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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 635**

**[Docket No. 160531477-6999-02]**

**RIN 0648-BG10**

**Atlantic Highly Migratory Species; Removal of Vessel Upgrade Restrictions for Swordfish Directed Limited Access and Atlantic Tunas Longline Category Permits**

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

**ACTION:** Final rule.

**SUMMARY:** This final rule removes vessel upgrading restrictions for vessels issued swordfish directed and Atlantic tunas Longline category limited access permits (LAPs). Currently, regulations allow for upgrading vessels or transferring permits to another vessel only if the vessel upgrade or permit transfer results in an increase of no more than 35 percent in length overall, gross registered tonnage, and net tonnage, as measured relative to the baseline vessel specifications (i.e., the specifications of the vessel first issued a Highly Migratory Species (HMS) LAP). This final rule eliminates these restrictions on upgrades and permit transfers. This action affects vessel owners issued swordfish directed and Atlantic tunas Longline category LAPs and fishing in the Atlantic Ocean, including the Gulf of Mexico and Caribbean Sea.

**DATES:** This rule is effective on December 23, 2016.

**ADDRESSES:** Other documents relevant to this final rule are available from the Atlantic HMS Management Division website at <http://www.nmfs.noaa.gov/sfa/hms/> or by contacting Steve Durkee by phone at 202-670-6637 or Rick Pearson by phone at 727-824-5399.

**FOR FURTHER INFORMATION CONTACT:** Steve Durkee by phone at 202-670-6637 or Rick Pearson by phone at 727-824-5399.

**SUPPLEMENTARY INFORMATION:** The U.S. Atlantic swordfish and tuna fisheries 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 the 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 recommendations of the International Commission for the Conservation of Atlantic Tunas (ICCAT).

## **Background**

This final rule removes vessel upgrading restrictions for vessels issued swordfish directed and Atlantic tunas Longline category LAPs. A brief summary of the background of this final rule is provided below. The details were described in the proposed rule for this action (81 FR 48731, July 26, 2016) and are not repeated here. Additional information regarding Atlantic HMS management can be found in the 2006 Consolidated Atlantic HMS FMP and its amendments, the annual HMS Stock Assessment and Fishery Evaluation (SAFE) Reports, and online at <http://www.nmfs.noaa.gov/sfa/hms/>. The comments received on the proposed rule for this action, and NMFS' responses to those comments, are summarized below in the section labeled "Response to Comments."

In 1999, NMFS issued initial LAPs in the Atlantic swordfish and shark fisheries (64 FR 29090, March 28, 1999). To be eligible to fish with pelagic longline gear, a vessel had to be issued a swordfish directed or incidental LAP, a shark directed or incidental LAP, and an Atlantic tunas Longline category permit. After initial issuance of these permits, no new permits were issued by NMFS, but permits could be transferred to other vessels. Swordfish and shark directed LAPs included restrictions on vessel upgrading and permit transfers. Vessel upgrades and permit transfers were allowed only if the upgrade or permit transfer to another vessel did not result in an increase in horsepower of more than 20 percent or an increase of more than 10 percent in length overall, gross registered tonnage, or net tonnage relative to the respective specifications of the first vessel issued the initial LAP (the baseline vessel). Additionally, vessels could only be upgraded one time. These vessel upgrading restrictions were put into place to limit capacity in the swordfish fishery. Incidental LAPs for these species did not have vessel upgrading restrictions. Upgrading restrictions for Atlantic tunas Longline category LAPs were not explicitly implemented in the 1999 rule. However, as a practical effect, Atlantic tunas Longline category LAPs were limited by the same upgrading restrictions as the swordfish and shark directed permits due to the requirement to hold all three permits when fishing with pelagic longline gear.

On June 7, 2007 (72 FR 31688), NMFS issued a final rule amending the HMS fishery regulations to provide additional opportunities for U.S. vessels to more fully utilize the North Atlantic swordfish quota, recognizing the improved status of the species. The 2007 action modified limited access vessel upgrading and permit transfer restrictions for vessels that were concurrently issued, or were eligible to renew, directed or incidental swordfish, directed or incidental shark, and Atlantic tunas Longline category LAPs (*i.e.*, vessels that were eligible to

fish with pelagic longline gear). The rule also clarified that Atlantic tunas Longline category LAPs were subject to the same vessel upgrade restrictions as swordfish and shark directed LAPs. These measures allowed eligible vessel owners to upgrade their vessels by 35 percent in size (length overall, gross registered tonnage, and net tonnage) relative to the specifications of the baseline vessel, and removed upgrade limits on horsepower. Additionally, these permits could be upgraded more than once, provided that the new maximum upgrade limits were not exceeded.

Since implementing the vessel upgrade requirements in 1999 and modifying them in 2007, several important things have changed in the Atlantic HMS pelagic longline fishery. As described in the proposed rule for this action, NMFS was concerned about ensuring that pelagic longline fishing effort and fleet capacity were commensurate with the available swordfish quota in 1999. The vessel upgrading restrictions were part of NMFS' management strategy to reduce fleet capacity. Since then, fleet capacity has been reduced through the successful application of the initial LAP qualification criteria and attrition over time. In 1998, prior to the implementation of upgrade restrictions, 233 pelagic longline vessels among the 2,000 permit holders landed swordfish and thus were considered "active." The number of such vessels dropped to a low of 102 in 2006 and has since remained between 109 and 122 vessels. Similarly, as of December 30, 1999, approximately 451 directed and incidental swordfish LAPs had been issued. By 2015, permit numbers had been reduced to 260 directed and incidental swordfish LAPs. Permit numbers are expected to remain at approximately these levels because no new LAPs are being issued.

Other requirements implemented since 1999, such as those designed to reduce bycatch in the pelagic longline fishery (e.g., closed areas, bait requirements, individual bluefin tuna quotas, and gear restrictions), have also limited fishing effort. The directed North Atlantic swordfish

quota has not been exceeded in almost 20 years and, in fact, has been underharvested for a number of years.

During this same time period, the stock status of North Atlantic swordfish has significantly improved. In 2009, ICCAT declared that the stock had been fully rebuilt. Using domestic stock status thresholds, NMFS has also declared that the North Atlantic swordfish stock is not overfished and that overfishing is not occurring.

In addition to limiting capacity in the HMS pelagic longline fishery, a secondary goal for implementing the specific swordfish directed and Atlantic tunas Longline vessel upgrade limits adopted in 1999 was to be consistent with similar regulations previously established by the New England and Mid-Atlantic Fishery Management Councils (Councils). In August 2015, the Councils removed gross registered and net tonnage limits (80 FR 51754) so that only length and horsepower limits remain in effect. Because this HMS action will remove all upgrade restrictions for vessels issued swordfish directed and Atlantic tunas Longline category LAPs, only the Council regulations will limit vessel upgrading for vessels issued LAPs for both Council-managed species and HMS. Thus, there will be no conflict between Council and HMS vessel upgrade restrictions. This action will simplify compliance for dually permitted vessels and provide greater flexibility for HMS permitted vessels.

Because the overall reduction in pelagic longline fleet capacity, in combination with the totality of effort controls implemented since 1999, has sufficiently limited the Atlantic HMS pelagic longline fishery's capacity, vessel upgrading and related permit transfer restrictions are no longer necessary at this time. Therefore, this final rule removes all upgrading restrictions for vessels issued swordfish directed and Atlantic tunas Longline category LAPs. Although limited in scope, this action eases a barrier to entry in the pelagic longline fishery, facilitates LAP

transfers, provides increased business flexibility, and helps vessel owners address safety issues. Eliminating vessel upgrading restrictions will have short- and long-term minor beneficial socioeconomic impacts, since it will allow fishermen to buy, sell, or transfer swordfish directed and Atlantic tunas Longline category LAPs without concerns about exceeding the maximum upgrade limit for the permits. It will also allow vessel owners to transfer their permits to newer vessels, which could have greater capacity, and address safety issues that exist with older vessels.

Removing the upgrading restrictions is not expected to affect the overall number of swordfish and tunas being landed by vessels, as these amounts are determined by established quotas and effort controls (including, for example, individual vessel quotas for bluefin tuna), not the size of the vessel. Thus, this action is expected to have no ecological impacts beyond those previously analyzed regarding the quotas and existing conservation and management measures, and will not result in additional interactions with protected resources, given the other restrictions on the Atlantic HMS pelagic longline fishery.

### **Response to Comments**

The comment period for the proposed rule closed on September 26, 2016. NMFS received three written comments, which can be found at <https://www.regulations.gov/> by searching for NOAA-NMFS-2016-0087. Comments were also received from the Atlantic HMS Advisory Panel during its meeting on September 7, 2016. No comments were received during a conference call/webinar held on August 23, 2016. NMFS received comments in support of, and one opposed to, removing vessel upgrade restrictions for vessels issued Atlantic tunas Longline category and swordfish directed permits. A summary of the comments received during the public comment period is provided below along with NMFS's responses.

*Comment 1:* A commenter opposed to removing HMS pelagic longline vessel upgrade restrictions stated that the proposal will enable permits to be transferred to larger vessels that could catch more fish. The commenter also wrote that there should be a complete ban on catching swordfish because the species is virtually extinct.

*Response:* North Atlantic swordfish are not virtually extinct. In 2009, ICCAT declared that the stock was fully rebuilt, and it has remained so ever since. Using domestic stock status thresholds, NMFS has also declared that the north Atlantic swordfish stock is not overfished and that overfishing is not occurring. The most recent stock assessment, conducted in 2013, indicates that the stock is not overfished ( $B_{2011}/B_{MSY} = 1.14$ ) and overfishing is not occurring ( $F_{2011}/F_{MSY} = 0.82$ ). North Atlantic swordfish quotas are set by ICCAT considering the stock's status and to ensure that the stock is sustainably harvested and to prevent overfishing from occurring. The United States adheres to its ICCAT-designated quota and, in fact, has underharvested the quota for the past several years. Numerous conservation and management measures remain in place in addition to the quota limitations to ensure that the stock is protected. The vessel upgrading restriction removal does not affect the amount of fish caught, nor does it relieve other restrictions that ensure effective conservation and management of this rebuilt fishery. Thus, the commenter's concerns about the stock being "virtually extinct" are unfounded and do not warrant modification of the proposed action.

While removing the upgrade restrictions for vessels issued swordfish directed and Atlantic tunas Longline category permits could facilitate the transfer of permits to larger vessels which could catch more swordfish, overall compliance with the quota in this fishery ensures that the stock is not negatively affected by fishing effort. North Atlantic swordfish landings are regulated by semi-annual quotas, and the fishery can be adjusted or closed as those quotas are

approached. Similarly, landings of most tunas and pelagic sharks are regulated by quotas which can be adjusted, as necessary, to remain within the quotas.

*Comment 2:* A supporter of the proposal to remove upgrade restrictions for vessels issued Atlantic tunas Longline category and swordfish directed permits stated that when the upgrade restrictions were first implemented, the commercial swordfish industry was at a peak in terms of both participation and landings. The commenter stated that the swordfish fleet is currently in decline due to increased operating costs, competition from foreign product, and regulatory restrictions, despite a fully recovered north Atlantic swordfish stock; that NMFS should pursue management measures to allow new entrants into the fishery and to expand the production capabilities of the existing fleet; and that eliminating vessel upgrading restrictions is a small step toward encouraging new entrants in the pelagic longline fishery to keep the fleet operative.

*Response:* Although this final action is limited in scope, it will ease a barrier to entry in the pelagic longline fishery, facilitate LAP transfers, and provide increased business flexibility. As discussed above, both the North Atlantic swordfish stock status and the pelagic longline fishery have changed significantly since 1999. The vessel upgrading restrictions were part of NMFS' initial management strategy to reduce fleet capacity. Since then, capacity has been reduced through the successful application of the initial LAP qualification criteria and attrition over time. Both the number of swordfish LAPs and the number of pelagic longline vessels actively landing swordfish have declined by approximately 50 percent since 1999. As a result of these and other management measures, swordfish are no longer overfished and overfishing is not occurring. The overall reduction in fleet capacity, in combination with the totality of effort controls implemented since 1999, has sufficiently limited the Atlantic HMS pelagic longline

fishery's capacity. Thus, vessel upgrading and related permit transfer restrictions are no longer necessary or relevant at this time. Adverse impacts on stock status can be avoided because swordfish landings are regulated by semi-annual quotas, and the fishery can be adjusted or closed as those quotas are approached. Similarly, landings of most tunas and pelagic sharks are regulated by quotas which can be adjusted, as necessary, to remain within the quotas.

*Comment 3:* When the upgrade restrictions were first implemented, vessel observers were not considered. The requirement to carry observers requires more space onboard a vessel, thus there is sometimes a need to increase the size of vessels more than might be allowed by the existing upgrade restrictions.

*Response:* Pelagic longline vessels are required to carry observers if selected by NMFS. Removing the upgrade restrictions for vessels issued swordfish directed and Atlantic tunas Longline category permits could allow owners to modify their vessels or purchase newer, larger vessels that would better accommodate these observers.

*Comment 4:* A commenter in support of the proposed action indicated that fishing vessels and fishing equipment needs improvement from time to time and that vessel upgrading restrictions have sometimes restricted that ability.

*Response:* NMFS agrees. Removing upgrade restrictions for vessels issued swordfish directed and Atlantic tunas Longline category vessels could facilitate improvements in safety, working conditions, and overall living conditions for both crew members and fishery observers while onboard. This final rule will allow pelagic longline vessel owners to make necessary modifications to their vessels without restrictions on vessel length and tonnage.

*Comment 5:* A commenter indicated that it has been almost impossible to replace their older engine with a similar engine due to the horsepower upgrade limits.

*Response:* Horsepower upgrade limits for most HMS pelagic longline vessels were removed in a final rule that published on June 7, 2007 (72 FR 31688).

*Comment 6:* NMFS should remove vessel upgrade restrictions on swordfish handgear LAPs in order to convert permits that are currently useless due to low horsepower upgrade limits and allow them to be used because handgear vessel owners often prefer high horsepower ratings.

*Response:* NMFS has previously considered this request in a final rule that published on June 7, 2007 (72 FR 31688) and will continue to do so. The swordfish handgear LAP authorizes the deployment of buoy gear, and buoy gear may be deployed in areas including the East Florida Coast pelagic longline closed area. This area contains oceanographic features that make it biologically unique. It provides important juvenile swordfish habitat, and is essentially a narrow migratory corridor containing high concentrations of swordfish located in close proximity to high concentrations of people who may fish for them. As stated in 2007, horsepower upgrade restrictions can limit the number of swordfish handgear LAPs that are issued because newer handgear vessels have very high horsepower ratings. Public comment indicated a concern that removing vessel upgrade restrictions on swordfish handgear LAPs could result in increased numbers of fishermen in the area, and the potential for crowding of fishermen, which could lead to potential fishing gear and user conflicts. Those concerns remain valid and NMFS decided not to pursue similar adjustments in the swordfish handgear fishery at this time.

*Comment 7:* Some fishermen might obtain swordfish directed permits because those permits could be used to fish with handgear (including buoy gear). This final action could provide a preliminary preview of lifting the vessel upgrade restrictions on swordfish handgear permits.

*Response:* Vessels in the swordfish buoy gear fishery are generally small. NMFS believes that the current vessel size restrictions (for maximum length and tonnage) applicable to pelagic longline vessels issued swordfish directed and Atlantic tunas Longline category LAPs have not been a limiting factor in the number of vessels that use buoy gear. Rather, commenters indicated that buoy gear vessel owners are primarily limited by horsepower upgrade restrictions. Because the horsepower upgrade restrictions have already been removed from most swordfish directed limited access and Atlantic tunas Longline category LAPs (72 FR 31688) and because vessels owners who wish to enter the buoy gear fishery and whose vessels have large horsepower engines have already obtained permits and entered the fishery, it is unlikely that this action will result in significant increases in persons obtaining swordfish directed and Atlantic tunas Longline category LAPs to fish with buoy gear.

*Comment 8:* NMFS should remove vessel upgrade restrictions on swordfish and shark incidental LAPs, and shark directed LAPs.

*Response:* Swordfish and shark incidental LAPs and shark directed LAPs do not have vessel upgrade restrictions.

### **Changes from the Proposed Rule**

There are no changes from the proposed rule.

### **Classification**

The NMFS Assistant Administrator has determined that this final action is necessary for the conservation and management of the Atlantic HMS fisheries, and that it is consistent with the 2006 Consolidated HMS FMP and its amendments, other provisions of the Magnuson-Stevens Act, ATCA, and other applicable laws.

This final action has been determined to be categorically excluded from the requirement

to prepare an environmental assessment in accordance with NOAA Administrative Order 216-6. A memorandum for the file has been prepared that sets forth the decision to use a categorical exclusion because the rule would implement minor changes to the regulations whose effects have already been analyzed, and additional effects are not expected. This action will have no additional effects that were not already analyzed, and the action is not precedent-setting or controversial. It would not have a significant effect, individually or cumulatively, on the human environment.

This final rule has been determined to be not significant for 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.

NMFS has determined that this final rule will have no effects on any coastal use or resource, and a negative determination pursuant to 15 CFR 930.35 is not required. Therefore, pursuant to 15 CFR 930.33(a)(2), coordination with appropriate state agencies under section 307 of the Coastal Zone Management Act is not required. No changes to the human environment are anticipated because removing the vessel upgrading restrictions would not affect the number of swordfish and tunas being landed by vessels, as these amounts are determined by the established quotas and effort controls, not the size of the vessel.

#### **List of Subjects in 50 CFR Part 635**

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

Dated: November 17, 2016.

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Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs,  
National Marine Fisheries Service.

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

**PART 635-ATLANTIC HIGHLY MIGRATORY SPECIES**

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

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

2. In § 635.4, revise paragraphs (1)(2)(i), (1)(2)(ii) introductory text, (1)(2)(ii)(B), and (1)(2)(ii)(C) to read as follows:

**§ 635.4 Permits and fees.**

\* \* \* \* \*

(1) \* \* \*

(2) \* \* \*

(i) Subject to the restrictions on upgrading the harvesting capacity of permitted vessels in paragraph (1)(2)(ii) of this section, as applicable, and to the limitations on ownership of permitted vessels in paragraph (1)(2)(iii) of this section, an owner may transfer a shark or swordfish LAP or

an Atlantic Tunas Longline category permit to another vessel that he or she owns or to another person. Directed handgear LAPs for swordfish may be transferred to another vessel or to another person but only for use with handgear and subject to the upgrading restrictions in paragraph (1)(2)(ii) of this section and the limitations on ownership of permitted vessels in paragraph (1)(2)(iii) of this section. Shark directed and incidental LAPs, swordfish directed and incidental LAPs, and Atlantic Tunas Longline category permits are not subject to the upgrading requirements specified in paragraph (1)(2)(ii) of this section. Shark and swordfish incidental LAPs are not subject to the ownership requirements specified in paragraph (1)(2)(iii) of this section.

(ii) An owner may upgrade a vessel with a swordfish handgear LAP, or transfer such permit to another vessel or to another person, and be eligible to retain or renew such permit only if the upgrade or transfer does not result in an increase in horsepower of more than 20 percent or an increase of more than 10 percent in length overall, gross registered tonnage, or net tonnage from the vessel baseline specifications.

\* \* \* \* \*

(B) Subsequent to the issuance of a swordfish handgear limited access permit, the vessel's horsepower may be increased, relative to the baseline specifications of the vessel initially issued the LAP, through refitting, replacement, or transfer. Such an increase may not exceed 20 percent of the baseline specifications of the vessel initially issued the LAP.

(C) Subsequent to the issuance of a swordfish handgear limited access permit, the vessel's length overall, gross registered tonnage, and net tonnage may be increased, relative to the baseline specifications of the vessel initially issued the LAP, through refitting, replacement, or transfer. An increase in any of these three specifications of vessel size may not exceed 10 percent

of the baseline specifications of the vessel initially issued the LAP. This type of upgrade may be done separately from an engine horsepower upgrade.

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