate archival tag landing report requirement.

Comment 6: NMFS requested and received various comments regarding whether fishermen who catch an HMS with an externally affixed archival tag should be required to release the fish if it is otherwise legal to land. Some scientists noted that the return of archival tags from recaptured HMS can be very valuable to researchers because the physical recovery of such tags can provide much more data than non-returned tags, and these tags can often be redeployed on other fish. Other commenters stated that fish that are tagged with an archival tag should be allowed to be landed regardless of the regulations; fish should be allowed to be landed if they are legal species within retention sizes; fish that have an internally implanted archival tag should be allowed to be landed as long as the tag is returned to the researcher or NMFS; sharks with externally affixed tags should be released; and all tagged fish which are caught should be released.

Response: After reviewing these comments, NMFS has determined that a requirement for fishermen to release any HMS with an externally affixed archival tag is not warranted at this time. Under this final rule, fishermen may continue to retain any otherwise legal HMS, including those with externally affixed archival tags. Fishermen may also continue to retain HMS with an internally implanted archival tag regardless of any regulatory prohibition, as long as the tag is returned to the appropriate research entity or NMFS. If fishermen were prohibited from retaining an HMS because it had an externally affixed archival tag, it could negatively affect tag return rates and cooperation with researchers. In most cases, researchers state that they attach greater value to the potential for returned tags than to the mandatory release of tagged fish and the continued collection of information from having the tagged fish in the water. This is

particularly true since many externally affixed archival tags only collect data for a limited period of time (e.g., 1 week, 1 month, 6 months, etc.), which is set by the researcher before placing the tag.

Comment 7: Several commenters requested a public hearing for clarification of the proposed rule and to allow the scientific and environmental community the chance to provide information and suggest alternatives to the proposed rule.

Response: The purpose and scope of this final rule, which is largely administrative in nature, was fully described in the proposed rule. NMFS announced the proposed rule via email notification and posting on the Atlantic HMS website when it published in the **Federal Register**, and provided a 30-day public comment period. The majority of the commenters who requested a public hearing were concerned about the impact of the removal of a written authorization on the tagging of protected or endangered species. As described above, however, this final rule does not address the tagging of protected or endangered species nor would it affect associated regulations and requirements applicable to listed species or increase interactions with such species. As such, because their concerns were so far outside the scope of the rulemaking, we determined that a public hearing was not necessary and that a written response to comments would be adequate and appropriate.

Comment 8: NMFS received a public comment regarding the effects of tagging on HMS (specifically sharks). The commenter highlighted issues surrounding infection and tag biofouling, and argued that NMFS should not implement the proposed measures because they would result in more harmful tagging of HMS.

Response: While available research indicates that any kind of fish tagging, including the application of archival tags, could result in physiological stress, injury, infection, and other

sublethal impacts, the majority of scientific evidence indicates that tag-induced mortality of HMS is negligible and is not a threat to HMS populations. An archival tag is one type of tag placed on HMS, and is a scientific tool that has been used to vastly improve understanding of HMS movements, habitat use, exposure to anthropogenic impacts, post-release mortality rates, and other aspects of biology. Archival tagging studies have improved NMFS' ability to conserve and sustainably manage HMS populations, and NMFS encourages the responsible continued use of all tags, including archival tags.

Classification

The NMFS Assistant Administrator has determined that the final rule is consistent with the 2006 Consolidated HMS FMP and its amendments, the Magnuson-Stevens Act, and other applicable laws.

This final 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 during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

List of Subjects in 50 CFR Part 635

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

Dated: August 15, 2016

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS amends 50 CFR part 635 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, as specified in § 635.33, or fail to report the fish, as specified in § 635.5.

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