DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 630

[Docket No. 980630163–8163–01; I.D.011598A]

RIN 0648–AJ68

Atlantic Swordfish Fishery; Management of Driftnet Gear

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations to prohibit the use of driftnets in the Atlantic swordfish fishery and to eliminate any incidental catch allowance for swordfish in any other driftnet fishery. The intent of the proposed action is to reduce interactions of driftnets in the Atlantic swordfish fishery with certain protected marine species.

DATES: Comments must be submitted on or before December 14, 1998. Public hearings on this proposed rule will be held on Friday, November 13, 1998, in Silver Spring, MD, at 9:00–11:00 a.m. and on Tuesday, November 17, 1998, in Fairhaven, MA, at 7:00–10:00 p.m.

ADDRESSES: Comments on the proposed rule should be submitted to Rebecca Lent, Highly Migratory Species Management Division, Office of Sustainable Fisheries, NMFS, 1315 East-West Highway, Silver Spring, MD. For copies of the draft Environmental Assessment/ Regulatory Impact Review/ Initial Regulatory Flexibility Analysis (EA/RIR/IRFA), contact Jill Stevenson at (301) 713–2347 or write to Rebecca Lent. The locations of the public hearings on this proposed rule are: (1) The Seaport Inn/Starboard Room, 110 Middle Street, Fairhaven, MA 02719; and (2) NOAA Building, SSMC III, Room 4527 (4th floor), 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Jill Stevenson or Chris Rogers, 301-713-2347; fax: 301–713 1917.

SUPPLEMENTARY INFORMATION: The Atlantic swordfish fishery is managed under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and the Atlantic Tunas Convention Act (ATCA). The fishery management plan (FMP) is implemented by regulations at 50 CFR part 630. This fishery is also subject to the requirements of the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA) due to incidental take of protected species by driftnet gear used in this fishery.

Introduction

This proposed rule is intended to reduce the take of marine mammals in the Atlantic swordfish fishery. Observer data and vessel logbooks indicate that, in the Atlantic swordfish fishery, driftnet gear results in a significantly higher rate of take of protected marine mammals relative to other gear (i.e., pelagic longline and harpoon). Additionally, the driftnet fishery has had takes of protected sea turtles (e.g., loggerhead, leatherback). The high take rates of protected species for the fishery necessitates 100–percent observer coverage. Coupled with the limited driftnet swordfish quota and a corresponding need for real-time quota monitoring, this fishery is difficult and costly to manage.

In addition to protected species concerns, NMFS has identified other concerns related to the management of the driftnet fishery for Atlantic swordfish. First, on September 30, 1997, NMFS identified Atlantic bluefin tuna, swordfish, large coastal sharks, Atlantic blue marlin, and Atlantic white marlin (all species captured by driftnet gear), as being overfished. Second, the cost of quota monitoring in the driftnet fishery is relatively high and is likely to become higher in light of Atlantic swordfish rebuilding. Finally, NMFS has concerns about the potential for expanded use of driftnet gear in the tuna and shark fisheries with continued bycatch of swordfish and protected species.

NMFS has analyzed two alternatives regarding the bycatch and fishery management concerns as part of the draft EA/RIR/IRFA accompanying this proposed rule: (1) prohibiting the use of driftnet gear in the Atlantic swordfish fishery and (2) allowing the use of the gear but with various management measures designed to reduce protected species takes. Under Alternative 2, NMFS considered current management measures (No Action), new measures that would include the Atlantic Offshore Cetacean Take Reduction Plan (AOCTRP) set allocation scheme, and new measures that would include a marine mammal bycatch limit. As discussed in further detail in the draft EA/RIR/IRFA, the status quo would not address bycatch and cost of management concerns, and the set allocation scheme and protected species limit would result in a disproportionately high cost of management to NMFS relative to the management of other gear used in the swordfish fishery.

Given the high costs to NMFS of 100–percent observer coverage, of bycatch reduction measures (see discussion below), and of real-time quota monitoring for the driftnet fishery, NMFS proposes to prohibit the use of driftnets in the Atlantic swordfish fishery and the possession of Atlantic swordfish on board any vessel possessing a driftnet. If the rule is issues as proposed, the swordfish quota previously allocated to the driftnet gear category (62 FR 55357, October 24, 1997) would be made available to other directed fishery participants (longline and harpoon vessels).

Background

In 1985, the South Atlantic Fishery Management Council (SAFMC) prepared and submitted an FMP for Atlantic swordfish to NMFS. At that time, there were six driftnet vessels fishing for swordfish in the Atlantic Ocean along the Northeast coast. These vessels tended to use driftnets as a supplement to harpoons or pelagic longlines. The SAFMC considered banning driftnets due to concerns over undesirable bycatch; however, the final FMP (50 FR 33952, August 22, 1985) did not contain a measure prohibiting driftnets because insufficient information was available to warrant it. The 1985 FMP included provisions for data collection for all fishing gears and procedures for restricting fishing practices that result in an undesirable bycatch level.

The size of the swordfish driftnet fleet has expanded to about twice its 1985 size. Since 1985, NMFS has implemented a comprehensive data collection program in the swordfish fishery. Driftnet vessel owners are subject to a 100–percent observer coverage requirement and vessel permitting and reporting. As a result of this program, NMFS has collected a significant amount of information, including fishing effort, catch and size composition, and rates of finfish and protected species bycatch.

The current management program, including real-time quota monitoring and associated catch and closure projections, imposes a significant cost to NMFS. If the driftnet quota is exceeded, which is possible due to highly variable daily catch rates, NMFS must account for the excess harvest by transferring swordfish quota from the incidental catch category. If the quota is not reached in the projected timeframe (as in 1996 and again in 1998), NMFS must evaluate the amount of remaining quota and consider the feasibility of reopening

the driftnet fishery. This involves another round of effort and catch rate projections and the continued risk of overharvest. There is also a safety risk due to the nature of a brief derby fishery.

Since the swordfish FMP was submitted in 1985, NMFS with the full cooperation of the fishermen has employed various management strategies to monitor swordfish landings in ''real time'' and avoid underharvest or overharvest of the assigned quota. These strategies included placing NMFS staff on vessels to observe the fishery and working with the fleet via a fax system in which one vessel reported the catch of several vessels. Despite the efforts of NMFS and participating fishermen, it remains difficult and costly for NMFS to estimate real-time catch rates in this fishery.

MMPA

Under MMPA procedures, the Atlantic pelagic driftnet fishery has been listed as a Category I fishery since 1991 due to the frequency of incidental mortality and serious injury to marine mammals. Based on 1991 through 1995 observer data (the most recent data considered for this listing), an estimated 282 marine mammals were killed annually, including: 187 common dolphins, 25 pilot whales, 19 offshore bottlenose dolphins, 14 spotted dolphins, 13 Risso's dolphins, 11 striped dolphins, and 10 beaked whales. Data from 1996 and 1998 (the fishery was not permitted to operate in 1997) indicate that the magnitude of bycatch has not decreased in recent years. Indeed, during the 1998 driftnet fishery, mortality rates for some marine mammal species were twice those of prior years.

In 1994, the MMPA was re-authorized, establishing the Take Reduction Team framework. The Atlantic Offshore Cetacean Take Reduction Team (AOCTRT) was formed in May 1996 to address protected species bycatch by the Category I Atlantic pelagic fisheries (i.e., driftnet, longline, and pair trawl fisheries that target highly migratory species). Observer data collected since 1991 considered by the AOCTRT indicate that marine mammal interaction rates are high in the driftnet fishery and that effort has expanded since 1985.

The AOCTRP was submitted to NMFS in November, 1996. In accordance with section 118(f) of the MMPA, the AOCTRP contained measures to address the bycatch of strategic stocks of marine mammals. The consensus plan recommended a broad range of regulatory and non-regulatory bycatch reduction measures, including a set allocation scheme to reduce the derby nature of the driftnet fishery, time/area closures and educational workshops, among others. Other take reduction measures related to driftnet gear were discussed and rejected by the AOCTRT for various reasons.

NMFS acknowledges the work of the AOCTRT and recognizes that all parties participated in the negotiated meetings in good faith. However, in light of information on the management costs of this fishery including AOCTRP measures, the October 1998 draft EA/RIR/IRFA accompanying this proposed action considers a broader range of options for managing this fishery.

ESA

In the driftnet fishery for Atlantic swordfish, take of endangered species has been an ongoing concern. Endangered marine mammal takes in the driftnet fishery from 1991 through 1995 include one right whale, one humpback whale, and one sperm whale. In addition, an estimated 36 endangered sea turtles were killed from 1991 through 1995 in the driftnet fishery, including 1 Kemp's ridley, 28 leatherback, and 7 loggerhead sea turtles. Furthermore, observer data indicate that driftnet vessels also took endangered green turtles during the 1998 swordfish fishery. In fact, the green turtle take in 1998 met the level authorized by an Incidental Take Statement (ITS) developed for the highly migratory species driftnet and pelagic longline fisheries before the swordfish quota was reached. Continued fishing would have risked green turtle takes above levels authorized by the ITS.

NMFS has responded to this ongoing concern through a series of management activities. On September 25, 1996, NMFS reinitiated consultation under section 7(a) of the ESA on the Atlantic tuna, swordfish, and shark fisheries. While this consultation was under way, an emergency fishery closure was implemented covering the semiannual subquota period of December 1, 1996, through May 29, 1997 (61 FR 64486, December 5, 1996) to ensure that no irreversible and irretrievable commitment of resources was made.

On May 29, 1997, NMFS issued a Biological Opinion (BO) that concluded that the operation of the driftnet segment of the Atlantic swordfish, tunas, and shark fisheries is likely to jeopardize the continued existence of the northern right whale. The BO identified two possible alternatives for avoiding jeopardy: (1) implementing the driftnet measures of the AOCTRP (recommendations to eliminate the derby fishery through set allocation, time/area closures, 100–percent observer coverage) and Atlantic Large Whale Take Reduction Plan (recommendations for time/area closures, 100 percent observer coverage) and (2) prohibiting the use of driftnet gear in the swordfish, tunas, and shark fisheries, in all areas and at all times. The emergency closure was extended from May 29 through November 26, 1997 (62 FR 30775, June 5, 1997), or until a preferred option to avoid the likelihood of jeopardy could be identified and implemented.

On August 12, 1997, NMFS reinitiated consultation on the Atlantic pelagic fishery due to new information regarding the implementation of conservation measures to protect northern right whales and due to recent information on mortality and recruitment of the right whale population and on common dolphin abundance. An amended BO, issued on August 29, 1997, concluded that the potential exists for further entanglements of endangered species in driftnet gear during the winter fishery and part of the traditional summer fishery. The geographic distribution of right whales is close to, or overlaps with, the area of operation of the Atlantic driftnet fishery during that part of the year. The BO identified an additional alternative for avoiding jeopardy to right whales, which included expanded time/area closures and 100 percent observer coverage for driftnet vessels targeting swordfish and tunas only. Concerns about bycatch of right whales in the Atlantic shark driftnet fishery were addressed under separate regulations implementing the Atlantic Large Whale Take Reduction Plan (62 FR 39157, July 22, 1997.)

Due to the time required to evaluate the reasonable and prudent alternatives, NMFS issued a rule under the authority of the ESA (62 FR 63467, December 1, 1997) to implement the time/area closure identified in the BO (for the period November 27, 1997, to July 31, 1998) in order to reduce the likelihood of interactions with right whales. However, the time/area closure implemented under the ESA rule was not deemed sufficient to protect all marine mammal stocks that interact with driftnet gear and was issued as a temporary rule which expired on July 31, 1998.

Further observer data from the 1998 fishing season indicate that driftnet vessels took the limit of green turtles authorized by the ITS before the swordfish quota was reached. Although 1998 swordfish driftnet quota remains, NMFS subsequently decided not to

reopen the fishery due to concerns about bycatch of protected species, particularly endangered sea turtles.

Management Issues

Information collected since the implementation of the Atlantic Swordfish FMP has allowed NMFS to assess the costs of alternatives for managing the driftnet segment of the swordfish fishery.

The driftnet sector of this fishery requires relatively high management costs because of necessary bycatch reduction measures, observer coverage requirements, and the demands of real-time quota monitoring. The driftnet sector of the swordfish fishery was allocated 2 percent of the annual North Atlantic swordfish in 1998. Approximately 10 to 12 vessels participate each year in this fishery, and it typically lasts 7 to 14 days depending on the number of vessels and catch rates.

Management costs for decreasing the high rate of protected species takes in this relatively small driftnet fishery were estimated under each alternative. These estimates indicate the relative cost of implementing and enforcing each alternative. The analysis also includes additional management measures (e.g., vessel monitoring systems, industry-funded observers) in the set allocation scheme and marine mammal bycatch limit alternatives, with the intent of reducing NMFS' management costs as much as possible.

Annual management cost estimates for implementing the alternatives ranged from $133,500 per year (prohibiting driftnets) to more than $1 million (set allocation) for initial year implementation costs. Significant recurring costs, ranging from $60,000 to $904,600, were also estimated for all alternatives. Recurring costs of gear prohibition are minimal. While initial and recurring costs to NMFS could be significantly reduced by having vessel operators fund both a vessel monitoring system and an observer program, these would still be costs borne by the economy in harvesting swordfish with driftnets, and therefore, would reduce the net economic benefit of this fishery. A more detailed presentation of management costs is available in the Draft EA/RIR/IRFA (See **ADDRESSES**).

The preferred alternative of prohibiting driftnet gear is estimated to have the lowest management cost of any of the alternatives considered and would be the most easily enforced, requiring minor at-sea and dockside monitoring. It would also be the most effective at reducing marine mammal takes. The only costs of implementing this alternative after the first year would be the enforcement of the no-retention measure for swordfish on driftnet vessels.

Costs of managing the driftnet fishery under each alternative relative to the gross ex-vessel revenues of the swordfish quota were examined and compared to the costs of managing the pelagic longline fishery under status quo. The cost of managing the driftnet fishery under the preferred alternative is 49 percent of the gross ex-vessel revenues of the swordfish driftnet quota in the first year. Costs are minimal in subsequent years. Costs under other alternatives range from 73 percent to over 2.5 times the ex-vessel value of the swordfish quota.

In contrast, the costs to manage the pelagic longline fishery amount to 47 percent of the gross ex-vessel revenue of the swordfish longline/harpoon quota under status quo management measures. The proposed action would greatly reduce the cost of management relative to harvesting the allocated swordfish quota.

Conclusion

Currently, driftnets are not commonly used to target Atlantic tunas although a few driftnet trips targeted tunas in 1997 and 1998. NMFS does not have sufficient information about the tuna driftnet fishery (with either large or small mesh nets) to evaluate the level of impact from vessels that may convert to tuna driftnetting as a result of this prohibition in the swordfish fishery. However, based on trips taken in 1997 and 1998 that targeted tunas, NMFS believes it is unlikely that many swordfish driftnet boats will convert to tuna fishing in response to a prohibition in the swordfish fishery.

NMFS is currently developing a fishery management plan for tunas, sharks, and swordfish to replace existing fishery management plans for Atlantic sharks and swordfish. Management measures to address expansion of driftnet activities in the shark and tuna fisheries are being considered in the development of that fishery management plan. In the short term, this proposed action should further reduce the potential of using driftnet gear to target tunas by eliminating the swordfish incidental catch allowance for any driftnet vessel, regardless of target species.

In sum, NMFS selected the prohibition of driftnets for Atlantic swordfish as the preferred alternative because it appropriately meets the objectives of the Magnuson-Stevens Act and has the greatest likelihood of reducing bycatch of marine mammals and of reducing the costs of management incurred by NMFS of this fishery.

Classification

This proposed rule is published under the authority of the Magnuson-Stevens Act, 16 U.S.C. 1801 *et seq.*, and ATCA, 16 U.S.C. 971 *et seq.*

NMFS has concluded that this proposed rule to prohibit the use of driftnet gear in the Atlantic swordfish fishery would have a significant economic impact on a substantial number of small entities. Accordingly, an initial regulatory flexibility analysis has been prepared.

The initial regulatory flexibility analysis assumes that fishermen, during the time they would normally fish for swordfish with a driftnet, would: (1) transfer fishing effort into the longline/harpoon category in order to take advantage of the transferred swordfish quota from the driftnet category, (2) fish for other species with other fishing gears, (3) use driftnets for other highly migratory species, or (4) exit commercial fishing. Seventeen driftnet vessels were considered to be the universe of affected small entities in this analysis. Under the preferred alternative, each of these scenarios results in greater than a 5–percent decrease in gross revenues for more than 20 percent of the affected entities, or would cause greater than 2 percent of the affected entities to be forced to cease operations. Therefore, regardless of which activity any individual driftnet fisherman pursues should the proposed action be implemented, the RFA thresholds for significant impact are expected to be exceeded.

The other alternatives considered include the status quo, a set allocation scheme to reduce the derby nature of the fishery (with associated measures), and a marine mammal bycatch limit (with associated measures). These alternatives may have lesser economic impacts on the driftnet participants; however, none of those alternatives guarantee reduced takes of marine mammals and, further, do not eliminate such fishery management concerns as the increasing costs to manage this limited fishery. Further, the management costs of the preferred alternative relating to the value of the swordfish gear quota compares favorably with the costs of managing the pelagic longline fishery. The RIR provides further discussion of the economic effects of all the alternatives considered.

The proposed action would not impose any additional reporting or recordkeeping requirements.

NMFS reinitiated formal consultation for all Highly Migratory Species commercial fisheries on September 25, 1996, and again on August 12, 1997, under section 7 of the ESA. In BOs issued on May 29, 1997, and August 29, 1997, NMFS concluded that operation of the harpoon fishery is not likely to adversely affect the continued existence of any endangered or threatened species under NMFS jurisdiction and that operation of the longline fishery may adversely affect, but may not jeopardize, the continued existence of any endangered or threatened species under NMFS jurisdiction. Conversely, it was concluded that driftnet fishing for swordfish in the Northeast and Mid-Atlantic and for sharks in the Southeast jeopardized the continued existence of the northern right whale. A temporary rule under the authority of the ESA implemented time/area closures for driftnet gear in the northeast as an interim measure. Another rulemaking implemented a take reduction plan for Atlantic large whales in the southeast United States under the MMPA. This proposed rule, if implemented, would further reduce the likelihood of interactions between driftnet gear and northern right whales.

This proposed rule has been determined to be not significant for purposes of E.O. 12866. Comments on this proposed rule are invited and will be accepted if received by December 14, 1998.

List of Subjects in 50 CFR Part 630

Fisheries, Fishing, Reporting and recordkeeping requirements, Treaties.

Dated: October 15, 1998.

Rolland A. Schmitten,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 630, is proposed to be amended as follows:

PART 630—ATLANTIC SWORDFISH FISHERY

1. The authority citation for part 630 continues to read as follows:

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

§ 630.3 [Amended]

2. In § 630.3, parapgraph (b) is amended by removing the words ''or gillnet''.

3. In § 630.7, paragraphs (p), (s), and (t) are revised, and paragraphs (bb) and (cc) are redesignated as paragraphs (aa) and (bb) respectively, to read as follows:

§ 630.7 Prohibitions.

* * * * *

(p) Fish for Atlantic swordfish with a driftnet or possess an Atlantic swordfish on board a vessel with a driftnet on board, as specified in § 630.22.

* * * * *

(s) During a closure of the directed fishery under § 630.25(a)(1) or (b), on board a vessel using or having on board the specified gear, fish for swordfish, or possess or land swordfish in excess of the bycatch limits, as specified in § 630.25(c).

(t) On board a vessel using or having on board gear other than longline or harpoon, fish for swordfish, or possessing or landing swordfish in excess of the bycatch limit, as specified in § 630.25(d).

* * * * *

4. Section 630.22 is revised to read as follows:

§ 630.22 Gear restrictions.

No driftnet may be used to fish for swordfish from the north or south Atlantic swordfish stocks. An Atlantic swordfish may not be possessed on board or harvested from a vessel using or having on board a driftnet.

5. In § 630.24, paragraphs (a)(1), (b)(1), (b)(2), and (e)(1) are revised, and paragraphs (a)(3) and (f) are removed to read as follows:

§ 630.24 Quotas.

(a) *Applicability*. (1) A swordfish harvested from the North Atlantic swordfish stock by a vessel of the United States other than one participating in the recreational fishery is counted against the directed-fishery quota or the bycatch quota. A swordfish harvested by longline or harpoon and landed before the effective date of a closure for that gear, pursuant to § 630.25(a)(1), is counted against the directed-fishery quota. After a closure, a swordfish landed by a vessel using or possessing gear for which a bycatch is allowed under § 630.25(c) is counted against the bycatch allocation specified in paragraph (c) of this section. Notwithstanding the above, a swordfish harvested by a vessel using or possessing gear other than longline, harpoon, or rod and reel is counted against the bycatch quota specified in paragraph (c) of this section at all times.

* * * * *

(b) *Directed-fishery quotas*. (1) The annual directed fishery quota for the North Atlantic swordfish stock for the period June 1, 1998, through May 31, 1999, is 2,098.6 mt dw. The allocation is divided into two equal semiannual quotas of 1,028.5 mt dw, one for the period June 1 through November 30, 1998, and the other for the period December 1, 1998, through May 31, 1999.

(2) The annual directed fishery quota for the North Atlantic swordfish stock for the period June 1, 1999, through May 31, 2000, is 2,033.2 mt dw. The quota is divided into two equal semiannual quotas of 996.5 mt dw, one for the period June 1 through November 30, 1999, and the other for the period December 1, 1998, through May 31, 2000.

* * * * *

(e) *Inseason adjustments*. (1) NMFS may adjust the December 1 through May 31 semiannual directed fishery quota to reflect actual catches during the June 1 through November 30 semiannual period, provided that the 12-month directed-fishery quota is not exceeded.

* * * * *

6. In § 630.25, the section heading and paragraphs (a)(1) and (c), and the introductory text to paragraph (d) are revised to read as follows:

§ 630.25 Closures and incidental catch limits.

(a) *Notification of a closure*. (1) When the directed-fishery annual or semiannual quota specified in § 630.24 is reached, or is projected to be reached, NMFS will publish notification in the **Federal Register** closing the directed-fishery for fish from the North Atlantic swordfish stock or from the South Atlantic swordfish stock, as appropriate. The effective date of such notification will be at least 14 days after the date such notification is filed at the Office of the Federal Register. The closure will remain in effect until additional directed-fishery quota becomes available.

* * * * *

(c) *Bycatch limits during a directed-fishery closure*. (1) During a closure of the directed fishery, aboard a vessel using or having aboard a longline and not having aboard harpoon gear—

(i) A person may not fish for swordfish from the North Atlantic swordfish stock; and

(ii) No more than 15 swordfish per trip may be possessed in the North Atlantic Ocean, including the Gulf of Mexico and Caribbean Sea, north of 5 degrees N. lat., or landed in an Atlantic, Gulf of Mexico, or Caribbean coastal state. The Assistant Administrator may modify or change the bycatch limits upon publication of notice in the **Federal Register** pursuant to the requirements and procedures in paragraph (a)(1) of this section. Changes in the bycatch limits will be based upon the length of the directed fishery closure as well as the estimated catch per vessel in the non-directed fishery.

(2) During a closure of the directed fishery, aboard a vessel using or having aboard harpoon gear—

(i) A person may not fish for swordfish from the North Atlantic swordfish stock; and

(ii) No swordfish may be possessed in the North Atlantic Ocean, including the Gulf of Mexico and Caribbean Sea, north of 5° N. latitude, or landed in an Atlantic, Gulf of Mexico, or Caribbean coastal state.

(d) Bycatch limits in the non-directed fishery. On board a vessel using or having on board gear other than harpoon or longline, other than a vessel in the recreational fishery–-

* * * * *

[FR Doc. 98–28057 Filed 10–15–98; 4:08 pm]

BILLING CODE 3510–22–F