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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 300**

**[Docket No. 180209155-8589-02]**

**RIN 0648-BH77**

**International Fisheries; Western and Central Pacific Fisheries for Highly Migratory Species; Fishing Limits in Purse Seine and Longline Fisheries, Restrictions on the Use of Fish Aggregating Devices in Purse Seine Fisheries, and Transshipment Prohibitions**

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

**ACTION:** Final rule.

**SUMMARY:** Under authority of the Western and Central Pacific Fisheries Convention Implementation Act (WCPFC Implementation Act), NMFS issues this final rule that establishes limits on fishing effort by U.S. purse seine vessels in the U.S. exclusive economic zone and on the high seas between the latitudes of 20° N and 20° S in the area of application of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Convention); restrictions regarding the use of fish aggregating devices (FADs) for U.S. purse seine fishing vessels; limits on the catches of bigeye tuna by U.S. longline vessels in the Convention area; prohibitions on U.S. vessels used to fish for highly migratory species from engaging in transshipment in a particular area of the high seas (the Eastern High

Seas Special Management Area or EHSSMA); and removal of existing reporting requirements for vessels transiting the EHSSMA. The rule also makes corrections to outdated cross references in existing regulatory text. This action is necessary to satisfy the obligations of the United States under the Convention, to which it is a Contracting Party.

**DATES:** This rule is effective on [*insert date of publication in the FEDERAL REGISTER*], except for the revised reporting requirements in 50 CFR 300.218(g), which contains information collection requirements that have not been approved by the Office of Management and Budget (OMB). NOAA will publish a document in the **Federal Register** announcing the effective date for the revised reporting requirements upon OMB approval.

*Compliance dates:* The compliance date for the amendment to 50 CFR 300.223(b), the FAD prohibition period, is [*insert date of publication in the FEDERAL REGISTER*]. The compliance date for the amendment to 50 CFR 300.225, the EHSSMA transshipment prohibition, is January 1, 2019.

**ADDRESSES:** Copies of supporting documents prepared for this final rule, including the regulatory impact review (RIR), the 2015 programmatic environmental assessment (PEA), the 2012 environmental assessment, and supplemental information report (SIR) prepared for National Environmental Policy Act (NEPA) purposes, as well as the proposed rule (83 FR 21748; May 10, 2018), are available via the Federal e-rulemaking Portal, at [www.regulations.gov](http://www.regulations.gov) (search for Docket ID NOAA-NMFS-2018-0050). Those documents are also available from NMFS at the following address:

Michael D. Tosatto, Regional Administrator, NMFS, Pacific Islands Regional Office (PIRO), 1845 Wasp Blvd., Building 176, Honolulu, HI 96818.

A final regulatory flexibility analysis (FRFA) prepared under authority of the Regulatory Flexibility Act is included in the Classification section of the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** Rini Ghosh, NMFS PIRO, 808-725-5033.

**SUPPLEMENTARY INFORMATION:** On May 10, 2018, NMFS published a proposed rule in the **Federal Register** (83 FR 21748). The proposed rule was open for public comment until May 25, 2018.

This final rule is issued under the authority of the Western and Central Pacific Fisheries Convention Implementation Act (WCPFC Implementation Act) (16 U.S.C. 6901 *et seq.*), which 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 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 Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC or Commission). The WCPFC Implementation Act further provides that the Secretary of Commerce shall ensure consistency, to the extent practicable, of fishery management programs administered under the WCPFC Implementation Act and the Magnuson-Stevens Fishery Conservation and Management Act (MSA; 16 U.S.C. 1801 *et seq.*), as well as other specific laws (see 16 U.S.C. 6905(b)). The Secretary of Commerce

has delegated the authority to promulgate regulations under the WCPFC Implementation Act to NMFS. A map showing the boundaries of the area of application of the Convention (Convention Area), which comprises the majority of the western and central Pacific Ocean (WCPO), can be found on the WCPFC Web site at:

*www.wcpfc.int/doc/convention-area-map.*

This final rule implements specific provisions of two recent Commission decisions: Conservation and Management Measure (CMM) 2017-01, “Conservation and Management Measure for Bigeye, Yellowfin, and Skipjack tuna in the Western and Central Pacific Ocean;” and CMM 2016-02, “Conservation and Management Measures for Eastern High Seas Pocket Special Management Area.” The rule also makes corrections to outdated cross references in existing regulatory text. The preamble to the proposed rule provides background information on the Convention and the Commission, the provisions that are being implemented in this rule, and the basis for the proposed regulations, which is not repeated here.

### **The Action**

The elements of the final rule are detailed below. The administrative changes to correct outdated references in existing regulatory text are described at the end.

Some of the provisions in CMM 2017-01 apply only to calendar year 2018, while others are applicable until February 10, 2021. Because the Commission likely will continue to implement similar management measures regarding FADs and longline bigeye tuna catch limits beyond 2018, and to avoid a lapse in the management of the fishery, most of the elements of CMM 2017-01 in the final rule will remain effective until

they are replaced or amended. However, the elements implementing the purse seine effort limits will be effective for 2018 only, as explained further below.

### *Longline Bigeye Tuna Catch Limits*

Under the final rule, there is a calendar year catch limit of 3,554 metric tons (mt) of bigeye tuna for U.S. longline vessels fishing in the Convention Area that would remain effective until replaced. In the proposed rule, NMFS stated that it was possible that the limit for 2018 would be adjusted downward to account for any overage of the 2017 limit. However, NMFS has confirmed that the 2017 limit was not exceeded so no adjustment of the 2018 limit is needed.

The calendar year longline bigeye tuna catch limit will apply only to U.S.-flagged longline vessels operating as part of the U.S. longline fisheries. The limit will not apply to U.S. longline vessels operating as part of the longline fisheries of American Samoa, CNMI, or Guam. Existing regulations at 50 CFR 300.224(b), (c), and (d) detail the manner in which longline-caught bigeye tuna is attributed among the fisheries of the United States and the U.S. Participating Territories.

Consistent with the basis for the limits prescribed in CMM 2017-01 and with regulations issued by NMFS to implement bigeye tuna catch limits in U.S. longline fisheries as described below, the catch limit is measured in terms of retained catches—that is, bigeye tuna that are caught by longline gear and retained on board the vessel.

#### *1. Announcement of the Limit Being Reached*

As set forth under the existing regulations at 50 CFR 300.224(e), if NMFS determines that the limit is expected to be reached in a calendar year, NMFS will publish

a document in the **Federal Register** to announce specific fishing restrictions that will be effective from the date the limit is expected to be reached until the end of the calendar year. NMFS will publish notification of the restrictions at least 7 calendar days before the effective date to provide vessel owners and operators with advance notice. Periodic forecasts of the date the limit is expected to be reached will be made available to the public, such as by posting on a website, to help vessel owners and operators plan for the possibility of the limit being reached.

2. *Restrictions after the Limit is Reached*

As set forth under the existing regulations at 50 CFR 300.224(f), if the limit is reached, the restrictions that will be in effect will include the following:

a. *Retain on board, transship, or land bigeye tuna:* Starting on the effective date of the restrictions and extending through December 31 of the given calendar year, it will 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 as follows:

First, any bigeye tuna already on board a fishing vessel upon the effective date of the restrictions can be retained on board, transshipped, and/or landed, provided that they are landed within 14 days after the restrictions become effective. A vessel that had declared to NMFS pursuant to 50 CFR 665.803(a) that the current trip type is shallow-setting is not subject to this 14-day landing restriction, so these vessels will be able to land bigeye tuna more than 14 days after the restrictions become effective.

Second, bigeye tuna captured by longline gear can be retained on board, transshipped, and/or landed if they are caught by a fishing vessel registered for use under a valid American Samoa Longline Limited Access Permit, or if they are landed in

American Samoa, Guam, or CNMI. However, the bigeye tuna must not be caught in the portion of the U.S. EEZ surrounding the Hawaiian Archipelago, and must be landed by a U.S. fishing vessel operated in compliance with a valid permit issued under 50 CFR 660.707 or 665.801.

Third, bigeye tuna captured by longline gear can be retained on board, transshipped, and/or landed if they are caught by a vessel that is included in a specified fishing agreement under 50 CFR 665.819(d), in accordance with 50 CFR 300.224(f)(iv).

*b. Transshipment of bigeye tuna to certain vessels:* Starting on the effective date of the restrictions and extending through December 31 of the calendar year, it will 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 665.801.

*c. Fishing inside and outside the Convention Area:* To help ensure compliance with the restrictions related to bigeye tuna caught by longline gear in the Convention Area, two additional, related prohibitions would be in effect starting on the effective date of the restrictions and extending through December 31 of the calendar year. First, vessels are prohibited from fishing 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 still must land any bigeye tuna taken in 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 enters the Convention Area at any time during the same fishing trip, the longline gear on the fishing vessel must be stowed in a

manner so as not to be readily available for fishing while the vessel is in the Convention Area; 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. These two prohibitions do not apply to the following vessels: (1) vessels on declared shallow-setting trips pursuant to 50 CFR 665.803(a); and (2) vessels operating for the purposes of this rule as part of the longline fisheries of American Samoa, Guam, or the CNMI. This second group includes vessels registered for use under valid American Samoa Longline Limited Access Permits and vessels landing their bigeye tuna catch in one of the three U.S. Participating Territories, so long as these vessels conduct fishing activities in accordance with the conditions described above, and vessels included in a specified fishing agreement under 50 CFR 665.819(d), in accordance with 50 CFR 300.224(f)(iv).

#### *FAD Restrictions*

There is a FAD prohibition period from July through September in each calendar year in the Convention Area between the latitudes of 20° N and 20° S (inclusive of the EEZs and high seas in the Convention Area), and an additional two-month FAD prohibition period just on the high seas in that area in November and December in each calendar year. Under CMM 2017-01, the United States can choose to implement the additional two-month FAD prohibition period in either April and May or November and December. As stated in the preamble to the proposed rule, based on the expected economic impacts on U.S. fishing operations and the nation as a whole, and expected environmental and other effects, NMFS expects that a high seas FAD prohibition period

in November and December may be somewhat more cost-effective than a FAD prohibition period in April and May. NMFS specifically sought public comment on which option is more appropriate. Four comment letters were received in support of implementing the additional high seas FAD prohibition period in November and December, and one comments letter was received requesting that consideration be given to having the additional prohibition period take place in April and May in future years, as detailed in the comment summary and response section below.

As currently defined in 50 CFR 300.211, a FAD is “any artificial or natural floating object, whether anchored or not and whether situated at the water surface or not, that is capable of aggregating fish, as well as any object used for that purpose that is situated on board a vessel or otherwise out of the water. The definition of FAD does not include a vessel.” Under this final rule, the regulatory definition of a FAD would not change. Although the definition of a FAD does not include a vessel, the restrictions during the FAD prohibition periods include certain activities related to fish that have aggregated in association with a vessel, or drawn by a vessel, as described below.

The prohibitions applicable to the FAD-related measures are in existing regulations at 50 CFR 300.223(b)(1)(i)-(v). Specifically, during the July-September FAD prohibition periods in each calendar year, and on the high seas in November and December, owners, operators, and crew of fishing vessels of the United States equipped with purse seine gear shall not do any of the following activities in the Convention Area in the area between 20° N latitude and 20° S latitude:

- 1) Set a purse seine around a FAD or within one nautical mile of a FAD;

2) Set a purse seine in a manner intended to capture fish that have aggregated in association with a FAD or a vessel, such as by setting the purse seine in an area from which a FAD or a vessel has been moved or removed within the previous eight hours, setting the purse seine in an area in which a FAD has been inspected or handled within the previous eight hours, or setting the purse seine in an area into which fish were drawn by a vessel from the vicinity of a FAD or a vessel;

3) Deploy a FAD into the water;

4) Repair, clean, maintain, or otherwise service a FAD, including any electronic equipment used in association with a FAD, in the water or on a vessel while at sea, except that a FAD may be inspected and handled as needed to identify the FAD, identify and release incidentally captured animals, un-foul fishing gear, or prevent damage to property or risk to human safety; and a FAD may be removed from the water and if removed may be cleaned, provided that it is not returned to the water; and

5) From a purse seine vessel or any associated skiffs, other watercraft or equipment, submerge lights under water; suspend or hang lights over the side of the purse seine vessel, skiff, watercraft or equipment, or direct or use lights in a manner other than as needed to illuminate the deck of the purse seine vessel or associated skiffs, watercraft or equipment, to comply with navigational requirements, and to ensure the health and safety of the crew. These prohibitions would not apply during emergencies as needed to prevent human injury or the loss of human life, the loss of the purse seine vessel, skiffs, watercraft or aircraft, or environmental damage.

This final rule revises the introductory paragraph of 50 CFR 300.223(b)(1) to make it clearer that the prohibitions apply only to owners, operators, and crew of purse

seine fishing vessels. NMFS has recently received inquiries as to whether the prohibitions apply to the owners, operators, and crew of vessels using other gear types. This final rule also makes a technical change to 50 CFR 300.223(b)(1)(iv)(B) to clarify that, during the FAD prohibition periods, a FAD may be removed from the water to be repaired, cleaned, maintained, or otherwise serviced, provided that it is not returned to the water. This minor change ensures consistency with the introductory language in that paragraph.

Under the final rule, an active FAD is defined as a FAD that is equipped with a buoy with a clearly marked reference number allowing its identification and equipped with a satellite tracking system to monitor its position, as specified by the definition of instrumented buoy in CMM 2017-01.

CMM 2017-01 specifies that the buoy shall be activated exclusively on board the vessel. In order to implement this provision, the final rule specifies that the tracking equipment must be turned on while the FAD is onboard the vessel and before it is deployed in the water. In accordance with CMM 2017-01, under the final rule, each U.S. purse seine vessel would have a limit of 350 active drifting FADs in the Convention Area at any one time.

#### *Purse Seine Fishing Effort Limits*

In the past, NMFS has implemented the U.S. purse seine fishing effort limits on the high seas and in the U.S. EEZ adopted by the Commission as a single combined limit in a combined area of the high seas and U.S. EEZ termed the Effort Limit Area for Purse Seine or ELAPS. CMM 2017-01 and predecessor conservation and management measures have always treated the high seas and EEZ limits separately, and these decisions do not provide Members, Cooperating Non-members, and Participating

Territories (collectively referred to here as “members”) the express authority to combine them. Nevertheless, NMFS’ reasoning for combining the high seas and U.S. EEZ limits was that it afforded more operational flexibility to the fleet and there were no substantial conservation effects to living marine resources for treating the two areas separately or combined, so long as the overall effort remained equal or less than the sum of the two limits.

For several years the United States has argued that the Commission’s purse seine effort limits are having a disproportionate burden on the economy of American Samoa, particularly fish processing facilities like the one tuna cannery in operation. At the most recent regular session of the Commission in December 2017, the Commission finally took consensus action to lessen that burden. Specifically, Paragraph 29 of CMM 2017-01 allows the United States to address the impact of the Commission limits on American Samoa tuna processing by transferring 100 fishing days from the U.S. EEZ effort limit to the high seas effort limit, and to potentially regain these transferred days in the U.S. EEZ effort limit, provided that limit has been reached by October 1, 2018 (subject to certain landing requirements). This provision is applicable to 2018 only.

In light of CMM 2017-01’s Paragraph 29 allowing the United States to transfer some of its EEZ days to the high seas in 2018, there is a need to reconsider NMFS’ past practice of combining the U.S. high seas limit and U.S. EEZ limit.

CMM 2017-01 specifies separate EEZ (Attachment 1, Table 1) and high seas (Attachment 1, Table 2) purse seine effort limits for the United States. However, previous CMMs on tropical tunas also specified separate EEZ and high seas effort limits for the United States. The new provision included in CMM 2017-01 that was not included in

previous CMMs on tropical tunas is the transfer provision in Paragraph 29. In the past, there was no express constraint on NMFS' ability to transfer the entire U.S. EEZ limit to the high seas limit and the entire high seas limit to the U.S. EEZ limit. However, in light of the new transfer provision in CMM 2017-01 for 2018, specifying clear rules and guidelines for the number and manner a transfer of days between the high seas limit and U.S. EEZ must take place, NMFS believes that the U.S. EEZ and high seas purse seine effort limits for 2018 must be implemented separately. That is, NMFS needs to separately enforce the high seas and U.S. EEZ days in order to ensure that the high seas fishing effort limit - as augmented under paragraph 29 by 100 days from the U.S. EEZ - is not exceeded. Accordingly, NMFS will not combine the two limits under a single ELAPS limit for 2018. This change is consistent with the plain reading of CMM 2017-01, which specifies a separate limit for the U.S. EEZ and a separate limit for the high seas for the United States, as well as the transfer provisions in Paragraph 29.

In the proposed rule, NMFS had stated that all of the elements for CMM 2017-01 would remain in place until they are replaced or modified. However, based on the time-limited application of Paragraph 29, and the comments received regarding the purse seine effort limits, as detailed in the Comments and Response section below, NMFS believes that it is appropriate to implement the purse seine effort limits in this final rule for 2018 only. Implementation of Commission-specified purse seine effort limits in future years, including whether the limits for the U.S. EEZ and high seas are combined or implemented separately and how transfers between the limits may take place, will be determined after consideration of future decisions adopted by the Commission.

CMM 2017-01 specifies a limit of 1,270 fishing days per year for the high seas and a limit of 558 fishing days per year for the U.S. EEZ. Applying the provisions of Paragraph 29, the final rule would establish a limit of 1,370 fishing days on the high seas and a separate limit of 458 fishing days in the U.S. EEZ. These numbers utilize the provision of CMM 2017-01 provided to alleviate the economic hardship experienced by American Samoa during a fishery closure and transfer 100 fishing days from the U.S. EEZ effort limit to the high seas effort limit.

CMM 2017-01 also specifies that the United States may add an additional 100 fishing days to its annual purse seine fishing effort limit in the U.S. EEZ if the limit in the U.S. EEZ is reached by October 1, 2018. Thus, under the final rule, in the event that NMFS expects that the U.S. EEZ effort limit would be reached by October 1, 2018, NMFS would publish a document in the **Federal Register**, no later than seven days prior to October 1, to increase the U.S. EEZ effort limit by 100 fishing days for 2018.

The meaning of “fishing day” is defined at 50 CFR 300.211; that is, any day in which a fishing vessel of the United States equipped with purse seine gear searches for fish, deploys a FAD, services a FAD, or sets a purse seine, with the exception of setting a purse seine solely for the purpose of testing or cleaning the gear and resulting in no catch.

NMFS will monitor the number of fishing days spent in the U.S. EEZ and on the high seas using data submitted in logbooks and other available information. If and when NMFS determines that a limit is expected to be reached by a specific future date, it will publish a document in the **Federal Register** announcing that the purse seine fishery in the area where the limit is expected to be reached will be closed starting on a specific future date and will remain closed until the end of the calendar year. NMFS will publish

that document at least seven days in advance of the closure date. Starting on the announced closure date, and for the remainder of calendar year, it will be prohibited for U.S. purse seine vessels to fish in the area where the limit is expected to be reached, except that such vessels would not be prohibited from bunkering (refueling) during a fishery closure. NMFS published an interim rule on August 25, 2015 (see 80 FR 51478) to remove the restriction that prohibited U.S. purse seine vessels from conducting bunkering during fishery closures of the ELAPS. NMFS will continue those regulations as part of this final rule so that bunkering would be allowed during any fishery closures of the U.S. EEZ or high seas due to reaching a limit in a given calendar year.

Under existing regulations at 50 CFR 300.218(g), NMFS can direct U.S. purse seine vessel owners and operators to provide daily FAD reports, specifying the number of purse seine sets made on FADs during that day. NMFS promulgated this regulation to help track a limit on the number of FAD sets that was applicable in previous years but recognizes that this information is also valuable to help predict when a fishing effort limit is expected to be reached with greater certainty. Thus, under this final rule, NMFS is revising the existing regulations so that NMFS can direct U.S. purse seine vessel owners and operators to provide reports on the fishing activity of the vessel (e.g., setting, transiting, searching), location, and type of set, in order to obtain better data for tracking the fishing effort limits.

#### *Eastern High Seas Special Management Area*

This final rule removes the requirements at 50 CFR 300.222(o) and 50 CFR 300.225 for U.S. commercial fishing vessels to provide reports prior to entering or exiting the EHSSMA. This final rule also prohibits all U.S. commercial fishing vessels fishing

for highly migratory species (HMS) from engaging in transshipments in the EHSSMA, beginning on January 1, 2019.

#### *Administrative Changes to Existing Regulations*

The regulations at 50 CFR 300.217(b) and 300.218(a)(2)(v) contain outdated cross references that are corrected in this final rule. In § 300.217, paragraph (b)(1) is revised to provide a cross reference to § 300.336(b)(2), not § 300.14(b), and in § 300.218(a)(2)(v), the cross reference is to § 300.341(a) instead of to § 300.17(a) and (b). Sections 300.14(b) and 300.17(a) and (b) no longer exist and have been replaced through a new regulatory action implementing provisions of the High Seas Fishing Compliance Act (16 U.S.C. 5501 *et seq.*).

#### **Comments and Responses**

NMFS received nine comment letters on the proposed rule. The comments are summarized below, followed by responses from NMFS.

*Comment 1:* Two commenters provided general statements of support for the limits and restrictions that would be implemented in the rule. One of the commenters expressed support for more stringent fishing limits for all waters. According to the commenters, overfishing has devastating ecological and economic consequences.

*Response:* NMFS acknowledges and notes the comments.

*Comment 2:* Representatives of the Hawaii Longline Association (HLA) provided comments supporting the establishment of the 3,554 mt longline bigeye tuna catch limit. HLA also requested that NMFS proceed carefully, but quickly, with the process to implement regulations under a separate rulemaking that would allow longline bigeye tuna catch to be attributed to the U.S. participating territories in the WCPFC in 2018 under

specified fishing agreements. This would allow any fish landed immediately after the 3,554 mt limit is reached in 2018 to be attributed to the U.S. territory that is a party to the specified fishing agreement and would prevent a fishery closure. HLA noted that, in past years, the Hawaii deep-set longline fishery has been closed for extended periods of time in the WCPO, even though a specified fishing agreement had been executed and approved, because NMFS delayed its issuance of territory specification regulations. Thus, some U.S. deep-set longline vessels were unable to fish for no reason other than administrative delay.

*Response:* NMFS is proceeding with the separate rulemaking to implement regulations that would provide for longline bigeye tuna catch to be attributed to the U.S. participating territories in the WCPFC in 2018 under specified fishing agreements as expeditiously as possible.

*Comment 3:* Representatives from different sectors of the U.S. purse seine fleet provided comments regarding implementation of the purse seine effort limits for the U.S. EEZ and high seas areas. One commenter expressed support for having separate limits for the high seas and for the U.S. EEZ, while five commenters objected to the establishment of separate purse seine effort limits for the U.S. EEZ and high seas areas. The commenters that objected stated that for the past nine years, NMFS has combined those two areas with their associated limits into one area (the Effort Limit Area for Purse Seine, or ELAPS) to provide flexibility to the U.S. WCPO purse seine industry, and the process has worked very well. They claimed that by creating separate limits for the U.S. EEZ and the high seas now, NMFS will, if it proceeds with the proposed rule, effectively reduce fishing opportunities for the U.S. fleet by over 400 days. They stated that the proposed

rule provides no explanation for why this previous reasoning no longer applies or why NMFS has changed its position on this important issue. According to the commenters, it appears that the significant change to implement separate limits is being proposed to merely aid monitoring, but there is no apparent reason why sufficient monitoring cannot occur to satisfy CMM 2017-01 under a combined limit and none is provided by NMFS. According to one commenter, NMFS is required by law to provide a rationale for its decision and to carefully address and explain its changes in position. The commenter stated that NMFS' proposal to implement separate effort limits is arbitrary and capricious, and therefore unlawful under the Administrative Procedure Act (APA).

*Response:* As stated above and in the preamble to the proposed rule, NMFS acknowledges that in the past NMFS has implemented the U.S. purse seine fishing effort limits on the high seas and in the U.S. EEZ adopted by the Commission as a single combined limit in a combined area of the high seas and U.S. EEZ termed the Effort Limit Area for Purse Seine or ELAPS. NMFS' reasoning for combining the high seas and U.S. EEZ limits was that it afforded more operational flexibility to the fleet and there are no substantial differences in terms of effects to living marine resources between the two approaches - treating the two areas separately or combining the areas - so long as the overall effort remained equal or less than the sum of the limits of the two areas. Although NMFS agrees with the comment that a single combined effort limit would afford more operational flexibility to the fleet, as explained above, the plain reading of Paragraph 29 of CMM 2017-01, which includes specific rules and guidelines for the United States for transferring fishing days between the high seas effort limit area and the U.S. EEZ effort limit area, precludes NMFS from doing so in 2018.

As noted above, for several years the United States has argued that the Commission's purse seine effort limits are having a disproportionate burden on the American Samoa economy, particularly fish processing facilities like the one tuna cannery in operation. At its 14<sup>th</sup> regular session in December 2017, the Commission took positive steps to lessen that burden. CMM 2017-01 now allows the United States to address the impact of the Commission limits on American Samoa tuna processing by transferring 100 fishing days from the U.S. EEZ effort limit to the high seas effort limit, and to potentially regain these transferred days in the U.S. EEZ effort limit provided that limit has been reached by October 1, 2018 (subject to certain landing requirements). The Commission's decision was intended to provide U.S. purse seiners with an increase of 100 fishing days for 2018 along with an incentive to land their catch in American Samoa.

Commission decisions have always identified separate high seas and EEZ fishing effort limits for CCMs. The new provision included in CMM 2017-01 that was not included in previous CMMs on tropical tunas is the transfer provision in Paragraph 29. In the past, there was no express constraint on NMFS' ability to transfer the entire U.S. EEZ limit to the high seas limit and the entire high seas limit to the U.S. EEZ limit. However, in light of the new transfer provision in CMM 2017-01 for 2018, specifying clear rules and guidelines for the number of days available for transfer and the manner in which a transfer of days between the high seas limit and U.S. EEZ limit must take place, NMFS believes that the U.S. EEZ and high seas purse seine effort limits for 2018 must be implemented separately. That is, NMFS must separately enforce the high seas and U.S. EEZ fishing effort limits in order to ensure that the high seas fishing effort limit of 1,370 days - as augmented under paragraph 29 by 100 days from the U.S. EEZ - is not

exceeded. Enforcing only a single combined limit of 1,828 days could result in the the augmented high seas limit being exceeded, in violation of CMM 2017-01.

CMM 2017-01 specifies a limit of 1,270 fishing days per year for the high seas and a limit of 558 fishing days per year for the U.S. EEZ, and includes specific rules and guidelines for transferring fishing days from the U.S. EEZ limit to the high seas limit. The final rule establishes a limit of 1,370 fishing days on the high seas and a separate limit of 458 fishing days in the U.S. EEZ (or 558 days if the limit is reached by October 1, 2018) for 2018 in accordance with the transfer provisions set forth in Paragraph 29 of CMM 2017-01 and in order to implement CMM 2017-01 in accordance with the Commission's clear intent. NMFS is not implementing the separate limits merely to aid in monitoring, as the commenters suggest, but rather to implement the clear requirements of CMM 2017-01.

It is important to note that, under the final rule, the overall number fishing days in the high seas and U.S. EEZ remain the same (1,828) as the overall number of fishing days allowed in previous years, and could actually be higher (1,928) if the certain conditions described above are met. Accordingly, NMFS disagrees that enforcing separate high seas and EEZ limits under the final rule – which NMFS believes is compelled by a plain reading of CMM 2017-01 – unfairly reduces the number of available fishing days to some foreign-built U.S. purse seiners. These foreign-built U.S. purse seine vessels primarily fish under licenses issued pursuant to the South Pacific Tuna Treaty (SPTT) and, because they do not have fishery endorsements on their U.S. Coast Guard Certificates of Documentation, they are generally prohibited from fishing

within the U.S. EEZ. However, these restrictions on operating within the U.S. EEZ have long been in effect (see 46 U.S.C. 12113).

Currently, 9 of the 37 U.S. purse seine vessels with WCPFC Area Endorsements have that fishery endorsement, so these vessels would be able to continue fishing up to the 458 day limit in the U.S. EEZ (or 558 day limit, if the U.S. EEZ limit is reached by October 1, 2018) when the limit in the high seas is reached in 2018. Furthermore, the foreign-built U.S.-flagged vessels, which are ineligible to fish within the U.S. EEZ, retain the option of shifting their fishing effort either to foreign zones under the SPTT or into the eastern Pacific Ocean (EPO). Please also see below for the response to Comment 4 on the potential loss of 400 fishing days to the fleet.

NMFS is implementing separate limits in 2018, because of the language in Paragraph 29 of CMM 2017-01 for 2018. Implementation of Commission-specified purse seine effort limits in future years, including whether the limits for the U.S. EEZ and high seas are combined or implemented separately and how transfers between the limits may take place, will be determined after consideration of future decisions adopted by the Commission.

*Comment 4:* Several comments from U.S. purse seine industry representatives related to NMFS' assessment of the economic effects of the proposed purse seine fishing effort limits. One commenter stated that NMFS appears to believe that its proposal to split the ELAPS is a mere administrative matter with no substantial consequences. This and other commenters stated that the proposal would have very significant impacts on many vessels in the U.S. purse seine fleet, potentially costing them millions of dollars in lost fishing opportunities.

One commenter stated that NMFS underestimates the severe economic impact the proposed rule would have on the U.S. purse seine fleet, and another stated that the regulatory impact review (RIR) prepared for the proposed rule makes no meaningful attempt to quantify the costs of the proposed splitting of the ELAPS limits. The commenter stated that based on the history of fishing in the U.S. EEZ, as presented in the RIR, and absent a strong El Niño and in an average year, almost 440 fishing days would go unused as a result of the fishing days under the U.S. EEZ limit not being available on the high seas. Under the current ELAPS arrangement, those 440 fishing days are available to the entire purse seine fleet. Another commenter also stated that 440 fishing days would go unused, effectively reducing the allocation of fishing days to the U.S. fleet, and additional commenters similarly stated that having separate limits for the U.S. EEZ and the high seas would result in the fishing days under the U.S. EEZ being unused or wasted. Two commenters stated that the cost of “upfront” fishing days under the SPTT (\$12,500 per fishing day, according to one commenter) can be used to estimate the value of those lost fishing days, and went on to comment that the aggregate cost to the 25 purse seine vessels without fishery endorsements on their U.S. Coast Guard Certificates of Documentation would be about \$5,500,000 per year, or \$220,000 per vessel per year.

Several commenters provided comments stating that alternative fishing opportunities—in the event the U.S. EEZ and/or the high seas are closed to fishing—would be constrained in the latter half of the year, when the high seas would more likely be closed. With respect to the opportunity of fishing in foreign EEZs, several commenters pointed out the high access fees required for such fishing. With respect to fishing in the EPO, several commenters pointed out the limited fishing capacity available

in the EPO, and noted that the high seas portion of the area of overlap between the WCPFC and Inter-American Tropical Tuna Commission (IATTC) would be subject to the proposed high seas limit. One commenter stated that NMFS has indicated in the past that there was no additional capacity available to place vessels on the list of U.S. vessels eligible to fish in the EPO, and asked for clarification of this option, given that it appears to be one of the key alternatives available to vessels impacted by the proposed rule.

With respect to the alternative of not fishing, one commenter stated that NMFS' statement that a vessel would have some variable costs reduced if it is forced to stop fishing is a ridiculous statement because it does not reflect the reality of a bank's view on missed payments, and that NMFS' statement that vessels could use non-fishing time to do maintenance and repair assumes there will be money left to do so. The same commenter stated that NMFS' analysis fails to take into account that, of the \$10 million grossed by the fleet, \$2 million net comes off the top for access fees under the SPTT.

One commenter stated that the proposed rule's costs to many vessels in the U.S. purse seine fleet would be to the benefit of only a few U.S. vessels, and more broadly, their foreign competitors. The commenter explained that under the MSA, NMFS may not provide sector preference within the fleet, but in this case a defacto sector preference under the MSA is beneficial to foreign nations, by allowing them to take advantage of U.S. fleet interests, reducing U.S. fleet access, and increasing costs for the U.S. fleet, while providing further benefits to foreign nations whose interests are not necessarily aligned with the interests of the U.S. Government.

One commenter stated that having separate limits for the U.S. EEZ and the high seas would put the vessels that support American Samoa at an economic disadvantage.

Several commenters stated that having separate limits would hurt the cannery and possible employment for the people of American Samoa. These commenters stated that there is not a consistent amount of fish in the U.S. EEZ for the vessels to be able to fish there, and that closing the U.S. EEZ and the high seas earlier would cause vessels to operate further from American Samoa, making it less likely that they will unload in American Samoa.

One commenter stated that the proposed rule would needlessly increase the U.S. fisheries trade deficit by just more than \$21 million.

*Response:* First, NMFS notes that it has revised the RIR from the original version, dated April 2018, that was made available with the proposed rule. The original version included provisional estimates for certain 2017 fishery performance indicators, including the numbers of fishing days used in the U.S. EEZ and on the high seas. Those estimates have since been finalized and corrections to other estimates have been made, and the revised RIR has been updated accordingly. The revised analysis does not alter the conclusions or determinations made in the original RIR.

NMFS agrees that a combined limit would afford more operational flexibility to the fleet as a whole, but as explained above, NMFS believes a plain reading of Paragraph 29 of CMM 2017-01 – which provides benefits to American Samoa and provides for up to 100 additional vessel days if certain conditions are met - precludes NMFS from implementing a combined limit for 2018. However, NMFS has updated its analysis to include the combined limit in the FRFA and revised RIR for comparison purposes.

NMFS agrees that a combined limit would effectively make more fishing days available to those U.S. purse seine vessels without fishery endorsements on their U.S.

Coast Guard Certificates of Documentation than would this action. However, NMFS does not agree that “almost 440 fishing days would go unused,” as stated by one commenter in comparing the two approaches. NMFS recognizes that U.S. vessels that are already ineligible to fish within the U.S. EEZ would have fewer days to use on the high seas in 2018 than in previous years, but overall days available to the fleet remain consistent with previous years, and may actually increase to 1,928 days if certain conditions under CMM 2017-01 are met. Also, because the vast majority of U.S. purse seine effort in the region already is concentrated in foreign zones under the provisions of the SPTT, NMFS does not anticipate substantial impacts resulting from unused EEZ days.

NMFS does not believe that the proposal to establish separate purse seine fishing effort limits for the U.S. EEZ and the high seas is a mere administrative matter with no substantial consequences. To the contrary, NMFS concluded in the initial regulatory flexibility analysis (IRFA) and the RIR that either of the two limits, and especially the high seas limit, could be reached in any of the years 2018-2020, and that the closure of any fishing grounds for any amount of time can be expected to bring adverse impacts to affected entities. With respect to the proposed high seas limit of 1,370 fishing days, NMFS noted that the proposed level had been met or exceeded in three of the last nine years, a history that suggests a substantial likelihood of the proposed high seas limit being reached in any of the years 2018-2020. NMFS stated that the severity of the impacts of a closure of the high seas or the U.S. EEZ would be greatly dependent on the length of the closure and the most favored fishing ground during the closure. As an indication of the possible impacts, NMFS cited a study of the closure of the ELAPS in 2015 in which the overall losses to the combined sectors of the vessels, canneries and

support companies from the closure were estimated to be between \$11 and \$110 million, depending on the period considered. NMFS further noted the study suggested that there were impacts from the 2015 ELAPS closure on the American Samoa economy, and that a connection existed between U.S. purse seine vessels and the broader American Samoa economy. As a further indication of the possible impacts to producers in the fishery of lost fishing days as a result of one or both limits being reached (i.e., an indication of the upper bound of those impacts), NMFS provided information in the RIR and IRFA on revenues in the fleet, including the fact that, with an indicative fleet size of 35 vessels, the fleet could have gross ex-vessel revenues of more than \$1 million per day, on average. The losses to producers in the purse seine fishery as a result of one or both of the limits being reached would likely not reach that maximum rate because, as explained in the RIR and IRFA, there are next-best opportunities to fishing on the high seas or in the U.S. EEZ, including fishing in foreign EEZs under the SPTT, fishing in the EPO, and not fishing.

NMFS described in the RIR and IRFA some of the factors that might make each of those alternative opportunities relatively attractive or unattractive, and acknowledges that under the regulations implementing IATTC decisions at 50 CFR part 300, subpart C the available capacity for U.S. purse seine vessels that wish to fish in the EPO and be listed on the IATTC vessel register is limited. However, vessels with SPTT licenses may take one trip per year for up to 90 days in duration in the EPO for a total of 32 trips for the fleet in a calendar year, without being listed on the IATTC vessel register. With respect to the possibility of fishing in foreign EEZs in the Convention Area during a closure of the high seas and/or U.S. EEZ, NMFS agrees that the access fees under the

SPTT, such as the 2018 fee of \$12,500 per fishing day to fish in the waters of many of the Pacific Island parties to the SPTT, give an indication of the cost of a closure of the high seas, since fishing on the high seas does not require payment of such access fees. The high seas appear to be generally less favorable fishing grounds than foreign EEZs, and thus, U.S. vessels appear to be already paying the \$12,500 access fee even before the U.S. high seas limit is reached and the area is closed. Thus, \$12,500 is probably an overestimate of the cost per day of the high seas being closed.

NMFS recognizes, and explained in the RIR and IRFA, that the proposed purse seine fishing effort limits would affect vessels with fishery endorsements on their U.S. Coast Guard Certificates of Documentation differently than those vessels without fishery endorsements, as those without fishery endorsements are not authorized to fish in the U.S. EEZ, and would not have access to the fishing days available under the limit for the U.S. EEZ. NMFS agrees that if the proposed limits for the U.S. EEZ and high seas were combined into a single limit for the ELAPS, as done in the past, the vessels without fishery endorsements would have access to the entirety of the combined limit (i.e., competitively, with all other vessels in the U.S. fleet).

NMFS recognizes, and explained in the RIR and IRFA, that the proposed purse seine fishing effort limits in the U.S. EEZ and high seas could cause a race to fish in those respective areas, with possible consequent effects on the timing of catches and cannery deliveries and costs in terms of the health and safety of crew members as well as the economic performance of vessels.

NMFS recognizes, and explained in the RIR and IRFA, that there are constraints to alternative opportunities in the event the U.S. EEZ and/or high seas are closed to

fishing, and NMFS acknowledges the specific constraints pointed out by the commenters. NMFS agrees that the alternative “next best” opportunities may not fully compensate for the losses associated with not being able to fish in the U.S. EEZ and/or on the high seas in the event they are closed. NMFS’ main point in those portions of the RIR and IRFA is to identify and describe what appear to be among the most attractive alternative opportunities (including not fishing at all), and thereby give at least a qualitative idea of the opportunity costs associated with the proposed fishing effort limits.

Regarding the comment that the NMFS analysis fails to take into account that, of the \$10 million grossed by the fleet, \$2 million net comes off the top for access fees under the SPTT, NMFS agrees that gross ex-vessel revenues overestimate the possible losses to fishing businesses as a result of this action.

Regarding the comment that the proposed rule’s costs to many vessels in the U.S. purse seine fleet would be to the benefit of a few U.S. vessels, and more broadly, their foreign competitors, NMFS agrees that restrictions on U.S. fishing vessels could put some of them at a competitive disadvantage relative to foreign fleets, but this rule implements a WCPFC decision that broadly applies to all the major purse seine fleets in the WCPO. Moreover, as discussed above, NMFS does not believe it continues to have discretion to combine the high seas and U.S. EEZ purse seine effort limits for the United States for 2018. NMFS has not identified any alternative ways to implement the WCPFC decisions that would be more advantageous to U.S. fishing vessels. While NMFS acknowledges that some foreign-built U.S. vessels may be impacted differently than vessels with fishery endorsements that can fish in the U.S. EEZ, NMFS is satisfied that

the final rule treats all vessels fairly and achieves conservation consistent with U.S. obligations under the Convention.

Regarding the comment that having separate limits for the U.S. EEZ and the high seas would put the vessels that support American Samoa at an economic disadvantage, NMFS notes that Paragraph 29 of CMM 2017-01, which specifies the separate effort limits, was specifically negotiated to alleviate the economic hardship of American Samoa.

NMFS acknowledges the comments about the economic impacts of the proposed fishing effort limits on the cannery in American Samoa and employment for the people of American Samoa. As explained in the RIR by reference to the study of the impacts of the ELAPS closure in 2015, a closure of the high seas and/or U.S. EEZ could impact the American Samoa economy. However, as stated in the RIR, because the cannery in Pago Pago also handles deliveries from the fishing fleets of other nations, as well as from other domestic fleets, the cannery might not be appreciably affected in terms of income or employment.

NMFS acknowledges the comment that the action would increase the U.S. fisheries trade deficit by just more than \$21 million. NMFS does not have information to verify the commenter's estimate of the impacts of the rule on the U.S. fisheries trade deficit. However, NMFS believes that promulgation of this rule is necessary to carry out the U.S. international obligations under the Convention.

*Comment 5:* Four U.S. purse seine industry representatives provided comments indicating that they supported having the additional two-month FAD prohibition period on the high seas take place in November and December, as set forth in the proposed rule,

rather than in April and May. One U.S. purse seine industry representative provided comments requesting that NMFS look closely at the practical effect of having the additional two-month FAD prohibition period in November and December instead of April and May before deciding on the prohibition period in future years. The commenter stated that the U.S. fleet and the American Samoa economy may function better with having the prohibition period take place in April and May. According to the commenter, fishing in the high seas will be impacted by the timing of the FAD prohibition period. The proposed rule does not allocate the limited number of high seas days to eligible boats. Therefore, the commenter believes that there will be a race to fish on the high seas. Vessels that are unable to operate during the first part of the year, or for as long as the high seas are open, will suffer an economic loss. That will include boats that are under repair. Additionally, the supply of tuna to the American Samoa canneries could be negatively impacted due to a high seas prohibition period. That is because the high seas fishing grounds are relatively close to American Samoa. Vessels that cannot fish in the high seas may have to shift their areas of operation far from American Samoa, thereby depriving the territory of tuna supply. If the FAD prohibition period is in November and December and there are no high seas days remaining at that time, there would be a reduction in fish supply to American Samoa. A high seas FAD prohibition period in April and May, or an allocation of high seas days, or both, would mitigate this risk. The commenter encourages NMFS to take these concerns into consideration.

*Response:* As described in Attachment 1 of the RIR, NMFS acknowledges that there are pros and cons to both the late (November and December) and early (April and May) FAD prohibition period options for 2018, and that on balance, the late option is

expected to have less direct economic impact on fishing businesses associated with the U.S. WCPO purse seine fishery. CMM 2017-01 specifies that the additional two-month FAD prohibition period is for calendar year 2018 only. However, as explained in the proposed rule, the regulations to implement the additional two-month high seas FAD closure will be in effect until they are replaced or amended, and the supporting analytical documents assess the effects of implementation of the rule for a three-year period. NMFS will collect data related to the 2018 high seas FAD prohibition period and conduct the appropriate analysis to support proposed regulations for future years, taking into consideration the economic impacts to fishing businesses, including canneries in American Samoa.

*Comment 6:* Two U.S. purse seine industry representatives provided comments stating that the 15-day comment period on the proposed rule was insufficient. One of the commenters stated that issue of the separate limits for the high seas and U.S. EEZ alone warrants at least a 30-day comment period. The commenter stated that the 15-day comment is contrary to applicable law, and the rationale provided in the proposed rule for the 15-day comment period – that Section 304(b) of the MSA provides for a 15-day comment period on these types of fishery rules – is insufficient. Provisions of the WCPFC Implementation Act and the APA apply to this rulemaking.

*Response:* NMFS acknowledges that lengthier public review and comment periods may be provided for some proposed rules. As noted by the commenter, NMFS is promulgating this final rule under the authority of the WCPFC Implementation Act and in accordance with the rulemaking provisions of the APA. Neither the WCPFC Implementation Act nor the APA specify a minimum comment period for proposed rules.

However, we noted that Section 304(b) of the MSA specifically allows for a 15-day comment period for fisheries management rules. Furthermore, NMFS explained in the preamble of the proposed rule that it had good cause to provide a 15-day comment period in order to meet the implementation requirements of CMM 2017-01. Based on the nature and extent of the comments received on the proposed rule and the need to make the rule effective in a timely manner, NMFS believes that the 15-day comment period on the proposed rule was sufficient. Moreover, the comments do not indicate that any commenter was prejudiced by the 15-day comment period.

*Comment 7:* Two U.S. purse seine industry representatives expressed concern that the regulations would be in effect for longer than one year. One commenter stated that once issued, regulations tend not to be changed, even when outdated or superseded, and asked that the agency enable necessary regulatory changes to be made expeditiously, such as by interim rulemaking, particularly when restrictions will be relaxed. The other commenter noted that although CMM 2017-01 was agreed upon as a three-year measure, certain key purse seine-related provisions (among others) were considered especially contentious. According to the commenter, some believed that CMM 2017-01 weakened several measures applied in 2017 relating to FAD management and high seas purse seine effort controls. The commenter noted that these contentious provisions are applicable for only one year, and could change in 2019. The commenter stated that several Pacific island countries have indicated that portions of CMM 2017-01 will need to be re-evaluated. The commenter stated that NMFS does not have the authority to implement any three-year provisions for FADs and purse seine effort controls in specific areas.

*Response:* NMFS acknowledges that some of the provisions in CMM 2017-01 apply only to calendar year 2018, while others are applicable until February 10, 2021, and that the Commission is scheduled to discuss a number of the provisions during its annual meeting in December 2018. However, as explained in the preamble to the proposed rule, because the Commission likely will continue to implement similar management measures regarding FADs and longline bigeye tuna catch limits beyond 2018, and to avoid a lapse in the management of the affected fisheries, NMFS is implementing all of the elements of CMM 2017-01, except for the purse seine effort limits, in this rule so that they will remain effective until they are replaced or amended. Due to the comments received regarding implementation of the purse seine effort limits and the fact that Paragraph 29 of CMM 2017-01 is specified for 2018 only, NMFS is implementing the purse seine effort limits for 2018 only.

The WCPFC Implementation Act at Section 16 U.S.C. 6904(a) authorizes the promulgation of regulations as may be necessary to carry out the United States international obligations under the Convention, including recommendations and decisions adopted by the Commission. Instead of applying a piecemeal approach for implementation of the provisions of CMM 2017-01, NMFS has determined that it is necessary to implement all the applicable provisions, except for the purse seine effort limits, so that they will remain effective until they are replaced or amended. Since the Commission's regular session annually occurs in December, this approach avoids a lapse in management of affected fisheries and also provides the regulated community with advance notice regarding regulations that will be in effect in future years. In past years, NMFS has implemented Commission decisions for specific calendar years, and this

approach has caused both a lapse in management of the affected fisheries in subsequent calendar years, as well as last minute notification to the regulated community of the entry into force of specific restrictions and requirements. If the Commission adopts changed or new provisions at its December meeting, NMFS would implement those provisions in a timely manner.

*Comment 8:* Two representatives of the U.S. purse seine industry provided comments regarding the restrictions on the number of active FADs per vessel. One commenter stated that the 350-active buoy limit per vessel is consistent with the limit already implemented by the IATTC. The commenters both stated that it is industry practice for purse seine vessels to share buoys. For example, if a buoy drifts beyond the limits of economic operation of one vessel, it might be transferred to another vessel for fishing or retrieval. One commenter requested that the rule provide for sharing and transferring active buoys without reducing the 350-active buoy limit for any one vessel, and also requested that the definition of a buoy be standardized with that of the IATTC to avoid confusion. The other commenter asked how enforcement and reporting of the active FAD limit per vessel would take place, and requested that the administrative and record-keeping burden created by this element of the rule be evaluated under the Paperwork Reduction Act (PRA).

*Response:* NMFS appreciates the need for consistency with the regulations recently promulgated to implement IATTC Resolution C-17-02, “Conservation Measures for Tropical Tunas in the Eastern Pacific Ocean during 2018-2020 and Amendment to Resolution C-17-01,” which also includes limits on the number of active FADs per purse seine vessel (see 83 FR 15503; published April 11, 2018). However, Resolution C-17-02

and CMM 2017-01 include some different provisions regarding the active FAD limits. Thus, the differences between the regulations implementing the active FAD provisions in IATTC Resolution C-17-02 and this final rule are due to the differences in the separate IATTC and WCPFC decisions.

NMFS believes that it would be premature to implement a reporting requirement to monitor and enforce the active FAD requirements in the final rule, because the WCPFC Secretariat has not yet developed a system to receive such reports. Thus, the active FAD limits in this final rule would be monitored and enforced without a reporting requirement. NMFS may seek adoption of a Commission-wide active FAD reporting requirement at the upcoming WCPFC annual meeting in December or further consistency with the IATTC resolution.

The regulations regarding active FADs in the final rule do not preclude the sharing or transferring of active FAD buoys. The regulations limit U.S. vessel owners and operators to no more than 350 drifting active buoys per vessel in the Convention Area at any one time. Thus, when an active FAD buoy is transferred to and tracked by a new vessel, it would be part of the new vessels' active FAD limit. The regulations regarding active FADs do not impose any new recordkeeping or reporting requirements and thus, are not subject to the PRA.

*Comment 9:* One representative of the U.S. purse seine industry provided comments requesting that the regulations address unintentional setting on FADs. According to the commenter, it is possible that a purse seine vessel may not see a FAD or something that meets the definition of a FAD floating within a mile of the vessel. The commenter requested that the prohibition on setting on FADs during the FAD prohibition

periods be based on an intentional or negligent standard. The commenter stated that if a vessel has followed reasonable search and look-out precautions and does not see a FAD by electronic or visual means and has made a notation in the logbook, that should be sufficient evidence that there was no intent to set on a FAD.

Another commenter stated that NMFS is arbitrarily picking and choosing how to implement various FAD definitions. Although NMFS is proposing consistency with the definition of active FAD for the regulations implementing the IATTC Resolution C-17-02 and this final rule, the general FAD definition in the regulations implementing WCPFC definitions at 50 CFR 300.211 is different than and not consistent with the general FAD definition in the IATTC regulations at 50 CFR 300.21. According to the commenter, NMFS' approach to defining FAD generally provides very little direction to the U.S. purse seine fishery and creates regulatory confusion, which can result in NMFS unfairly prosecuting alleged FAD violations. The commenter requests that NMFS promptly address these overarching FAD definitional issues.

*Response:* The FAD definitions that NMFS has promulgated and continues to promulgate in regulations implementing IATTC and WCPFC decisions stem from the language and intent of those separate IATTC and WCPFC decisions. On August 4, 2009, NMFS published a final rule implementing the purse seine provisions of CMM 2008-01 (74 FR 38544). The rule provided, *inter alia*, that owners, operators, and crew of fishing vessels of the United States shall not set a purse seine around a FAD or within one nautical mile of a FAD. The one nautical mile boundary helps ensure that fishing on schools of fish in association with FADs does not occur. NMFS has not proposed any

change to this standard, and notes that an intentional or negligent standard could undermine the effectiveness of the prohibition.

NMFS understands the benefit of consistency in definitions, as vessels in the U.S. purse seine fleet sometimes fish in both the WCPO and the EPO. However, NMFS believes that it is premature to modify the definition of FAD set forth at 50 CFR 300.211 before it has an opportunity to further consider the consequences of modifying this definition. NMFS has scheduled a separate public meeting to discuss FAD definitions and the concerns raised by industry and will take the outcomes of that public meeting into consideration when developing future regulations, as appropriate (see 83 FR 26011, published June 5, 2018, for information regarding the public meeting). NMFS notes that modifying the definition at this stage could be inconsistent with the United States' obligations as a WCPFC member.

*Comment 10:* One purse seine industry representative provided comments stating that he did not understand why the proposed rule requires the daily reporting on FAD sets, given the number of FAD sets is not restricted in the Convention Area. The commenter stated he saw no reason for daily reporting, particularly since each FAD set will always be reported at the end of each fishing trip.

*Response:* As stated in the preamble to the proposed rule, NMFS is slightly revising the existing regulations regarding daily reporting on FAD sets so that NMFS can direct U.S. purse seine vessel owners and operators to provide reports on the fishing activity of the vessel (*e.g.*, setting, transiting, searching), location, and type of set, in order to obtain better data for tracking the fishing effort limits. Thus, the changes in the final rule from existing reporting requirements are intended to better track purse seine

fishing effort and are not connected to a FAD set limit. As the commenter correctly notes, the final rule does not implement a FAD set limit.

*Comment 11:* One purse seine industry representative stated that he had hoped that the agency would use this rulemaking to address the area of overlap between the IATTC and WCPFC convention areas (overlap area). The commenter stated his belief that the United States is the only flag State that enforces both the WCPFC and IATTC management measures in the overlap area. According to the commenter, besides the unnecessary burden of carrying two observers when operating in the overlap area, fishing in the overlap area requires the use of limited high seas fishing days. The commenter requested that the United States apply only IATTC management measures in the overlap area, retroactive to January 1, 2018.

*Response:* NMFS recently published an advance notice of proposed rulemaking to solicit public input on management of the overlap area and encourages the commenter to provide input on that separate action (see 83 FR 27305, published June 12, 2018).

*Comment 12:* One purse seine industry representative commented that NMFS' implementation of separate purse seine effort limits for the high seas and the U.S. EEZ goes against the policies of the current Administration. According to the commenter, the Administration has sought deregulations in favor of small businesses, and other industries have benefitted from this. The commenter stated that the President signed an Executive Order stating that for every new regulation, two old regulations should be removed. The commenter requested clarification on why the rule is not expected to be an Executive Order 13771 regulatory action.

*Response:* NMFS is promulgating this regulation under the authority of the WCPFC Implementation Act to carry out the obligations of the United States under the Convention, including the decisions of the Commission. The final rule implements recent WCPFC decisions. The final rule is not considered an Executive Order 13771 regulatory action because it is not considered economically significant under Executive Order 12886 as it is not expected to have an annual effect on the economy of \$100 million or more.

*Comment 13:* One purse seine industry representative commented that there is no conservation value in high seas area closures as they are not an effective way of managing pelagic species. The commenter stated that the high seas limits are a strictly economic device being pushed by various members of the Commission. Another purse seine industry representative stated that the separate effort limits provide no conservation benefits.

*Response:* NMFS agrees that there are no substantial differences between implementing a combined limit and separate limits in terms of effects on living marine resources, as described in the PEA. The potential for beneficial effects on living marine resources from the effort limits would stem from whether implementation of effort limits would lead to an overall reduction in fishing effort in the WCPO (see the discussion of cumulative impacts in the PEA).

### **Changes from Proposed Rule**

One change from the proposed regulations have been made in these final regulations. The purse seine fishing effort limits specified at 50 CFR 300.223(a) are being implemented for calendar year 2018 only.

### **Classification**

The Administrator, Pacific Islands Region, NMFS, has determined that this final rule is consistent with the WCPFC Implementation Act and other applicable laws.

*Administrative Procedure Act*

There is good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effective date for the provisions regarding the FAD prohibition period for purse seine vessels set forth at 50 CFR 300.223(b)(2)(i). The FAD prohibition period is intended to reduce or otherwise control fishing pressure on bigeye tuna in the WCPO in order to maintain this stock to levels capable of producing maximum sustainable yield on a continuing basis. The Commission adopted a start date of July 1, 2018, for the first FAD prohibition period. Delaying the effective date of this provision increases the risk that the Commission's FAD prohibition period will become effective prior to the effective date of the final rule, resulting in the United States' non-compliance with its international obligations, which is contrary to the requirements of the WCPFC Implementation Act, and in turn contrary to the public interest.

*Coastal Zone Management Act (CZMA)*

NMFS determined that this action is consistent to the maximum extent practicable with the enforceable policies of the approved coastal management programs of American Samoa, the Commonwealth of the Northern Mariana Islands (CNMI), Guam, and the State of Hawaii. Determinations to Hawaii and each of the Territories were submitted on March 12, 2018, for review by the responsible state and territorial agencies under section 307 of the CZMA. Responses to the determination were received from Hawaii, CNMI, and Guam. CNMI and Guam concurred that the proposed project would be conducted in a manner that is consistent with the coastal management programs in CNMI and Guam.

The State of Hawaii, noting that the U.S. WCPO purse seine fishery and the longline fisheries operate outside of the jurisdiction of the Hawaii CZM Program enforceable policies, confirmed that they would not be submitting a response to the determination. No response was received from American Samoa. NMFS presumes American Samoa's concurrence, pursuant to 15 CFR 930.41(a).

#### *Executive Order 12866*

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

#### *Regulatory Flexibility Act (RFA)*

A final regulatory flexibility analysis (FRFA) was prepared as required by section 604 of the RFA. The FRFA incorporates the initial regulatory flexibility analysis (IRFA) prepared for the proposed rule. The analysis in the IRFA is not repeated here in its entirety. A description of the action, why it is being considered, and the legal basis for this action are contained above in the **SUMMARY** section and this **SUPPLEMENTARY INFORMATION** section of the preamble of this final rule. The FRFA analysis follows:

#### **Significant Issues Raised by Public Comments in Response to the IRFA**

NMFS did not receive any comments that responded specifically to the IRFA, but several comments on the proposed rule from U.S. purse seine industry representatives related to NMFS' assessment of the economic effects of the proposed rule, and thus could be relevant to the IRFA. See the discussion above summarizing Comments 3, 4, 5, and 12 and providing NMFS' responses to those comments.

#### **Description of Small Entities to Which the Rule Will Apply**

For Regulatory Flexibility Act purposes only, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing (see 50 CFR 200.2). A business primarily engaged in commercial fishing (NAICS code 114111) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of \$11 million for all its affiliated operations worldwide.

The final rule applies to owners and operators of U.S. commercial fishing vessels used to fish for HMS in the Convention Area, including longline vessels (except those operating as part of the longline fisheries of American Samoa, CNMI, or Guam), purse seine vessels, and albacore troll vessels. Based on the number of U.S. vessels with a WCPFC Area Endorsement, which is required to fish on the high seas in the Convention Area, the estimated numbers of affected longline, purse seine, and albacore troll fishing vessels are 158, 37, and 22, respectively.

Based on limited financial information about the affected fishing fleets, and using individual vessels as proxies for individual businesses, NMFS believes that all of the affected longline and albacore troll vessels, and slightly more than half of the vessels in the purse seine fleet, are small entities as defined by the RFA; that is, they are independently owned and operated and not dominant in their fields of operation, and have annual receipts of no more than \$11 million. Within the purse seine fleet, analysis of average revenue, by vessel, for the three years of 2014-2016 reveals that average annual revenue among vessels in the fleet was about \$10.2 million, and the annual averages were less than the \$11 million threshold for 22 vessels in the fleet.

## **Recordkeeping, Reporting, and Other Compliance Requirements**

The reporting, recordkeeping and other compliance requirements of this final rule are described earlier in the preamble. The classes of small entities subject to the requirements and the types of professional skills necessary to fulfill the requirements are described below for each of the first four elements of the final rule. The fifth element of the final rule, which provides administrative changes to existing regulations, is not considered further in this FRFA, as it is of a housekeeping nature and will not have any substantive effects on any entities.

### *1. Longline Bigeye Tuna Catch Limits*

This element of the final rule will not establish any new reporting or recordkeeping requirements. The new compliance requirement is for affected vessel owners and operators to cease retaining, landing, and transshipping bigeye tuna caught with longline gear in the Convention Area if and when the bigeye tuna catch limit of 3,554 mt (reduced by the amount of any overages in the preceding year) is reached in any of the years 2018-2020, for the remainder of the calendar year, subject to the exceptions and provisos described in other sections of this **SUPPLEMENTARY INFORMATION** section of the preamble. Although the restrictions that would come into effect in the event the catch limit is reached would not prohibit longline fishing, *per se*, they are sometimes referred to in this analysis as constituting a fishery closure.

Fulfillment of this requirement is not expected to require any professional skills that the vessel owners and operators do not already possess. The costs of complying with this requirement are described below to the extent possible.

Complying with this element of the final rule could cause foregone fishing opportunities and result in associated economic losses in the event that the bigeye tuna catch limit is reached in any of the years 2018-2020 and the restrictions on retaining, landing, and transshipping bigeye tuna are imposed for portions of those years. These costs cannot be projected quantitatively with any certainty. The annual limit of 3,554 mt can be compared to catches in 2005-2008, before limits were in place. The average annual catch in that period was 4,709 mt. Based on that history, as well as fishing patterns in 2009-2016, when limits were in place, there appears to be a relatively high likelihood of the limits being reached in 2018-2020. In 2015, for example, which saw exceptionally high catches of bigeye tuna, the limit of 3,502 mt was estimated to have been reached by, and the fishery was closed on, August 5 (see temporary rule published July 28, 2015; 80 FR 44883). The fishery was subsequently re-opened for vessels included in agreements with the governments of the CNMI and Guam under regulations implementing Amendment 7 to the Fishery Ecosystem Plan for Pelagic Fisheries of the Western Pacific Region (Pelagics FEP) (50 CFR 665.819). In 2016, the limit of 3,554 mt was estimated to have been reached by September 9, 2016, and in 2017, the limit of 3,138 mt was estimated to have been reached by September 1, 2017. Thus, if bigeye tuna catch patterns in 2018-2020 are like those in 2005-2008, the limit will be reached in the fourth quarter of the year, and if they are like those in 2015, 2016, or 2017, the limit will be reached in the third quarter of the year.

If the bigeye tuna limit is reached before the end of any of the years 2018-2020 and the Convention Area longline bigeye tuna fishery is consequently closed for the remainder of the calendar 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 next best alternative activity reflect the opportunity costs associated with longline fishing for bigeye tuna in the Convention Area. The economic cost of the final rule is not the direct losses in revenues that would result from not being able to fish for bigeye tuna in the Convention Area, but rather the difference in benefits derived from that activity and those derived from the next best activity. The economic cost of the final rule on affected entities is examined here by first estimating the direct losses in revenues that would result from not being able to fish for bigeye tuna in the Convention Area as a result of the catch limit being reached. Those losses represent the upper bound of the economic cost of the final rule on affected entities. Potential next-best alternative activities that affected entities could undertake are then identified in order to provide a (mostly qualitative) description of the degree to which actual costs would be lower than that upper bound.

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. For this purpose, it is assumed that, absent this final rule, bigeye tuna catches in the Convention Area in each of the years 2018-2020 would be 5,000 mt, slightly more than the average in 2005-2008. Under this scenario, imposition of the annual limits of 3,554 mt would result in 29 percent less bigeye tuna being caught each year than under no action. In the deep-set fishery, catches of marketable species other than bigeye tuna would likely be affected in a similar way if vessels do not shift to alternative activities. Assuming for the moment that ex-vessel prices would not be affected by a fishery closure, under the final rule, revenues in 2018-2020 to entities that

participate exclusively in the deep-set fishery would be approximately 29 percent less than under no action. Average annual ex-vessel revenues (from all species) per mt of bigeye tuna caught during 2005-2008 were about \$14,190/mt (in 2014 dollars, derived from the latest available annual report on the pelagic fisheries of the western Pacific Region (Western Pacific Regional Fishery Management Council, 2014, Pelagic Fisheries of the Western Pacific Region: 2012 Annual Report. Honolulu, Western Pacific Fishery Management Council)). If there are 128 active vessels in the fleet, as there were during 2005-2008, on average, then under the no-action scenario of fleet-wide annual catches of 5,000 mt, each vessel would catch 39 mt/yr, on average. Reductions of 29 percent in 2018-2020 as a result of the limits would be about 11 mt per year. Applying the average ex-vessel revenues (from all species) of \$14,190 per mt of bigeye tuna caught, the reductions in ex-vessel revenue per vessel would be \$160,000 per year, on average.

In the shallow-set fishery, affected entities will bear limited costs in the event of the limit being reached (but most affected entities also participate in the deep-set fishery and might bear costs in that fishery, as described below). The cost will be about 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 of shifting to shallow-setting in the EPO, which is to the east of 150 degrees W. longitude, whichever is less. In the fourth calendar quarters of 2005-2008, almost all shallow-setting effort took place in the EPO, and 97 percent of bigeye tuna catches were made there, so the cost of a bigeye tuna fishery closure to shallow-setting vessels appear to be very limited. During 2005-2008, the shallow-set fishery caught an average of 54 mt of bigeye tuna per year from the Convention Area. If the bigeye tuna catch limit is reached even as early as July 31 in any

of the years 2018-2020, the Convention Area shallow-set fishery would have caught at that point, based on 2005-2008 data, on average, 99 percent of its average annual bigeye tuna catches. Imposition of the landings restriction at that point in any of the years 2018-2020 would result in the loss of revenues from approximately 0.5 mt (1 percent of 54 mt) of bigeye tuna, which, based on recent ex-vessel prices, would be worth no more than \$5,000. Thus, expecting about 27 vessels to engage in the shallow-set fishery (the annual average in 2005-2012), the average of those potentially lost annual revenues would be no more than \$200 per vessel. It should be noted that for 2018, shallow-set longline fishing is no longer an available opportunity, as the fishery was closed, effective May 8, 2018, for the remainder of 2018 (see temporary rule published May 11, 2018; 83 FR 21939). The remainder of this analysis focuses on the potential costs of compliance in the deep-set fishery.

It should be noted that the impacts on affected entities' profits will be less than impacts on revenues when considering the costs of operating vessels, because 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 variable costs and revenues would stop accruing once a vessel stops fishing. But affected entities' costs also include fixed costs, which are borne regardless of whether a vessel is used to fish—e.g., if it is tied up at the dock during a fishery closure. Thus, profits will likely be adversely impacted proportionately more than revenues.

As stated previously, actual compliance costs for a given entity might be less than the upper bounds described above, because ceasing fishing will not necessarily be the most profitable alternative opportunity when the catch limit is reached. Two alternative

opportunities that are expected to be attractive to affected entities include: 1) deep-set longline fishing for bigeye tuna in the Convention Area in a manner such that the vessel is considered part of the longline fishery of American Samoa, Guam, or the CNMI; and 2) deep-set longline fishing for bigeye tuna and other species in the EPO. These two opportunities are discussed in detail below. Four additional opportunities are: 3) shallow-set longline fishing for swordfish (for deep-setting vessels that would not otherwise do so; but as noted above, this opportunity is no longer available in 2018), 4) deep-set longline fishing in the Convention Area for species other than bigeye tuna, 5) working in cooperation with vessels operating as part of the longline fisheries of the Participating Territories – specifically, receiving transshipments at sea from them and delivering the fish to the Hawaii market, and 6) vessel repair and maintenance. A study by NMFS of the effects of the WCPO bigeye tuna longline fishery closure in 2010 (Richmond, L., D. Kotowicz, J. Hospital and S. Allen, 2015, Monitoring socioeconomic impacts of Hawai'i's 2010 bigeye tuna closure: Complexities of local management in a global fishery, *Ocean & Coastal Management* 106:87-96) did not identify the occurrence of any alternative activities that vessels engaged in during the closure, other than deep-setting for bigeye tuna in the EPO, vessel maintenance and repairs, and granting lengthy vacations to employees. Based on those findings, NMFS expects that alternative opportunities 3), 4), 5) and 6) are probably unattractive relative to the first two alternatives, and are not discussed here in any further detail. NMFS recognizes that vessel maintenance and repairs and granting lengthy vacations to employees are two alternative activities that might be taken advantage of if the fishery is closed, but no further analysis of their mitigating effects is provided here.

Before examining in detail the two potential alternative fishing opportunities that appear to be the most attractive to affected entities, it is important to note that under the final rule, once the limit is reached and the WCPO bigeye tuna fishery is closed, fishing with longline gear both inside and outside the Convention Area during the same trip will be prohibited (except in the case 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 for longline fishing for species other than bigeye tuna in the Convention Area, but not for both. This reduced operational flexibility will bring costs, because it will constrain the potential profits from alternative opportunities. Those costs cannot be quantified.

A vessel could take advantage of the first alternative opportunity (deep-setting for bigeye tuna in a manner such that the vessel is considered part of the longline fishery of one of the three U.S. Participating Territories), by three possible methods: a) landing the bigeye tuna in one of the three Participating Territories, b) holding an American Samoa Longline Limited Access Permit, or c) being considered part of a Participating Territory's longline fishery, by agreement with one or more of the three Participating Territories under the regulations implementing Amendment 7 to the Pelagics FEP (50 CFR 665.819). In the first two circumstances, the vessel would be considered part of the longline fishery of the Participating Territory only if the bigeye tuna were not caught in the portion of the U.S. EEZ around the Hawaiian Islands and were landed by a U.S. vessel operating in compliance with a permit issued under the regulations implementing

the Pelagics FEP or the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species.

With respect to the first method of engaging in alternative opportunity 1 (1.a.) (landing the bigeye tuna in one of the Participating Territories), there are three potentially important constraints. First, whether the fish are landed by the vessel that caught the fish or by a vessel to which the fish were transhipped, the costs of a vessel transiting from the traditional fishing grounds in the vicinity of the Hawaiian Archipelago to one of the Participating Territories would be substantial. Second, none of these three locales has large local consumer markets to absorb substantial additional landings of fresh sashimi-grade bigeye tuna. Third, transporting the bigeye tuna from these locales to larger markets, such as markets in Hawaii, the U.S. west coast, or Japan, would bring substantial additional costs and risks. These cost constraints suggest that this alternative opportunity has limited potential to mitigate the economic impacts of the final rule on affected small entities.

The second method of engaging in the first alternative opportunity (1.b.) (having an American Samoa Longline Limited Access Permit), will be available only to the subset of the Hawaii longline fleet that has both Hawaii and American Samoa longline permits (dual permit vessels). Vessels that do not have both permits could obtain them if they meet the eligibility requirements and pay the required costs. For example, the number of dual permit vessels increased from 12 in 2009, when the first WCPO bigeye tuna catch limit was established, to 23 in 2016. The previously cited NMFS study of the 2010 fishery closure (Richmond *et al.* 2015) found that bigeye tuna landings of dual permit vessels increased substantially after the start of the closure on November 22, 2010,

indicating that this was an attractive opportunity for dual permit vessels, and suggesting that those entities might have benefitted from the catch limit and the closure.

The third method of engaging in the first alternative opportunity (1.c.) (entering into an Amendment 7 agreement), was also available in 2011-2017 (in 2011-2013, under section 113(a) of Public Law 112-55, 125 Stat. 552 *et seq.*, the Consolidated and Further Continuing Appropriations Act, 2012, continued by Public Law 113-6, 125 Stat. 603, section 110, the Department of Commerce Appropriations Act, 2013; hereafter, “section 113(a)”). As a result of agreements that were in place in 2011-2014, the WCPO bigeye tuna fishery was not closed in any of those years. In 2015, 2016, and 2017 the fishery was closed but then reopened when agreements went into effect. Participation in an Amendment 7 agreement would likely not come without costs to fishing businesses. As an indication of the possible cost, the terms of the agreement between American Samoa and the members of the Hawaii Longline Association (HLA) in effect in 2011 and 2012 included payments totaling \$250,000 from the HLA to the Western Pacific Sustainable Fisheries Fund, equal to \$2,000 per vessel. It is not known how the total cost was allocated among the members of the HLA, so it is possible that the owners of particular vessels paid substantially more than or less than \$2,000.

The second alternative opportunity (2) (deep-set fishing for bigeye tuna in the EPO), will be an option for affected entities only if it is allowed under regulations implementing the decisions of the IATTC. NMFS has issued a final rule to implement the IATTC’s most recent resolution on the management of tropical tuna stocks (83 FR 15503; April 11, 2018). The final rule establishes an annual limit of 750 mt on the catch of bigeye tuna in the EPO by vessels at least 24m in length in each of the years

2018-2020. Annual longline bigeye tuna catch limits have been in place for the EPO in most years since 2004. Since 2009, when the limit was 500 mt, it was reached in 2013 (November 11), 2014 (October 31), and 2015 (August 12). In 2016 NMFS forecasted that the limit would be reached July 25 and subsequently closed the fishery, but later determined that the catch limit had not been reached and re-opened the fishery on October 4, 2016 (81 FR 69717). The limit was not reached in 2017.

The highly seasonal nature of bigeye tuna catches in the EPO and the relatively high inter-annual variation in catches prevents NMFS from making a useful prediction of whether and when the EPO limits in 2018-2020 are likely to be reached. If it is reached, this alternative opportunity would not be available for large longline vessels, which constitute about a quarter of the fleet.

Historical fishing patterns can provide an indication of the likelihood of affected entities making use of the opportunity of deep-setting in the EPO in the event of a closure in the WCPO. The proportion of the U.S. 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 ranged from 2 percent to 11 percent, and may have been constrained by the IATTC-adopted bigeye tuna catch limits established by NMFS (no limit was in place for 2008). Prior to 2009, most of the U.S. annual bigeye tuna catch by longline vessels in the EPO typically was made in the second and third quarters of the year; in 2005-2008 the percentages caught in the first, second, third, and fourth quarters were 14, 33, 50, and 3 percent, respectively. These data demonstrate two historical patterns – that relatively little of the bigeye tuna catch in the longline fishery was typically taken in the EPO (11 percent in 2005-2008, on average),

and that most EPO bigeye tuna catches were made in the second and third quarters, with relatively few catches in the fourth quarter when the proposed catch limit would most likely be reached. These two patterns suggest that there could be substantial costs for at least some affected entities that shift to deep-set fishing in the EPO in the event of a closure in the WCPO. On the other hand, fishing patterns since 2008 suggest that a substantial shift in deep-set fishing effort to the EPO could occur. In 2009, 2010, 2011, 2012, 2013, 2014, 2015, and 2016 the proportions of the fishery's annual bigeye tuna catches that were captured in the EPO were about 16, 27, 23, 19, 36, 35, 47, and 36 percent, respectively, and most bigeye tuna catches in the EPO were made in the latter half of the calendar years.

The NMFS study of the 2010 closure (Richmond *et al.* 2015) found that some businesses—particularly those with smaller vessels—were less inclined than others to fish in the EPO during the closure because of the relatively long distances that would need to be travelled in the relatively rough winter ocean conditions. The study identified a number of factors that likely made fishing in the EPO less lucrative than fishing in the WCPO during that part of the year, including fuel costs and the need to limit trip length in order to maintain fish quality and because of limited fuel storage capacity.

In addition to affecting the volume of landings of bigeye tuna and other species, the catch limits could affect fish prices, particularly during a fishery closure. Both increases and decreases appear possible. After a limit is reached and landings from the WCPO are prohibited, ex-vessel prices of bigeye tuna (e.g., that are caught in the EPO or by vessels in the longline fisheries of the three U.S. Participating Territories), as well as of other species landed by the fleet, could increase as a result of the constricted supply.

This would mitigate economic losses for vessels that are able to continue fishing and landing bigeye tuna during the closure. For example, the NMFS study of the 2010 closure (Richmond *et al.* 2015) found that ex-vessel prices during the closure in December were 50 percent greater than the average during the previous five Decembers. (It is emphasized that because it was an observational study, neither this nor other observations of what occurred during the closure can be affirmatively linked as effects of the fishery closure.)

Conversely, a WCPO bigeye tuna fishery closure could cause a decrease in ex-vessel prices of bigeye tuna and other products landed by affected entities if the interruption in the local supply prompts the Hawaii market to shift to alternative (e.g., imported) sources of bigeye tuna. Such a shift could be temporary—that is, limited to 2018-2020—or it could lead to a more permanent change in the market (e.g., as a result of wholesale and retail buyers wanting to mitigate the uncertainty in the continuity of supply from the Hawaii longline fisheries). In the latter case, if locally caught bigeye tuna fetches lower prices because of stiffer competition with imported bigeye tuna, then ex-vessel prices of local product could be depressed indefinitely. The NMFS study of the 2010 closure (Richmond *et al.* 2015) found that a common concern in the Hawaii fishing community prior to the closure in November 2010 was retailers having to rely more heavily on imported tuna, causing imports to gain a greater market share in local markets. The study found this not to have been borne out, at least not in 2010, when the evidence gathered in the study suggested that few buyers adapted to the closure by increasing their reliance on imports, and no reports or indications were found of a dramatic increase in the use of imported bigeye tuna during the closure. The study concluded, however, that the 2010 closure caused buyers to give increased consideration to imports as part of their

business model, and it was predicted that tuna imports could increase during any future closure. To the extent that ex-vessel prices would be reduced by this action, revenues earned by affected entities would be affected accordingly, and these impacts could occur both before and after the limit is reached, and as described above, possibly after 2020.

The potential economic effects identified above will vary among individual business entities, but it is not possible to predict the range of variation. Furthermore, the impacts on a particular entity will depend on both that entity's response to the final rule and the behavior of other vessels in the fleet, both before and after the catch limit is reached. For example, the greater the number of vessels that take advantage — before the limit is reached — of the first alternative opportunity (1), fishing as part of one of the Participating Territory's fisheries, the lower the likelihood that the limit will be reached.

The fleet's behavior in 2011 and 2012 is illustrative. In both those years, most vessels in the Hawaii fleet were included in a section 113(a) arrangement with the government of American Samoa, and as a consequence, the U.S. longline catch limit was not reached in either year. Thus, none of the vessels in the fleet, including those not included in the section 113(a) arrangements, were prohibited from fishing for bigeye tuna in the Convention Area at any time during those two years. The fleet's experience in 2010 (before opportunities under section 113(a) or Amendment 7 to the Pelagics FEP were available) provides another example of how economic impacts could be distributed among different entities. In 2010 the limit was reached and the WCPO bigeye tuna fishery was closed on November 22. As described above, dual permit vessels were able to continue fishing outside the U.S. EEZ around the Hawaiian Archipelago and benefit from the relatively high ex-vessel prices that bigeye tuna fetched during the closure.

In summary, based on potential reductions in ex-vessel revenues, NMFS has estimated that the upper bound of potential economic impacts of the final rule on affected longline fishing entities could be roughly \$160,000 per vessel per year, on average. The actual impacts to most entities are likely to be substantially less than those upper bounds, and for some entities the impacts could be neutral or positive (e.g., if one or more Amendment 7 agreements are in place in 2018-2020 and the terms of the agreements are such that the U.S. longline fleet is effectively unconstrained by the catch limits).

## *2. FAD Restrictions*

This element of the final rule does not establish any new reporting or recordkeeping requirements. The new requirement is for affected vessel owners and operators to comply with the FAD restrictions described earlier in the **SUPPLEMENTARY INFORMATION** section of the preamble, including FAD prohibition periods throughout the Convention Area from July 1 through September 30 in each of the years 2018-2020 and FAD prohibition periods just on the high seas in the Convention Area from November 1 through December 31 in each of the same years. There also is a limit of 350 active FADs that may be deployed per vessel at any given time. Anecdotal information from the U.S. purse seine fishing industry indicates that U.S. purse seine vessels have not ever deployed more than 350 active FADs at any given time, so NMFS does not expect that the limit will be constraining or otherwise affect the behavior of purse seine operations, and it is not considered further in this FRFA.

Fulfillment of the element's requirements is not expected to require any professional skills that the vessel owners and operators do not already possess. The costs of complying with the requirements are described below to the extent possible.

The proposed FAD restrictions would substantially constrain the manner in which purse seine fishing could be conducted in the specified areas and periods in the Convention Area; in those areas and during those periods, vessels would be able to set only on free, or “unassociated,” schools.

With respect to the three-month FAD closure throughout the Convention Area: Assuming that sets would be evenly distributed through the year, the number of annual FAD sets would be expected to be about three-fourths the number that would occur without a seasonal FAD closure. For example, during 2014-2016, the proportion of all sets that were made on FADs when FAD setting was allowed was 50 percent. As an indicative example, if the fleet makes 8,000 sets in a given year (somewhat more than the 2014-2016 average of 7,420 sets per year) and 50 percent of those are FAD sets, it would make 4,000 FAD sets. If there is a three-month closure and 50 percent of the sets outside the closure are FAD sets, and sets are evenly distributed throughout each year, the annual number of FAD sets would be 3,000. This can be compared to the estimated 2,494 annual FAD sets that were made in 2014-2016, on average, when there were three-month FAD closures.

With respect to the two-month high seas FAD closure: The effects of this element are difficult to predict. If the high seas are closed to all purse seine fishing during November-December as a result of the fishing effort limit being reached, the high seas FAD closure during those two months would have no additional effect whatsoever. If the high seas are not closed to fishing, the prohibition on FAD setting would make the high seas less favorable for fishing than they otherwise would be, because only unassociated sets would be allowed there. It is not possible to characterize how influential that factor

would be, however. Thus, it is not possible to predict the effects in terms of the spatial distribution of fishing effort or the proportion of fishing effort that is made on FADs.

With respect to both the three-month FAD closure and two-month high seas FAD closure: As for the limits on fishing effort, vessel operators might choose to schedule their routine maintenance periods so as to take best advantage of the available opportunities for making FAD sets, such as during the FAD closures. However, the limited number of vessel maintenance facilities in the region might constrain vessel operators' ability to do this.

It is emphasized that the indicative example given above is based on the assumption that the FAD set ratio would be 50 percent during periods when FAD sets are allowed, as well as that sets are distributed evenly throughout the year. These assumptions are weak from several perspectives, so the results should be interpreted with caution. First, as described above, FAD set ratios have varied widely from year to year, indicating that the conditions that dictate "optimal" FAD set ratios for the fleet vary widely from year to year, and cannot be predicted with any certainty. Second, the optimal FAD set ratio during open periods might depend on how long and when those periods occur. For example, FAD fishing might be particularly attractive soon after a closed period during which FADs aggregated fish but were not fished on. These factors are not explicitly accounted for in this analysis, but the 50 percent FAD ratio used in this analysis was taken from 2014-2016, when there was a three-month FAD closure, so it is probably a better indicator for the action alternatives than FAD set ratios for years prior to 2009, when no seasonal FAD closures were in place. With respect to the distribution of sets through the year, the existence of collective limits on fishing effort might create an

incentive for individual vessels to fish harder earlier in the year than they otherwise would, resulting in a “race to fish.” Limitations on fishing effort throughout the Convention Area could cause vessels to fish (irrespective of set type or the timing of FAD closures) harder earlier in a given year than they would without the limits. However, any such effect is not expected to be great, because most vessels in the fleet tend to fish virtually full time, leaving little flexibility to increase fishing effort at any particular time of the year.

Vessels in the U.S. WCPO purse seine fleet make both unassociated sets and FAD sets when not constrained by regulation, so one type of set is not always more valuable or efficient than the other type. Which set type is optimal at any given time is a function of immediate conditions in and on the water, but probably also of such factors as fuel prices (unassociated sets involve more searching time and thus tend to bring higher fuel costs than FAD sets) and market conditions (e.g., FAD fishing, which tends to result in greater catches of lower-value skipjack tuna and smaller yellowfin tuna and bigeye tuna than unassociated sets, might be more attractive and profitable when canneries are not rejecting small fish). Clearly, the ability to do either type of set is valuable, and constraints on the use of either type can be expected to bring adverse economic impacts to fishing operations. Thus, the greater the constraints on the ability to make FAD sets, the greater the expected economic impacts of the action. Because the factors affecting the relative value of FAD sets and unassociated sets are many, and the relationships among them are not well known, it is not possible to quantify the expected economic impacts of the FAD restrictions. However, it appears reasonable to conclude the following: First, the FAD restrictions will adversely impact producer surplus relative to the no-action

alternative. The fact that the fleet has made such a substantial portion of its sets on FADs in the past indicates that prohibiting the use of FADs in the specified areas and periods could bring substantial costs and/or revenue losses. Second, vessel operators might be able to mitigate the impacts of the FAD restrictions by scheduling their routine vessel and equipment maintenance during the FAD closures, but this opportunity might be constrained by the limited vessel maintenance facilities in the region.

### *3. Purse Seine Fishing Effort Limits*

This element of the final rule does not establish any new reporting or recordkeeping requirements, but the existing “Daily FAD reports” required at 50 CFR 300.218(g) are slightly revised, and renamed “Daily purse seine fishing effort reports” and slightly modify the type of information collected.

There are annual limits of 1,370 and 458 fishing days on the high seas and in the U.S. EEZ, respectively, in the Convention Area. In addition, there is a mechanism to increase the U.S. EEZ limit in a given year to 558 fishing days if 458 fishing days are used by October 1 of that year.

Fulfillment of this element’s requirements is not expected to require any professional skills that the vessel owners and operators do not already possess. The costs of complying with the requirements are described below to the extent possible.

Regarding the modification to the daily reporting requirement, the specific information required in the reports are slightly modified from those of the existing “Daily FAD reports,” but the costs of compliance are not expected to change.

Regarding the fishing effort limits, if and when the fishery on the high seas or in the U.S. EEZ is closed as a result of a limit being reached in any of the years 2018-2020,

owners and operators of U.S. purse seine vessels will have to cease fishing in that area for the remainder of the calendar year. Closure of the fishery in either of those areas could thereby cause foregone fishing opportunities and associated economic losses if the area contains preferred fishing grounds during such a closure. Historical fishing rates in the two areas give a rough indication of the likelihood of the limits being reached.

Regarding the U.S. EEZ, from 2009 through 2017, no more than 47 percent of the proposed limit of 458 fishing days was ever used (and no more than the 39 percent of the possible limit of 558 fishing days). This history suggests a relatively low likelihood of the EEZ limit being reached in 2018-2020. However, the allowance for an extra 100 fishing days if the 458 fishing days are used by October 1 could provide an incentive for the fleet to use more fishing days in the EEZ than it otherwise would. Furthermore, this would be the first time that separate limits would be established for the EEZ and the high seas, so the incentives for individual vessels in the fleet will change relative to previous years. A minority of the fleet is authorized to fish in the U.S. EEZ (9 of the 37 vessels in the fleet have fishery endorsements on their U.S. Coast Guard Certificates of Documentation, which are required to fish in the U.S. EEZ; the majority of U.S. purse seine fishing activity in the Convention Area takes place in the waters of Pacific Island Parties to the SPTT, pursuant to the terms of the SPTT). With a separate limit for the U.S. EEZ, this minority might take more advantage of it than it has in the past.

Regarding the high seas, from 2009 through 2017, between 29 and 134 percent of the annual limit of 1,370 fishing days was used, and at least 100 percent was used in three of the nine years. In two years, 2015 and 2016, the ELAPS was closed for part of the year (starting June 15 in 2015, and September 2 in 2016), so more fishing effort might have

occurred in those two years were there no limits. This history suggests a substantial likelihood of the high seas limit of 1,370 fishing days being reached in any of the years 2018-2020.

Two factors could have a substantial influence on the amount of fishing effort in the U.S. EEZ and on the high seas in 2018-2020: First, the number of fishing days available in foreign waters (the fleet's main fishing grounds) pursuant to the SPTT will influence the incentive to fish outside those waters, including the U.S. EEZ and high seas. Second, El Niño—Southern Oscillation (ENSO) conditions will influence where the best fishing grounds are.

Regarding fishing opportunities in foreign waters, in December 2016, the United States and the Pacific Island Parties to the SPTT (PIPs) agreed upon a revised SPTT, and under this new agreement U.S. purse seine fishing businesses can purchase fishing days in the EEZs of the PIPs. There are limits on the number of such “upfront” fishing days that may be purchased. These limits can influence the amount of fishing in other areas, such as the U.S. EEZ and the high seas, as well as the EPO. For example, if the number of available upfront fishing days is relatively small, fishing effort in the U.S. EEZ and/or high seas might be relatively great. In fact, the number of upfront days available for the Kiribati EEZ, which has traditionally constituted important fishing grounds for the U.S. fleet, is notably small—only 300 fishing days per year. However, the new SPTT regime provides for U.S. purse seine fishing businesses to purchase “additional” fishing days through direct bilateral agreements with the PIPs. NMFS cannot project how many additional days will be purchased in any given years, so cannot gauge how the limits on

upfront days might influence fishing effort in the U.S. EEZ or on the high seas. Limits on upfront days are therefore not considered here any further.

Additionally, effective January 1, 2015, Kiribati prohibited commercial fishing in the Phoenix Islands Protected Area, which is a large portion of the Kiribati EEZ around the Phoenix Islands. These limitations in the Kiribati EEZ in 2015 probably made fishing in the ELAPS more attractive than it otherwise would be.

Regarding El Niño Southern Oscillation (ENSO) conditions, the eastern areas of the WCPO tend to be comparatively more attractive to the U.S. purse seine fleet during El Niño events, when warm surface water spreads from the western Pacific to the eastern Pacific and large, valuable yellowfin tuna become more vulnerable to purse seine fishing and trade winds lessen in intensity. Consequently, the U.S. EEZ and high seas, much of which is situated in the eastern range of the fleet's fishing grounds, is likely to be more important fishing grounds to the fleet during El Niño events (as compared to neutral or La Niña events). This is supported by there being a statistically significant correlation between annual average per-vessel fishing effort in the ELAPS and the Oceanic Niño Index, a common measure of ENSO conditions, over the life of the SPTT through 2010.

El Niño conditions were present in 2015 and in the first half of 2016, and might have contributed to the relatively high rates of fishing in the ELAPS in those years. ENSO neutral conditions began in the latter half of 2016, and continued until the fourth quarter of 2017, when there was a shift to La Niña conditions, which persisted through early 2018 (and which is consistent with the moderate rates of fishing in the ELAPS in 2017). As of May 10, 2018, the National Weather Service states that in April 2018 ENSO-neutral conditions returned, and are predicted to continue at least through

September-November 2018. The Northern Hemisphere 2018-2019 winter has about 50% probability of El Niño conditions (National Oceanic and Atmospheric Administration, National Weather Service, Climate Prediction Center. Web page accessed June 12, 2018: [www.cpc.ncep.noaa.gov/products/analysis\\_monitoring/enso\\_advisory/index.shtml](http://www.cpc.ncep.noaa.gov/products/analysis_monitoring/enso_advisory/index.shtml)). Thus ENSO conditions are likely to have a largely neutral influence through the Northern Hemisphere fall of 2018, followed by a growing probability of conditions that favor fishing in the ELAPS during the Northern Hemisphere 2018-2019 winter. The influence of ENSO conditions on fishing effort after that cannot be predicted with any certainty.

Another potentially important factor is that the EEZ and high seas limits are competitive limits, so they could cause a “race to fish” in the two areas. That is, vessel operators might seek to take advantage of the limited number of fishing days available in the areas before the limits are reached, and fish harder in one or both areas than they would if there were no limits. On the one hand, any such race-to-fish effect might be reflected in the history of fishing in the ELAPS, described above. Anecdotal information from the fishing industry suggests that the limits might have been internally allocated by the fleet in the past, which might have tempered any race to fish. It is not known whether the industry intends to internally allocate the limits established in this final rule.

In summary, although difficult to predict, either the U.S. EEZ or high seas limits could be reached in any of the years 2018-2020, especially the high seas limits. If either limit is reached in a given year, the fleet will be prohibited from fishing in that area for the remainder of the calendar year.

The closure of any fishing grounds for any amount of time can be expected to bring adverse impacts to affected entities (e.g., because the open area might, during the

closed period, be less productive than the closed area, and vessels might use more fuel and spend more time having to travel to open areas). The severity of the impacts of a closure would depend greatly on the length of the closure and where the most favored fishing grounds are during the closure. A study by NMFS (Chan, V. and D. Squires. 2016. Analyzing the economic impacts of the 2015 ELAPS closure. NMFS Internal Report) estimated that the overall losses to the combined sectors of the vessels, canneries and vessel support companies from the 2015 ELAPS closure ranged from \$11 million and \$110 million depending on the counterfactual period considered. These results suggest that there were impacts from the ELAPS closure on the American Samoa economy and a connection between U.S. purse seine vessels and the broader American Samoa economy.

If either the U.S. EEZ or high seas is closed, possible next-best opportunities for U.S. purse seine vessels fishing in the WCPO include fishing in the other of the two areas, fishing in foreign EEZs inside the Convention Area, fishing outside the Convention Area in EPO, and not fishing.

With respect to fishing in the U.S. EEZ or on the high seas: If the U.S. EEZ were closed, the high seas would be available to the fleet until its limit is reached. If the high seas were closed, the U.S. EEZ would be available until its limit is reached, but only for the vessels with fishery endorsements on their Certificates of Documentation (currently 9, including 8 vessels with SPTT licenses and one additional vessel without).

With respect to fishing in the Convention Area in foreign EEZs: As described above, under the SPTT the fleet might have substantial fishing days available in the Pacific Island country EEZs that dominate the WCPO, but it is not possible to predict

how many fishing days will be available to the fleet as a whole or to individual fishing businesses.

With respect to fishing in the EPO: The fleet has generally increased its fishing operations in the EPO since 2014, and as of 2017, there were 17 purse seine vessels in the WCPO fleet that are also listed on the IATTC Vessel Register. In order to fish in the EPO, a vessel must be on the IATTC's Regional Vessel Register and categorized as active (50 CFR 300.22(b)), which involves fees of about \$14.95 per cubic meter of well space per year (e.g., a vessel with 1,200 m<sup>3</sup> of well space would be subject to annual fees of \$17,940). (As an exception to this rule, an SPTT-licensed vessel is allowed to make one fishing trip in the EPO each year without being categorized as active on the IATTC Regional Vessel Register. The trip must not exceed 90 days in length, and there is an annual limit of 32 such trips for the entire SPTT-licensed fleet (50 CFR 300.22(b)(1)).) The number of U.S. purse seine vessels in the WCPO fleet that have opted to be categorized as such has increased in the last few years from zero to 17, probably largely a result of constraints on fishing days in the WCPO and/or uncertainty in future access arrangements under the SPTT. This suggests an increasing attractiveness of fishing in the EPO, in spite of the costs associated with doing so. However, in 2018 vessels probably will not have the opportunity to fish in the EPO year-round. To implement a recent decision of the IATTC, NMFS has published a final rule that requires purse seine vessels to choose between two EPO fishing prohibition periods each year in 2018-2020: July 29 – October 8 or November 9 – January 19 (72 days in either case). Thus, the opportunity to fish in the EPO might be constrained, depending on when the U.S. EEZ and/or high

seas in the WCPFC Area is closed, and which EPO closure period a given vessel operator chooses.

With respect to not fishing at all during a closure of the U.S. EEZ or high seas: This would mean a loss of any revenues from fishing. However, many of the vessels' variable operating costs would be avoided in that case, and it is possible that for some vessels a portion of the time might be used for productive activities like vessel and equipment maintenance.

The opportunity costs of engaging in next-best opportunities in the event of a closure are not known, so the potential impacts cannot be quantified. However, to give an indication of the magnitude of possible economic impacts to producers in the fishery (i.e., an indication of the upper bound of those impacts), information on revenues per day is provided here.

The last five years for which catch estimates for the U.S. WCPO purse seine fleet are available are 2012-2016. Those estimates, adjusted to an indicative fleet size of 35 vessels, equate to annual average catches of skipjack tuna, yellowfin tuna, and bigeye tuna of 236,077 mt, 24,802 mt, and 4,213 mt, respectively, or 265,091 mt in total. Applying an indicative current Bangkok cannery price for skipjack tuna of \$1,500 per mt to all three species, the value of annual fleet-wide catches at 2012-2016 average levels would be about \$398 million, equivalent to a little more than \$1 million per calendar day, on average. It should be noted that cannery prices are fairly volatile; for example, cannery prices are much lower now than prices during most of 2017.

In addition to the effects described above, the purse seine effort limits could affect the temporal distribution of fishing effort in the U.S. purse seine fishery. Since the limits

will apply fleet-wide—that is, they will not be allocated to individual vessels—vessel operators might have an incentive to fish harder in the affected areas earlier in each calendar year than they otherwise would. Such a race-to-fish effect might also be expected in the time period between when a closure of the fishery is announced and when it is actually closed, which would be at least seven calendar days. To the extent such temporal shifts occur, they could affect the seasonal timing of fish catches and deliveries to canneries. The timing of cannery deliveries by the U.S. fleet alone (as it might be affected by a race to fish in the EEZ or high seas) is unlikely to have an appreciable impact on prices, because many canneries in the Asia-Pacific region and elsewhere buy from the fleets of multiple nations, as well as other domestic fleets. A race to fish could bring costs to affected entities if it causes vessel operators to forego vessel maintenance in favor of fishing or to fish in weather or ocean conditions that they otherwise would not. This could bring costs in terms of the health and safety of the crew as well as the economic performance of the vessel.

#### *4. Eastern High Seas Special Management Area*

This element of the final rule removes a reporting/recordkeeping requirement, the requirement to notify NMFS when entering and exiting the EHSSMA. It also establishes a prohibition on transshipment in the EHSSMA.

Fulfillment of this element's requirements is not expected to require any professional skills that the vessel owners and operators do not already possess. The costs of complying with the requirements are described below to the extent possible.

Regarding the entry/exit notices, when NMFS established the requirement in 2012 (final rule published December 3, 2012; 77 FR 71501), it estimated that each report

would require about 15 minutes of labor (at a labor cost of about \$60 per hour) and no more than \$1 in communication costs, for an estimated total cost of compliance of about \$16 per notice. At that time, NMFS estimated that each longline vessel would enter and exit the EHSSMA between zero and approximately four times per year (requiring 0-8 notices per year at an annual cost of \$0-128), each purse seine vessel would do so between zero and approximately two times per year (requiring 0-4 notices per year at an annual cost of \$0-64), and each albacore troll vessel would do so between zero and two times per year (requiring 0-4 notices per year at an annual cost of \$0-64). According to the notices received by NMFS, zero longline vessels and zero albacore troll vessels have entered the EHSSMA from 2013 through 2017, and there have been nine entries/exits by purse seine fishing vessels. In any case, under the final rule, commercial fishing vessels will be relieved of about \$16 in compliance costs each time they enter or exit the EHSSMA.

### **Disproportionate Impacts**

As described above, the type of the impacts will vary greatly among fishing gear types (i.e., longline versus albacore troll versus purse seine), and the magnitude of the impacts also could vary greatly by fishing gear type (but they are difficult to quantify and compare). Nevertheless, all the affected entities in the longline and albacore troll fishing sectors are small entities, so there will be no disproportionate impacts between small and large entities within those sectors. In the purse seine fishing sector, slightly more than half the affected entities are small entities. The direct effect of the final rule will be to constrain fishing effort by purse seine fishing vessels, with consequent constraining effects on both revenues (because catches would be less) and operating costs (because

less fishing would be undertaken). Although some purse seine fishing entities are larger than others, NMFS is not aware of any differences between the small entities and the large entities (as defined by the RFA) in terms of their capital costs, operating costs, or other aspects of their businesses. Accordingly, there is no information to suggest that the direct adverse economic impacts on small purse seine entities will be disproportionately greater than those on large purse seine entities.

### **Steps Taken to Minimize the Significant Economic Impacts on Small Entities**

NMFS has sought to identify alternatives that would minimize the final rule's economic impacts on small entities ("significant alternatives"). Taking no action could result in lesser adverse economic impacts than the final rule for affected entities (but as described below, for some affected longline entities, the final rule could be more economically beneficial than no-action), but NMFS has rejected the no-action alternative because it would be inconsistent with the United States' obligations under the Convention. Alternatives identified for each of the four elements of the final rule are discussed below.

#### *1. Longline Bigeye Tuna Catch Limits*

NMFS has not identified any significant alternatives for this element of the final rule, other than the no-action alternative.

#### *2. FAD Restrictions*

NMFS considered in detail one alternative to this element of the final rule, but only with respect to the timing of the two-month FAD closure for the high seas. CMM 2017-01 allows members to choose either November-December, as in this final rule, or April-May. NMFS has compared the expected direct economic impacts of the two

alternatives on purse seine fishing businesses in the regulatory impact review prepared for the proposed rule. The analysis finds that a November-December closure is more likely to have a lesser direct economic impact on those businesses than an April-May closure, primarily because the later closure period is more likely to run concurrently with a closure of the high seas in the Convention Area to purse seine fishing (if the fishing effort limit in this final rule is reached), in which case the FAD closure would bring no additional economic impacts. NMFS has rejected the alternative of an April-May FAD closure for that reason. Please see Comment 5 above, for a summary of the comments received on this matter, as well as NMFS' response to those comments.

### *3. Purse seine Fishing Effort Limits*

In the past, Commission decisions did not expressly limit NMFS' ability to implement the U.S. purse seine fishing effort limits on the high seas and in the U.S. EEZ as a single combined limit in the ELAPS. As described above, for this final rule, in light of the plain language of Paragraph 29 of CMM 2017-01, which sets forth specific rules and guidelines regarding transferring fishing days from the U.S. EEZ limit to the high seas limit for the United States for 2018, we believe we are required to separately establish and enforce the U.S. high seas limit and the U.S. EEZ limit. Thus, NMFS is not implementing the alternative of combining the two limits into a single limit for the ELAPS for 2018. However, NMFS has analyzed this alternative here and in the revised RIR and, and will continue to consider this alternative in 2019 or 2020 (as described in the proposed rule and the RIR, the analysis for the rule is for a three-year time period), to the extent it is consistent with future Commission decisions on tropical tuna management.

A combined limit would provide 1,828 fishing days per calendar year in the

ELAPS (versus, under the rule, an annual limit of 1,370 fishing days on the high seas and a separate annual limit of 458 fishing days in the U.S. EEZ, with the possibility of an increase in the latter to 558 fishing days if the 458 fishing days are used by October 1, 2018). It is difficult to predict the behavior and performance of vessels under these two alternatives, but they could have different economic impacts on fishing businesses. The rule, with separate limits, offers the potential of more fishing days per year (1,928) than under the alternative of a combined limit (1,828). However, it does not appear likely that 458 fishing days will be used in the U.S. EEZ by October 1, 2018, so it is likely that both alternatives offer a total of 1,828 fishing days. A single combined limit offers more operational flexibility for the fleet as a whole than separate limits, and that greater flexibility would be expected to result in fewer losses to some or most of the affected fishing businesses. For example, under separate limits, the U.S. EEZ limit appears less constraining than the high seas limit, so it would likely be more costly to the fleet as a whole to make full use of both limits than it would to make full use of the single combined limit. However, the expected impacts of the two alternatives on fishing businesses would be dependent on whether a given vessel has a fishery endorsement on its U.S. Coast Guard Certificate of Documentation, which is required to fish in the U.S. EEZ. With separate limits for the U.S. EEZ and high seas, those vessels without fishery endorsements, which comprise the majority of the fleet, would not have access to the 458 (or possibly 558) fishing days per year for the U.S. EEZ, but under a combined limit for the ELAPS, those fishing days could be used on the high seas, so they would be effectively available to all affected fishing businesses. Thus, a single combined limit would appear to be more favorable to vessels without fishery endorsements. Having

separate limits could be advantageous to vessels with fishery endorsements if the high seas limit is reached before the U.S. EEZ limit is reached, which appears likely for 2018. In that case, the remainder of the limit for the U.S. EEZ would be available only to vessels with fishery endorsements. If the U.S. EEZ limit were more constraining than the high seas limit under separate limits (which it appears not to be), then separate limits would appear to be less advantageous to vessels with fishery endorsements than a combined limit, since under a combined limit they would have more time to fish in both the U.S. EEZ and on the high seas.

#### *4. Eastern High Seas Special Management Area*

NMFS has not identified any significant alternatives for this element of the final rule, other than the no-action alternative.

#### **Small Entity Compliance Guide**

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as “small entity compliance guides.” The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. NMFS has prepared small entity compliance guides for this rule, and will send the appropriate guides to holders of permits in the relevant fisheries. The guides and this final rule also will be available at [www.fpir.noaa.gov](http://www.fpir.noaa.gov) and by request from NMFS PIRO (see **ADDRESSES**).

#### *Paperwork Reduction Act*

This final rule contains a revised collection-of-information requirement subject to review and approval by OMB under the PRA. This requirement has been submitted to OMB for approval under Control Number 0648-0649. Public reporting burden for the daily report of purse seine effort information is estimated to average 10 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection information.

One comment was received on this collection-of-information requirement in response to the proposed rule (see Comment 10 and NMFS' response, above). Send comments on these or any other aspects of the collection of information to Michael D. Tosatto, Regional Administrator, NMFS PIRO (see **ADDRESSES**), and by e-mail to *OIRA\_Submission@omb.eop.gov* or fax to 202-395-5806.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

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

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

Dated: July 13, 2018.

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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 300 is 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, add a definition in alphabetical order for “Active FAD” to read as follows:

**§ 300.211 Definitions.**

\* \* \* \* \*

*Active FAD* is a FAD that is equipped with a buoy with a clearly marked reference number allowing its identification and equipped with a satellite tracking system to monitor its position.

\* \* \* \* \*

3. In § 300.217, revise paragraph (b)(1) to read as follows:

**§ 300.217 Vessel identification.**

\* \* \* \* \*

(b) \* \* \*

(1) Vessels shall be marked in accordance with the identification requirements of § 300.336(b)(2), and if an IRCS has not been assigned to the vessel, then the Federal, State, or other documentation number used in lieu of the IRCS must be preceded by the characters “USA” and a hyphen (that is, “USA-“).

\* \* \* \* \*

4. In § 300.218, revise paragraphs (a)(2)(v) and (g) to read as follows:

**§ 300.218 Reporting and recordkeeping requirements.**

(a)\*\*\*

(2)\*\*\*

(v) *High seas fisheries.* Fishing activities subject to the reporting requirements of § 300.341 must be maintained and reported in the manner specified in § 300.341(a).

\* \* \* \* \*

(g) *Daily purse seine fishing effort reports.* If directed by NMFS, the owner or operator of any fishing vessel of the United States equipped with purse seine gear must report to NMFS, for the period and in the format and manner directed by the Pacific Islands Regional Administrator, within 24 hours of the end of each day that the vessel is at sea in the Convention Area, the activity of the vessel (e.g., setting, transiting, searching), location and type of set, if a set was made during that day.

\* \* \* \* \*

5. In § 300.222, revise paragraphs (v), (w), (oo), and (pp) to read as follows:

**§ 300.222 Prohibitions.**

\* \* \* \* \*

(v) Use a fishing vessel equipped with purse seine gear to fish in an area closed to purse seine fishing under § 300.223(a).

(w) Set a purse seine around, near or in association with a FAD or a vessel, deploy, activate, or service a FAD, or use lights in contravention of § 300.223(b).

\* \* \* \* \*

(oo) Transship in the Eastern High Seas Special Management Area in contravention of § 300.225.

(pp) Fail to submit, or ensure submission of, a daily purse seine fishing effort report as required in § 300.218(g).

\* \* \* \* \*

6. In § 300.223, revise paragraphs (a) and (b) to read as follows:

**§ 300.223 Purse seine fishing restrictions.**

\* \* \* \* \*

(a) *Fishing effort limits.* This paragraph establishes limits on the number of fishing days that fishing vessels of the United States equipped with purse seine gear may operate in the Convention Area in the area between 20° N latitude and 20° S latitude in a calendar year.

(1) For the high seas there is a limit of 1,370 fishing days in 2018.

(2) For the U.S. EEZ there is a limit of 458 fishing days for 2018. If NMFS expects that this limit will be reached by October 1, 2018, NMFS will publish a document in the **Federal Register** increasing the limit for that calendar year to 558 fishing days no later than seven days prior to October 1, 2018.

(3) NMFS will determine the number of fishing days spent on the high seas and in the U.S. EEZ in each calendar year using data submitted in logbooks and other available information. After NMFS determines that a limit in a calendar year is expected to be reached by a specific future date, and at least seven calendar days in advance of the closure date, NMFS will publish a document in the **Federal Register** announcing that the purse seine fishery in the area where the limit is expected to be reached will be closed starting on that specific future date and will remain closed until the end of the calendar year.

(4) Once a fishery closure is announced pursuant to paragraph (a)(3) of this section, fishing vessels of the United States equipped with purse seine gear may not be used to fish in the closed area during the period specified in the **Federal Register** document, except that such vessels are not prohibited from bunkering during a fishery closure.

(b) *Use of fish aggregating devices.* (1) During the periods and in the areas specified in paragraph (b)(2) of this section, owners, operators, and crew of fishing vessels of the United States equipped with purse seine gear shall not do any of the activities described below in the Convention Area in the area between 20° N latitude and 20° S latitude:

(i) Set a purse seine around a FAD or within one nautical mile of a FAD.

(ii) Set a purse seine in a manner intended to capture fish that have aggregated in association with a FAD or a vessel, such as by setting the purse seine in an area from which a FAD or a vessel has been moved or removed within the previous eight hours, or setting the purse seine in an area in which a FAD has been inspected or handled within

the previous eight hours, or setting the purse seine in an area into which fish were drawn by a vessel from the vicinity of a FAD or a vessel.

(iii) Deploy a FAD into the water.

(iv) Repair, clean, maintain, or otherwise service a FAD, including any electronic equipment used in association with a FAD, in the water or on a vessel while at sea, except that:

(A) A FAD may be inspected and handled as needed to identify the FAD, identify and release incidentally captured animals, un-foul fishing gear, or prevent damage to property or risk to human safety; and

(B) A FAD may be removed from the water and if removed may be repaired, cleaned, maintained, or otherwise serviced, provided that it is not returned to the water.

(v) From a purse seine vessel or any associated skiffs, other watercraft or equipment, do any of the following, except in emergencies as needed to prevent human injury or the loss of human life, the loss of the purse seine vessel, skiffs, watercraft or aircraft, or environmental damage:

(A) Submerge lights under water;

(B) Suspend or hang lights over the side of the purse seine vessel, skiff, watercraft or equipment, or;

(C) Direct or use lights in a manner other than as needed to illuminate the deck of the purse seine vessel or associated skiffs, watercraft or equipment, to comply with navigational requirements, and to ensure the health and safety of the crew.

(2) The requirements of paragraph (b)(1) of this section shall apply:

(i) From July 1 through September 30, in each calendar year;

(ii) In any area of high seas, from November 1 through December 31, in each calendar year.

(3)(i) *Activating FADs for purse seine vessels.* A vessel owner, operator, or crew of a fishing vessel of the United States equipped with purse seine gear shall turn on the tracking equipment of an active FAD while the FAD is onboard the vessel and before it is deployed in the water.

(ii) *Restrictions on Active FADs for purse seine vessels.* U.S. vessel owners and operators of a fishing vessel of the United States equipped with purse seine gear shall not have more than 350 drifting active FADs per vessel in the Convention Area at any one time.

\* \* \* \* \*

7. In § 300.224, revise paragraph (a)(1) and remove and reserve paragraph (a)(2).

The revision reads as follows:

**§ 300.224 Longline fishing restrictions.**

(a) \* \* \*

(1) There is a limit of 3,554 metric tons of bigeye tuna per calendar year that may be captured in the Convention Area by longline gear and retained on board by fishing vessels of the United States.

\* \* \* \* \*

8. Revise § 300.225 to read as follows:

**§ 300.225 Eastern High Seas Special Management Area.**

The owner and operator of a fishing vessel of the United States used for commercial fishing for HMS is prohibited from engaging in transshipment in the Eastern High Seas Special Management Area.

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