

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 635**

**[Docket No. 160328287-6745-02]**

**RIN 0648-BF94**

**Atlantic Highly Migratory Species (HMS); Porbeagle Shark Management Measures**

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

**ACTION:** Final rule.

**SUMMARY:** This final rule implements the International Commission for the Conservation of Atlantic Tunas (ICCAT) Recommendation 15-06 regarding porbeagle sharks (*Lamna nasus*) caught in association with ICCAT fisheries. Recommendation 15-06 requires, among other things, fishing vessels to promptly release unharmed, to the extent practicable, porbeagle sharks caught in association with ICCAT fisheries when brought alive alongside for taking on board the vessel. This action affects fishermen fishing in the commercial highly migratory species (HMS) pelagic longline fishery and the HMS recreational fisheries for tunas, swordfish, and billfish in the Atlantic Ocean, including the Caribbean Sea and Gulf of Mexico. This action implements an ICCAT recommendation, consistent with the Atlantic Tunas Convention Act (ATCA), and will further domestic management objectives under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

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

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

**SUPPLEMENTARY INFORMATION:**

**Background**

Atlantic HMS are managed under the 2006 Consolidated HMS Fishery Management Plan (FMP). Implementing regulations at 50 CFR part 635 are issued under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1801 *et seq.*, and Atlantic Tunas Convention Act (ATCA), 16 U.S.C. 927 *et seq.* ATCA requires the Secretary of Commerce (Secretary) to promulgate regulations as may be necessary and appropriate to implement ICCAT recommendations.

At its 24th Annual Meeting in 2015, ICCAT adopted Recommendation 15-06 on “Porbeagle [Sharks] Caught in Association with ICCAT Fisheries.” Recommendation 15-06 requires, among other things, fishing vessels “... to promptly release unharmed, to the extent practicable, porbeagle sharks caught in association with ICCAT fisheries when brought alive alongside for taking on board the vessel.” Recommendation 15-06 notes that, according to the ICCAT Standing Committee for Research and Statistics (SCRS), biomass of northwest Atlantic and northeast Atlantic porbeagle sharks is depleted to well below the biomass at maximum sustainable yield, but recent fishing mortality is below the fishing mortality at maximum sustainable yield (i.e., the stocks are overfished but overfishing is not occurring).

Recommendation 15-06 further notes that the 2008 and 2012 Ecological Risk Assessments

concluded that the porbeagle shark was among the most vulnerable of shark species, which, even at low fishing mortality levels, makes it more susceptible to overfishing. Thus, Recommendation 15-06 was adopted by ICCAT to reduce fishing mortality of porbeagle sharks caught in association with ICCAT fisheries in order to reduce porbeagle shark fishing even further, and thus assist in rebuilding stocks which are currently overfished. On June 15, 2016 (81 FR 39017), NMFS published a proposed rule to consider changes to the regulations at 50 CFR part 635 consistent with Recommendation 15-06. The proposed rule contains details that are not repeated here. The comment period on the proposed rule ended on July 15, 2016.

Domestically, porbeagle sharks are managed pursuant to a rebuilding plan established in Amendment 2 to the 2006 Consolidated HMS FMP (73 FR 35788, June 24, 2008 as corrected at 73 FR 40658, July 15, 2008). Under current regulations, commercial and recreational HMS fishermen that operate in ICCAT fisheries are authorized to retain any porbeagle shark, regardless of whether the shark is dead or alive at haulback. In this final rule, NMFS requires, to the extent practicable, all live porbeagle sharks to be released by commercial and recreational HMS fishermen operating in ICCAT fisheries, as determined by the permits they hold or, in the case of recreational fisheries, whether they have also retained tuna-like species on a given trip.

### **Response to Comments**

During the proposed rule stage, NMFS received 28 written comments. The comments received on the proposed rule during the public comment period can be found at <http://www.regulations.gov/> by searching for NOAA-NMFS-2016-0066. A summary of the relevant comments on the proposed rule are shown below with NMFS' response.

*Comment 1:* NMFS received comments both in support of, and opposed to, implementing the ICCAT recommendation. Commenters who supported this action stated that the proposed rule was necessary to be consistent with the recommendation adopted by ICCAT. Commenters opposing the proposed rule stated that the porbeagle population in waters off the northeast United States was abundant.

*Response:* NMFS agrees that this action is consistent with the ICCAT recommendation. Regarding the status of porbeagle sharks, as described in the proposed rule, according to the most recent stock assessment in 2009, which was a joint stock assessment between ICCAT and the International Council for the Exploration of the Sea (ICES), the Northwest Atlantic porbeagle shark stock is depleted well below the biomass at maximum sustainable yield, and recent fishing mortality is below the fishing mortality at maximum sustainable yield. Based on these results, porbeagle sharks are considered to be overfished with no overfishing occurring both domestically and internationally. As cited in Recommendation 15-06, porbeagle sharks are among the most vulnerable shark species, which means that even at low fishing mortality levels, the species is more susceptible to overfishing than other less vulnerable shark species. ICCAT has provisionally scheduled the next porbeagle shark stock assessment for 2019. More information regarding the 2009 stock assessment can be found at

<http://www.iccat.int/Documents/SCRS/DetRep/DET-POR.pdf>.

*Comment 2:* Some commenters noted the need for complete prohibition of porbeagle sharks caught in association with non-ICCAT fisheries given the overfished status of the stock.

*Response:* This comment is outside the scope of this rulemaking because the purpose of this rulemaking only pertains to implementing ICCAT Recommendation 15-06, consistent with

ATCA. ICCAT Recommendation 15-06 pertains to the live release of porbeagle sharks caught in association with ICCAT fisheries and does not address possession of the species in non-ICCAT fisheries. Domestically, porbeagle sharks are managed pursuant to a rebuilding plan established in 2008 in Amendment 2 to the 2006 Consolidated HMS FMP, consistent with the requirements of the Magnuson-Stevens Act.

*Comment 3:* NMFS received comments stating that NMFS should issue its 12-month finding regarding listing porbeagle sharks under the Endangered Species Act (ESA).

*Response:* This comment is outside the scope of this rulemaking because the purpose of this rulemaking is to implement ICCAT Recommendation 15-06. The 12-month finding regarding listing porbeagle sharks under the ESA very recently published on August 1, 2016 (81 FR 50463). Any further information regarding the 12-month finding and any subsequent related agency action can be found at [www.federalregister.gov/](http://www.federalregister.gov/).

*Comment 4:* NMFS received a comment stating that current low interactions between recreational fishermen and porbeagle sharks, in combination with high release rates of the species, does not warrant additional regulations for the recreational fishery.

*Response:* Under the authority of ATCA and the Magnuson-Stevens Act, NMFS is obligated to promulgate such regulations as may be necessary and appropriate to carry out ICCAT recommendations. Additionally, as stated above, porbeagle sharks are overfished without overfishing occurring. ICCAT Recommendation 15-06 was designed in part to aid in rebuilding this vulnerable shark species. NMFS acknowledges that recreational fishermen interact with few porbeagle sharks and that most fishermen who catch porbeagle sharks release the majority of those sharks alive. Furthermore, the measures in this rulemaking only apply to

recreational fishermen that catch porbeagle sharks while also retaining swordfish, billfish, or tuna. This rulemaking does not apply to recreational fishermen that catch porbeagle sharks and do not retain swordfish, billfish, or tuna. As such, this regulation, which requires the live release of porbeagle sharks caught in association with ICCAT fisheries, should have few overall impacts on the recreational fishery.

*Comment 5:* NMFS received public comments regarding handling and release practices of porbeagle sharks. The commenters highlighted that the proposed changes could result in anglers switching to fishing practices that would ensure porbeagle sharks are dead at haulback in order to allow for retention of any porbeagle shark caught. Other commenters were concerned that the data indicating high release rates of porbeagle sharks in commercial and recreational fisheries were inaccurate because the data were self-reported and did not consider post-release mortality rates of porbeagle sharks.

*Response:* As described in the proposed rule, HMS logbook and pelagic observer program data indicate that approximately 97 percent of porbeagle sharks were released (alive and dead) from 2010 – 2015. Additionally, recreational data indicate approximately 90 percent of porbeagle sharks were released from 2010 – 2015. These data, which are a mix of self-reported and observer data are the best scientific data available and indicate that most porbeagle sharks have not been retained. While the data do not indicate how many sharks released alive would subsequently die as a result of being caught, the ICCAT Recommendation will increase the numbers of porbeagle sharks released alive and thereby likely increase the survival of those sharks and aid in rebuilding.

Regarding handling and release practices, U.S. fishermen who interact with porbeagle sharks have historically followed safe handling and release practices. This regulation requires U.S. fishermen to release live porbeagle sharks in a manner that is largely consistent with the safe handling and release practices that most fishermen employ. NMFS believes and expects that fishermen will continue to follow these safe handling and release practices after implementation of the ICCAT Recommendation 15-06. NMFS will continue to monitor potential violations of Atlantic HMS regulations to ensure that both commercial and recreational fishermen maintain proper catch and release practices.

*Comment 6:* Several commenters expressed concern that implementing ICCAT Recommendation 15-06 would result in a complete closure of the recreational porbeagle shark fishery.

*Response:* This final rule will not result in the closure of the recreational porbeagle shark fishery. As described in the proposed rule, implementation of ICCAT Recommendation 15-06 would impact HMS recreational fishermen who retain porbeagle sharks while also retaining swordfish, billfish, or tuna. Under these circumstances, recreational fishermen would have to either discard live porbeagle sharks or the swordfish, billfish, or tuna. If a porbeagle shark were caught that was dead at the time of haulback, a recreational HMS fisherman with swordfish, billfish, or tuna onboard could retain the porbeagle, consistent with all other regulations such as the retention and size limits. Similarly, if a recreational HMS fisherman did not have swordfish, billfish, or tuna onboard, and was not intending to retain any swordfish, billfish, or tunas, that fisherman could retain any porbeagle shark that met the retention and size limits, regardless of the disposition of the shark.

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

NMFS made one change to the proposed regulations. At § 635.22 (a)(3), NMFS has added text specifying that the permit holders subject to the applicable requirements of this rulemaking include fishermen who hold a Swordfish General Commercial permit when they are participating in an HMS registered tournament. The proposed rule clearly stated that recreational fishing for porbeagle sharks would be affected when swordfish, tuna, or billfish are retained or possessed on board, or offloaded from, the vessel on a trip. We inadvertently did not list the Swordfish General Commercial permit, even though participation in an HMS registered recreational tournament with such a permit is clearly recreational fishing, and such permit holders had notice of the proposed rule's effect on recreational fishing both through the Federal Register Notice and through NMFS outreach, including NMFS' HMS-specific email listserv and NMFS' general email listserv.

It is generally understood that the Swordfish General Commercial permit is similar to the HMS General Category commercial permit in that the permit is considered recreational when the vessel owner or operator is using that vessel in an HMS registered tournament and landings of HMS are allowed, consistent with the regulations. While the regulatory language in the proposed rule did not specifically include this category of permit when listing the permit titles, the rule did repeatedly refer to recreational fisheries, and permit holders could reasonably have anticipated that the prohibition would apply to them given the rule's overall context and content and thus had sufficient notice. The underlying NEPA analysis associated with this rulemaking is not affected by this correction. These fishermen are considered recreational when fishing during a registered HMS tournament, and all such fishing in tournaments was within the scope of what

was analyzed; any harvest of porbeagle sharks by these fishermen was analyzed at the proposed rule stage as recreational data. The Regulatory Flexibility Act (RFA) certification is similarly unaffected by this correction. It was based on the recreational information about porbeagle sharks received through the Large Pelagics Survey, which does not distinguish among permit types. Therefore, any recreational harvest of porbeagle sharks by Swordfish General Category permit holders was considered at the proposed rule stage. Furthermore, recreationally-caught porbeagle sharks cannot be sold, limiting the effects analyzed under the RFA,

### **Classification**

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

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

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

On December 29, 2015, NMFS issued a final rule establishing a small business size standard of \$11 million in annual gross receipts for all businesses primarily engaged in the commercial fishing industry (NAICS 11411) for Regulatory Flexibility Act (RFA) compliance

purposes only (80 FR 81194, December 29, 2015). The \$11 million standard became effective on July 1, 2016, and is to be used in place of the U.S. Small Business Administration's (SBA) current standards of \$20.5 million, \$5.5 million, and \$7.5 million for the finfish (NAICS 114111), shellfish (NAICS 114112), and other marine fishing (NAICS 114119) sectors of the U.S. commercial fishing industry in all NMFS rules subject to the RFA after July 1, 2016. *Id.* at 81194.

Pursuant to the Regulatory Flexibility Act, and prior to July 1, 2016, a certification was developed for this regulatory action using SBA's former size standards. NMFS has reviewed the analyses prepared for this regulatory action in light of the new size standard. All of the entities directly regulated by this regulatory action are commercial finfish fishing businesses. The new standard could result in fewer commercial finfish businesses being considered small. However, NMFS has determined that the new size standard does not affect its decision to certify this regulatory action. NMFS considers all HMS longline permit holders to be small entities because these vessels have reported annual gross receipts of less than \$11 million for commercial fishing. The average annual gross revenue per active pelagic longline vessel was estimated to be \$187,000 based on the 170 active vessels between 2006 and 2012 that produced an estimated \$31.8 million in revenue annually. The maximum annual revenue for any pelagic longline vessel between 2006 and 2015 was \$1.9 million, well below the NMFS small business size threshold of \$11 million in gross receipts for commercial fishing. Therefore, NMFS considers all Atlantic Tunas Longline category permit holders to be small entities. Since the annual revenue for Atlantic Tunas Longline category permit holders is well below both the former and new SBA

size standard, there continues to be no significant economic impact on a substantial number of small entities.

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

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

Dated: August 18, 2016.

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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 635 is amended as follows:

**PART 635-ATLANTIC HIGHLY MIGRATORY SPECIES**

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

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

2. In § 635.21, add paragraph (c)(1)(iii) to read as follows:

**§ 635.21 Gear operation and deployment restrictions.**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(iii) Has pelagic longline gear on board, persons aboard that vessel are required to release unharmed, to the extent practicable, porbeagle sharks that are alive at the time of haulback.

\* \* \* \* \*

3. In § 635.22, add paragraph (a)(3) to read as follows:

**§ 635.22 Recreational retention limits.**

(a) \* \* \*

(3) Vessels issued an HMS General Category permit under § 635.4(d) that are participating in an HMS registered tournament, vessels issued a Swordfish General commercial permit under § 635.4(f) that are participating in an HMS registered tournament, vessels issued a HMS Angling category permit under § 635.4(c), or vessels issued a HMS Charter/Headboat permit under §635.4(b) are required to release unharmed, to the extent practicable, porbeagle sharks that are alive at the time of haulback if swordfish, tuna, or billfish are retained or possessed on board, or offloaded from, the vessel during that trip.

\* \* \* \* \*

4. In § 635.24, add paragraph (a)(10) to read as follows:

**§ 635.24 Commercial retention limits for sharks, swordfish, and BAYS tunas.**

\* \* \* \* \*

(a) \* \* \*

(10) Notwithstanding other provisions in this paragraph (a), vessels issued a permit under this part that have pelagic longline gear on board or on vessels issued both an HMS

Charter/Headboat permit and a commercial shark permit when tuna, swordfish, or billfish are on board the vessel, offloaded from the vessel, or being offloaded from the vessel, are required to release unharmed, to the extent practicable, porbeagle sharks that are alive at the time of haulback.

\* \* \* \* \*

5. In § 635.71, add paragraph (d)(20) to read as follows:

**§ 635.71 Prohibitions.**

\* \* \* \* \*

(d) \* \* \*

(20) Retain, possess, or land porbeagle sharks that were alive at the time of haulback as specified in §§ 635.21(c)(1)(iii), 635.22(a)(3), and 635.24 (a)(10).

\* \* \* \* \*

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