
**Petition for Immediate Rulemaking to Protect Spawning
Atlantic Bluefin Tuna in the Gulf of Mexico**

Submitted to Secretary of Commerce Carlos M. Gutierrez
Office of the Secretary
Room 5516
U.S. Department of Commerce
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Submitted by:

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National Coalition for Marine Conservation (NCMC)
Natural Resources Defense Council (NRDC)
Oceana, Inc. (Oceana)

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I. INTRODUCTION

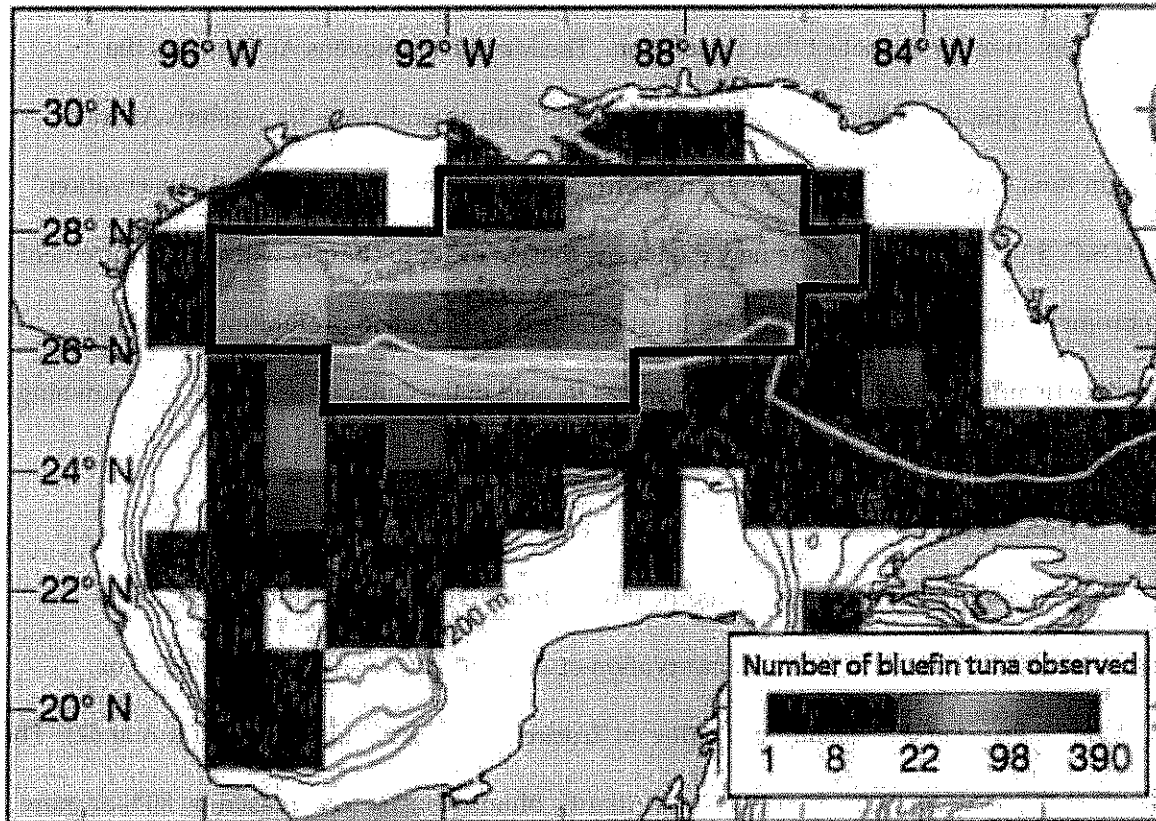
The Blue Ocean Institute (BOI), Monterey Bay Aquarium (MBAF), the National Coalition for Marine Conservation (NCMC), Natural Resources Defense Council (NRDC), and Oceana, Inc. (Oceana) ("the Petitioners") hereby petition the Secretary of Commerce ("Secretary") to take the following two actions:

(1) to exercise his authority under 16 U.S.C. § 1855(c) to promulgate interim measures necessary to stop pelagic longline fishing in Gulf of Mexico spawning areas during critical bluefin tuna spawning season; and

(2) to exercise his authority under 16 U.S.C. § 1854(g) to initiate rulemaking designed to make permanent these protections for western Atlantic bluefin tuna in the Gulf of Mexico by prohibiting pelagic longline fishing in bluefin spawning areas in the Gulf during bluefin spawning season.

The Secretary is required under the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.* (the "Magnuson-Stevens Act") to prevent overfishing and rebuild overfished populations. If the Secretary finds that an emergency or overfishing exists, or that interim measures are needed to reduce overfishing for any fishery, he is authorized to promulgate emergency regulations or interim measures necessary to address the emergency or end overfishing. 16 U.S.C. § 1855(c)(1). Here, recently published electronic tagging studies have identified a spawning "hot spot" for Atlantic bluefin tuna in the northern slope waters of the Gulf of Mexico. Block, Barbara A., et al., *Electronic Tagging and Population Structure of Atlantic Bluefin Tuna*, NATURE 434:1121-1127 (2005), attached as Exhibit A. Based on

the new data contained in Exhibit A to this petition, the Gulf of Mexico bluefin spawning area is bounded as shown in the following illustration ¹:



The data in Exhibit A demonstrate that immediate action by the Secretary to prohibit pelagic longline fishing in the Gulf of Mexico spawning area during the months of April-June, the bluefin spawning period, should reduce mortalities of reproductive adult bluefin tuna, reduce

¹ Proposed boundaries of the closure are outlined in thick black line in the map, modified from Figure 2a in Block et al. 2005, attached hereto as Exhibit A, enclosing contiguous degree-square areas with more than 22 bluefin tuna occurrences, with additional modifications to reflect areas of high bluefin tuna CPUE in the longline fishery as recorded by observer and logbook data. The number of bluefin tuna observed includes information from electronic tagging, pelagic longline observers, and pelagic longline logbooks referred to in Figure 2a as "Positions in 1° x 1° area." The exact coordinates of the proposed time/area closure are between 96°W 28°N east to 92°W, north to 29°N, east to 86°W, south to 28°N, east to 85°W, south to 27°N, west to 86°W, south to 26°N, west to 89°W, south to 25°N, west to 94°W, north to 26°N, west to 96°W, and north to the starting point.

further overfishing, and promote the rebuilding of the overexploited western Atlantic bluefin tuna population.

The new data also demonstrate that this seasonal area closure should be made permanent in order to protect that population. The Magnuson-Stevens Act requires the Secretary to prepare fishery management plans and plan amendments for western Atlantic bluefin tuna that contain management measures which "promote international conservation." 16 U.S.C. § 1854(g)(1)(G)(i). The new data show that, in order to comply with this requirement to promote conservation, the Secretary must establish a permanent prohibition on pelagic longline fishing in bluefin tuna spawning areas located in the Gulf of Mexico during spawning season.

II. BACKGROUND

The population of western Atlantic bluefin tuna remains at an all-time low. *See* International Commission for the Conservation of Atlantic Tunas (the "Commission" or "ICCAT"), *Report of the Standing Committee on Research and Statistics* (2004) (Exhibit A at 52). The spawning stock biomass² (SSB) of western Atlantic bluefin tuna has decreased by 80% or more since 1970. *Id.* Despite this dramatic decline in the western stock SSB, managers have allowed the fishing mortality rate for bluefin to reach its highest level since 1970. *Id.* As a result, the western Atlantic bluefin tuna is overfished, and continues to be subject to overfishing. *Id.* at 52-53. Indeed, recognizing the dire state of the western bluefin population, the National Marine Fisheries Service ("NMFS") has prohibited directed fishing for bluefin in the Gulf of Mexico. *See* 50 C.F.R. § 285.31(a)(30). However, closure of the directed fisheries has proved insufficient to protect bluefin in the Gulf, leading NMFS to issue regulations aimed at reducing bycatch of

² SSB is an estimate of the total weight of fish in a given stock that are involved in the spawning process during the spawning season.

bluefin in directed fisheries for other species. See, e.g., 57 Fed. Reg. 365 (January 6, 1992) and 69 Fed. Reg. 32,414 (May 30, 2003).

There is inadequate observer coverage of current fishing practices, and recent scientific results indicate that longline fishing, in particular, is most likely generating high numbers of dead discarded bluefin tuna. For example, a biological opinion prepared by the National Oceanic and Atmospheric Administration ("NOAA") on the Atlantic Pelagic Longline Fishery for Highly Migratory Species determined that from 1995 to 2002, a total of 10,498 bluefin tuna were caught by U.S. Atlantic pelagic longlines. See NOAA, *Biological Opinion – Reinitiation of Consultation on the Atlantic Pelagic Longline Fishery for Highly Migratory Species* at 2-7 (June 1, 2004). Of those caught by longlines, 8,832 fish were "discarded," meaning they were thrown back into the ocean. *Id.* According to NMFS data up to 1999, 80% of discarded bluefin tuna were dead. See NMFS, *Final Fishery Management Plan for Atlantic Tuna, Swordfish and Sharks* at ¶ 3.5.4.1.1 (April 1999).

A new study involving electronic monitoring of tagged bluefin identifies issues concerning both the eastern and western Atlantic bluefin tuna populations. Among other things, the study reaches two specific conclusions of particular and immediate importance to the management of the western Atlantic bluefin tuna. First, the study compiles conclusive evidence that western Atlantic bluefin tuna are subject to fishing-related mortality in the Gulf of Mexico during their spawning season. Second, the results of the study show that time/area closures would reduce the incidental catch of western Atlantic bluefin tuna by pelagic longline fisheries operating in the northern slope waters of the Gulf of Mexico, a critical habitat for bluefin tuna during the spawning season. See Block, *supra*, (Exhibit A at 6).

These conclusions are consistent with those expressed by NMFS, which has stated in a draft fishery management plan for Atlantic Highly Migratory Species that new time/area

closures of pelagic longlining fisheries or modifications to existing closures may be necessary to address bycatch of Atlantic bluefin tuna. *See* Pre-Draft of Atlantic Highly Migratory Species Fishery Management Plan at 50 (February 2005). In this draft HMS FMP, NMFS also set forth a variety of factors that should be considered in implementing new or modified existing time/area closures, including listing of a species as overfished (as is the western Atlantic bluefin tuna), analysis of gear impacts, and location of important spawning or nursery areas. *Id.* at 51. All these factors, particularly the new information on the location of an important spawning area or "hot spot" in the Gulf of Mexico, strongly support time/area closures of longline fisheries operating in the Gulf of Mexico in western Atlantic bluefin tuna spawning waters during spawning periods.

III. STATUTORY AUTHORITY FOR THIS PETITION

The petitioners submit this petition to the Secretary pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §500 *et seq.*, and the Magnuson-Stevens Act. The APA mandates that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule," 5 U.S.C. § 553(e), and when such petitions are denied, the agency must give "a brief statement of the grounds for denial," *id.* § 555(e); *see National Mining Assn. v. U.S. Dept. of Interior*, 70 F.3d 1345, 1352 (D.C.Cir. 1995); *American Horse Protection Assn., Inc. v. Lyng*, 812 F.2d 1, 5-6 (D.C. Cir. 1987). Further, "the right to petition for rulemaking entitles the petitioning party to a response on the merits of the petition." *Fund for Animals v. Babbitt*, 903 F.Supp. 96, 115-116 (D.D.C 1995). The APA requires the agency "within a reasonable time," to "proceed to conclude a matter presented to it." 5 U.S.C. § 555(b). Accordingly, the Secretary must "fully and promptly consider" the petition. *WWHT, Inc. v. F.C.C.*, 656 F.2d 807, 813 (D.C. Cir. 1981).

The Magnuson-Stevens Act requires the Secretary to manage western Atlantic bluefin tuna and other highly migratory species that migrate within the Gulf of Mexico, and authorizes the Secretary to promulgate emergency regulations or interim measures when necessary to stop overfishing. *See* 16 U.S.C. §§ 1852(a)(3) and 1855(c)(1). Today, scientific evidence shows the existence of a spawning "hot spot" for the western Atlantic bluefin tuna in the northern slope water of the Gulf of Mexico. *See* Exhibit A. As more fully set forth below, the Secretary has a duty to grant this Petition to protect spawning bluefin tuna from longline fishing pressure under the Magnuson-Stevens Act, the Atlantic Tunas Convention Act ("ATCA"), 16 U.S.C. § 971 *et seq.*, and the recommendations of ICCAT.

Under the circumstances, with the bluefin spawning season in the Gulf of Mexico estimated to span from April through June, the Secretary should respond to this request immediately. In addition, the Secretary should promptly initiate a rulemaking to make this bluefin spawning season fishery closure permanent by January 2006.

IV. DUTY OF THE SECRETARY TO STOP LONGLINE AND OTHER FISHING IN ATLANTIC BLUEFIN TUNA SPAWNING WATERS IN THE GULF OF MEXICO

A. The Magnuson-Stevens Act

The Magnuson-Stevens Act was intended, among other things, to prevent overfishing, restore presently overfished stocks, and maintain a long-term system of fishery management and conservation. 16 U.S.C. § 1801(a)-(b). Congress intended to "assure that the national fishery conservation and management program utilizes, and is based upon, the best scientific information available." *Id.* § 1801(c)(3). To that end, Congress enacted National Standard Two, which requires that conservation and management measures "shall be based upon the best scientific information available." *Id.* § 1851(a)(2). Further, national fishery conservation was intended to "[consider] the effects of fishing on immature fish and [encourage] development of

practical measures that minimize bycatch and avoid unnecessary waste of fish." *Id.* § 1801(c)(3).

In addition, National Standard Nine requires that conservation measures, "to the extent practicable . . . minimize bycatch." *Id.* § 1851(a)(9).

As applied to western Atlantic bluefin tuna, the Magnuson-Stevens Act provides two mechanisms by which the Secretary can comply with the requirements to prevent overfishing and minimize bycatch and unnecessary waste of fish. First, the Act requires the Secretary to prepare fishery management plans and plan amendments for bluefin tuna that comply with the national standards and contain conservation and management measures which "promote international conservation." 16 U.S.C. § 1854(g)(1)(G)(i). Second, the Act provides:

If the Secretary finds that an emergency exists or that interim measures are needed to reduce overfishing for any fishery, he may promulgate emergency regulations or interim measures necessary to address the emergency or overfishing, without regard to whether a fishery management plan exists for such fishery.

Id. § 1855(c)(1).

The new data contained in Exhibit A show that the Secretary must take action to promote international conservation of western Atlantic bluefin by prohibiting the use of pelagic longline fishing gear in the Gulf of Mexico bluefin spawning area during bluefin spawning season. The practice of longline fishing in Atlantic bluefin tuna spawning waters contributes significant numbers of dead discards of bluefin tuna, further depletes the population, results in unnecessary waste, and cripples the rebuilding potential of the Atlantic bluefin tuna. *See Block, et al., Exhibit A; see also Jeffrey A. Hutchings and John D. Reynolds, Marine Fish Population Collapses: Consequences for Recovery and Extinction Risk, BioScience, April 2004, at 297-302.* The Secretary should therefore take immediate action to make a bluefin seasonal spawning closure permanent by January 2006.

B. The Atlantic Tunas Convention Act (ATCA) and Recommendations of the Convention (ICCAT)

Under Section 971d of ATCA, the Secretary is authorized to adopt regulations that are necessary to carry out the purposes and objectives of the ICCAT and ATCA, 16 U.S.C. § 971d(a), and must adopt regulations that are necessary and appropriate to carry out ICCAT recommendations, *id.* § 971d(c)(1)(A). In furtherance of these duties, the Secretary is authorized to limit or prohibit the incidental catch of a regulated species, *id.* § 971d(c)(3)(E), and to divide waters into areas and establish one or more closed seasons as to such area, *id.* § 971d(c)(3)(B) and (C). Further, the Secretary is not limited to enumerated actions, but may “impose such other requirements and provide for such other measures as the Secretary may determine necessary to implement any recommendation of the Convention.” *Id.* § 971d(c)(3)(K). Finally, regulations must be consistent with fishery management plans prepared and implemented under the Magnuson-Stevens Act. *Id.* § 971d(c)(1)(C).

After a 1998 stock assessment showed that the western Atlantic bluefin tuna population is over-exploited³, ICCAT recommended that “[t]here shall be no directed fishery on the bluefin tuna spawning stocks in the western Atlantic in spawning areas such as the Gulf of Mexico.” *See Recommendation by ICCAT to Establish a Rebuilding Plan for Atlantic Bluefin Tuna* at ¶ 16 (June 21, 1999). Further, ICCAT recommended that all entities “minimize dead discards [of bluefin tuna] to the extent practicable”, and “continue to take measures to prohibit any transfer of fishing effort” between eastern and western Atlantic bluefin tuna stocks, *id.* ¶¶ 12 and 15. Accordingly, NMFS regulations prohibit directed fishing for bluefin tuna in the Gulf of Mexico. *See* 50 C.F.R. § 285.31(a)(30). However, NMFS has acknowledged that the prohibition on

³ The Commission’s Standing Committee on Research and Statistics (SCRS) found that “bluefin tuna stocks in the west Atlantic are over-exploited ($B < B_{msy}$, $F > F_{msy}$; i.e. current biomass is less than biomass at MSY and current fishing mortality is higher than that of the MSY level.)”

directed fishing does not adequately control mortality associated with directed longline fisheries for other species. *See, e.g.*, 69 Fed. Reg. 32,414 (amending incidental catch regulations to reduce dead discards of bluefin tuna associated with directed longline fishing in other fisheries); 57 Fed. Reg. 365 (determining that incidental catch limit in southern fishery was not effective at reducing bluefin tuna bycatch mortality and changing the restriction for this area).

As noted above, the Secretary is required under ATCA to carry out ICCAT's recommendations, and is authorized to adopt any regulations necessary to do so. 16 U.S.C. §§ 971d(c)(1)(A), 1855(c)(1). Indeed, the current Fishery Management Plan (FMP) for Atlantic Tuna, Swordfish and Sharks states, "it is the intent of this FMP to reduce the incidental catch of bluefin tuna on gears that are not authorized to take bluefin. However, it is also the intent to reduce waste of unavoidably caught bycatch." Currently the FMP requires closure of a small area in the northwestern Atlantic (from 39 to 40E N and 68 to 74E W) to pelagic longline fishing during the month of June. *Id.* However, spawning bluefin tuna in the Gulf of Mexico are not similarly protected. Based on the foregoing, and consistent with the best scientific information available (as shown in Exhibit A), the Secretary must implement a time/area closures to protect spawning bluefin tuna in the bluefin spawning area in the Gulf of Mexico.

V. THE LATEST SCIENTIFIC INFORMATION SUPPORTS IMMEDIATE ACTION TO CLOSE LONGLINE AND OTHER FISHERIES THAT CAN CATCH BLUEFIN TUNA TO PROTECT SPAWNING WESTERN ATLANTIC BLUEFIN TUNA IN THE GULF OF MEXICO

A. Spawning Western Atlantic Bluefin Tuna Are Subject to Fishing Pressure in Their Gulf of Mexico Spawning Areas.

As set forth above, the Secretary has broad authority to take immediate and permanent action to protect bluefin tuna. Here, the latest scientific information (contained in Exhibit A) reveals that western Atlantic bluefin tuna are subject to fishing-related mortality in spawning waters in the Gulf of Mexico during spawning season, in contravention of ICCAT

recommendations for rebuilding over-exploited western Atlantic bluefin tuna stocks. *See Recommendation by ICCAT to Establish a Rebuilding Plan for Atlantic Bluefin Tuna* at ¶ 16 (stating that there shall be “no directed fishery on the bluefin tuna spawning stocks in the western Atlantic in spawning areas such as the Gulf of Mexico,” and all parties “shall minimize dead discards to the extent practicable.”).

Recently-published electronic tagging data, combined with United States pelagic longline observer and logbook catch data, identify a “hot spot,” an area of concentrated bluefin tuna occurrence during spawning season, in the northern slope waters of the Gulf of Mexico from 1992 to 2004. *See* Block, et al., Exhibit A at 1-3. These fish enter the Gulf along the continental slope through the Straits of Florida, and move into the northern slope of the Gulf where the warm waters present favorable conditions for development of eggs and larva. *Id.* Histological examination of bluefin tuna caught by the researchers indicated that these were mature fish in pre-spawn stages, consistent with previous data indicating that spawning occurs in the Gulf of Mexico in April, May and June. *Id.*

The study by Block, et al. (see Exhibit A) demonstrates significant overlap between areas of frequent occurrence of Atlantic bluefin tuna on their western spawning ground in the Gulf of Mexico as shown in tracking data, and areas where bluefin tuna are frequently captured, as shown in U.S. pelagic longline scientific observer data and longline logbook data. *Id.* at 3, Figure 2. According to these data, the highest rates of capture of western Atlantic bluefin by tuna longline vessels occur roughly in the same areas as the spawning hot spot identified by tagging data. These data demonstrate that, contrary to ICCAT recommendations for rebuilding over-exploited western Atlantic bluefin tuna stocks, spawning bluefin tuna are presently subject to fishing pressure in their spawning areas in the Gulf of Mexico. *Id.* (Given the significant economic value of bluefin tuna, there is a suspicion that some tuna fishermen in the Gulf might

actually be targeting these fish and then keeping them as "bycatch.") In light of these data, the Secretary must immediately and permanently protect these bluefin spawning areas.

B. Attempting to Protect Bluefin Tuna by Continuing to Rely on Fishing Limits Rather Than Establishing a Seasonal Spawning Closure Would be Arbitrary and Capricious

The current prohibition on directed fishing for western Atlantic bluefin tuna in the Gulf of Mexico is inadequate to protect spawning bluefin in the Gulf, where warm weather conditions pose particular risks to individuals captured on longlines. Researchers conducting scientific longline fishing (live capture, tag and release) found that scientifically-captured bluefin of similar size to those captured by commercial fishermen frequently died, even when the scientists used measures to avoid mortality.⁴ Exhibit A at 2-3. Based on recent physiological data on the high rates of heat production and large metabolic demands of giant tuna, researchers concluded that "large bluefin tuna in spawning conditions might be susceptible to mortality on longlines in the [Gulf of Mexico] because of increased thermal and hypoxic stress induced by capture in warm surface waters." *Id.* at 3. In other words, pre-spawning western Atlantic bluefin tuna are at risk of mortality even when they are released, because the stress of capture is frequently fatal. *Id.* Under these circumstances, establishing a seasonal spawning closure is the only sure way to prevent excessive bluefin mortality in compliance with ICCAT, the Magnuson-Stevens Act, and ATCA.

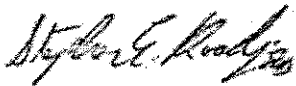
VI. CONCLUSION

Fresh scientific research findings demonstrate that a seasonal closure to pelagic longline fishing in Gulf of Mexico bluefin tuna spawning waters would significantly reduce incidental catch of western Atlantic bluefin tuna and therefore reduce overfishing of that

⁴ Researchers attempted to reduce mortality by reducing soak time and using circle hooks.

overfished population. Moreover, data on Atlantic bluefin tuna mortality under current policies have demonstrated that it would be arbitrary and capricious for the Secretary to continue to rely solely on existing regulations to limit fishing-related mortality in light of these new data. Accordingly, the Secretary must immediately institute a pelagic longline fishing seasonal spawning closure. In addition, the Secretary must initiate rulemaking designed to permanently establish this seasonal closure and complete that rulemaking not later than January 1, 2006.

Respectfully submitted,



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