



Via Regulations.gov

July 9, 2021

Mr. Randy Blankinship
HMS Management Division
Office of Sustainable Fisheries, F/SF1
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

RE: NOAA-NMFS-2018-0035; Reconsideration of the Spring Gulf of Mexico Monitoring Area

Dear Mr. Blankinship:

On behalf of Healthy Gulf and Turtle Island Restoration Network, Earthjustice submits these comments on the National Marine Fisheries Service's ("NMFS") reconsideration of its Spring Gulf of Mexico Monitoring Area rule. We urge NMFS to immediately reinstate the Spring Gulf of Mexico Gear-Restricted Areas ("GRAs") that the so-called monitoring areas replaced. The GRAs, which closed critical areas to pelagic longlining during April and May, were essential to protecting the primary spawning grounds for the western Atlantic bluefin tuna population. There is no legitimate scientific dispute that protecting spawning adults is necessary to ensure that this population can finally recover to robust, healthy levels.

In its call for public comments, NMFS requested that we provide "information that may not have been considered in the final rule" that replaced the highly successful Spring Gulf of Mexico Gear-Restricted Areas ("GRAs") with the so-called monitoring areas. 86 Fed. Reg. 31701 (June 15, 2021). The core problem with the 2020 Monitoring Area rule is that NMFS did not meaningfully consider any of the evidence in front of it or draw a rational connection between that evidence and its decisions in the final rule. Indeed, NMFS's 2020 rule conflicts with best available science, economic information, and the agency's obligations under the Magnuson-Stevens Fishery Conservation and Management Act, Atlantic Tunas Convention Act, and the International Convention for the Conservation of Atlantic Tunas. That is why our groups challenged the 2020 rule in federal court; that challenge has been fully briefed and awaits a decision. *Healthy Gulf et al v. NMFS et al*, Case No. 8:20-cv-01104-PX (D. Md.).

As we have explained in prior comments (attached) and in our briefs, the GRAs proved enormously successful at reducing bycatch of spawning bluefin tuna and provided unique, additional benefits to the conservation of this important species. While the GRAs were in effect, bluefin mortality in the Gulf decreased 88% in April and 81% in May, compared to the three years prior to implementation of the GRAs. Dead discards of bluefin decreased by 96% between 2012 and 2019. These decreases were well above what the individual bluefin quota ("IBQ") system achieved on its own in other months. Moreover, the GRAs achieved this protection without diminishing target catch of other species—the pelagic longline fishery increased its

target catch of yellowfin tuna by 38% while the GRAs were in effect. NMFS's own analysis of the 2020 rule showed that opening the GRAs to pelagic longline fishing could actually result in a decrease in fishing vessel revenue. In sum, ample evidence showed that NMFS's decision in the 2020 rule to open the Gulf GRAs to pelagic longlining was wholly inconsistent with scientific and economic data, and the agency's obligations to conserve bluefin tuna. NMFS must consider this evidence now and reinstitute the proven, scientifically based Gulf GRA protections.

Information that has become available since NMFS implemented its 2020 rule further demonstrates that converting the Gulf GRAs into "monitoring areas" offers no additional, useful data even as it risks the health of the bluefin population. No documented pelagic longline fishing sets have been made in the former Gulf GRAs during 2020 or 2021, meaning that the so-called monitoring program has not produced any monitoring data. It bears emphasis that this lack of fishing in the former Gulf GRAs does not mean that the IBQ program alone is sufficient to protect spawning bluefin or that the Gulf GRA protections are unnecessary. To the contrary, multiple other factors are likely responsible. Pelagic longline vessels have an incentive not to fish in these areas for the three-year "monitoring period" in order to support the case for removing spawning area protections permanently. Once the monitoring period passes, these vessels might well return to fishing on the spawning grounds, as they did before the Gulf GRAs were implemented, in the hopes of "incidentally" catching lucrative bluefin tuna. Moreover, many longliners are responding to economic incentives currently provided by the Oceanic Fish Restoration Project, which is paying a third of active vessels not to fish during bluefin spawning. The COVID-19 pandemic also likely precluded many vessels from fishing in 2020.

Furthermore, the Western Atlantic bluefin population requires even greater protection now than it did in 2020. The International Conference for the Conservation of Atlantic Tunas ("ICCAT") adopted a bluefin quota of 2,350 mt for 2021 despite warnings from scientists that it would result in a 94% chance of overfishing on this already diminished population. Unfortunately, the U.S. delegation pressured ICCAT to adopt that unsustainable quota. The Biden administration must change course when it comes to conserving bluefin—both by re-establishing the Gulf of Mexico spawning area protections so the population has a better chance of rebounding and by advocating science-based, precautionary bluefin management at ICCAT.

Thank you for your careful consideration of these comments.

Sincerely,



Andrea A. Treece
Senior Attorney, Oceans Program



September 30, 2019

Mr. Craig Cockrell
HMS Management Division
Office of Sustainable Fisheries, F/SF1
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

RE: NOAA-NMFS-2018-0035; Proposed rule regarding Atlantic bluefin tuna area-based and weak hook management measures

Dear Mr. Cockrell,

We appreciate your consideration of the following comments on the National Marine Fisheries Service (“NMFS”) proposed rule to revise measures put in place to reduce bycatch of bluefin tuna in the Atlantic highly migratory species pelagic longline fishery. 84 Fed. Reg. 33205 (July 12, 2019). A chief purpose of the proposed rule is to address whether “the current area-based management measure remains necessary to reduce and/or maintain low numbers of bluefin tuna discards and interactions in the pelagic longline fishery.” *Id.* As we noted in our 2018 scoping comments, there was and still is no evidence to support the notion that area-based protections are redundant or unnecessary. To the contrary, area-based management measures—particularly measures that protect bluefin tuna spawning in the Gulf of Mexico—are highly effective and essential for rebuilding the western Atlantic population of bluefin tuna and complying with domestic and international legal obligations.

For the reasons explained below, we urge NMFS to select Alternative C1 (No Action) with respect to the Gulf of Mexico gear-restricted areas (“GRAs”). The Gulf GRAs have proven extremely successful and—far from being redundant to other management measures—critical to conserving and rebuilding the bluefin population. We urge NMFS not move forward with any action that would alter the Northeastern United States Pelagic Longline Closed Area without first undertaking rigorous research and analysis to determine the effects of doing so. None of NMFS’s preferred alternatives meet that standard. We also recommend that NMFS select its preferred Alternative D2, which would require the use of weak hooks in the Gulf of Mexico from January through June.

I. Implementation of Gulf of Mexico Gear-Restricted Areas Has Been Enormously Successful and Remains Necessary to Prevent Bycatch of Spawning Bluefin Tuna in the Gulf of Mexico.

NMFS's 2014 decision to establish the Gulf of Mexico GRAs was essential to address a critical threat to the western Atlantic bluefin tuna population, as well as comply with domestic law and international obligations. There is no rational or legal basis for removing this management measure after it has proven incredibly successful in reducing mortality of breeding bluefin tuna while having little or no impact on catch of target species.

The Gulf of Mexico provides the major known spawning grounds for the western Atlantic bluefin tuna population. The adult bluefin that gather in the Gulf every spring to breed are crucial to the continued existence of this species. Removing these spawning individuals from the population removes critical reproductive capacity, foreclosing the possibility of rebuilding. Both NMFS and the International Commission for the Conservation of Atlantic Tunas ("ICCAT") have recognized the importance of protecting bluefin tuna in the Gulf of Mexico since the early 1980s. ICCAT formally recommended a ban on directed fishing for bluefin on their Gulf of Mexico spawning grounds in 1982. ICCAT, *New Regulations for the Atlantic Bluefin Tuna Catch 2 (1982)*, available at <http://www.iccat.es/Documents/Recs/compendiopdf-e/1982-01-e.pdf>. A year earlier, NMFS banned directed longline fishing for bluefin.

At the same time, however, NMFS established an "incidental catch" limit to allow fishermen to retain some "non-targeted" bluefin caught in the Gulf. 46 Fed. Reg. 8012, 8013 (Jan. 26, 1981). NMFS has continued to allow the retention of bluefin bycatch for the past three decades. Unfortunately, NMFS's authorization of bluefin bycatch retention combined with the high market prices paid for bluefin tuna fostered a *de facto* directed fishery on bluefin in this area. *See, e.g.*, 53 Fed. Reg. 10415, 10415 (Mar. 31, 1988) (NMFS noted that the incidental catch quotas "may have permitted a directed fishery for Atlantic bluefin tuna in the Gulf of Mexico, contrary to the intent of the regulations and the United States' obligations" to ICCAT); Teo, Steven L.H. & Barbara A. Block, May 2010, *Comparative Influence of Ocean Conditions on Yellowfin and Atlantic Bluefin Tuna Catch from Longlines in the Gulf of Mexico*, *PLoS ONE* 5:1-11 (noting increased bluefin CPUE in the Gulf of Mexico and ability to rig PLL gear to target bluefin rather than swordfish).

In the years preceding Amendment 7, bluefin landings and dead discards in the Gulf of Mexico surpassed levels seen before the 1982 ban on directed bluefin fishing. In fact, during those years the Gulf pelagic longline fishery caught and discarded approximately 100 tons of bluefin tuna every year.

The establishment of the Gulf of Mexico GRAs has drastically reduced bycatch and discards of valuable bluefin spawners. Average annual bycatch of bluefin tuna was 82% lower in April and May of 2016 and 2017 than in 2006-2012, before the GRAs were established. In 2012, bluefin tuna killed by longlines in the Gulf of Mexico comprised 41% of all bluefin longline mortality; in 2017, it comprised only 7% of total longline

mortality. Since the Gulf GRAs have been fully implemented, the longline sector of the fishery has stayed within its bluefin tuna catch limit, in contrast to years like 2012 when the sector exceeded the limit by more than 200%.

The Gulf GRAs' success in *preventing* bycatch from happening is essential for minimizing bluefin mortality and provides significant, necessary protection over that provided by the individual bluefin quotas ("IBQs") alone. NMFS electronic tagging studies and observer program data show that 52% of all bluefin caught on longlines in the Gulf of Mexico die by the time they are hauled back to the vessel. Whereas IBQs do not prevent bycatch and thus do not prevent this rate of mortality, the Gulf GRAs prevent bycatch of the most important members of the bluefin population—the spawners—and have reduced bluefin mortality dramatically.

In sum, the Gulf of Mexico GRAs are essential to protecting and rebuilding the western Atlantic bluefin tuna population. The success of these measures has exceeded all expectations. Removing them now, after they have proven both effective and efficient, would be absurd and, more to the point, illegal.

II. Measures to Reduce Bycatch of Bluefin Tuna and Other Non-Target Species Are Necessary to Comply with Applicable Law.

A. NMFS Must Retain Gear-Restricted Areas and Other Management Measures to Comply with NMFS's Duties under the International Convention for the Conservation of Atlantic Tunas and the Atlantic Tunas Conservation Act.

NMFS manages bluefin tuna fishing pursuant to its authority under the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson Act") and the Atlantic Tunas Convention Act ("ATCA"). ATCA authorizes NMFS 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 to adopt regulations that are necessary and appropriate to carry out ICCAT recommendations, *id.* § 971d(c)(1)(A). Finally, ATCA specifies that no regulation promulgated under it "may have the effect of increasing or decreasing any allocation or quota of fish or fishing mortality level to the United States agreed to pursuant to a recommendation [ICCAT]." *Id.* § 971d(c)(3). Given that ICCAT has recommended a ban on bluefin fishing in the Gulf since 1982, the amount of bluefin mortality in the Gulf permissible under ICCAT authority is effectively zero.

Maintaining the prohibition on pelagic longlining in the Gulf of Mexico GRAs during the bluefin spawning period is necessary to keep the U.S. in compliance with ICCAT recommendations and ATCA by preventing bycatch of spawning bluefin tuna and preventing the *de facto* bycatch fishery for bluefin tuna that used to take place in the Gulf from re-emerging. In addition, continuing to restrict pelagic longline fishing in the Northeastern U.S. Closed Area at least until rigorous scientific study has demonstrated that the measure should be altered, and maintaining a seasonal weak hook requirement in the Gulf, would promote the ICCAT policy of reducing dead discards of bluefin.

B. Maintaining Existing Management Measures Is Necessary to Comply with the Magnuson Act.

The Magnuson Act requires that NMFS manage fish stocks in compliance with a number of national standards. The first of these standards requires NMFS to prevent overfishing—and end it where it is already occurring—and manage fish stocks to achieve optimum yield “on a continuing basis.” 16 U.S.C. § 1851(a)(1). The Act defines optimum yield as the amount of fish which provides the greatest benefit to the Nation, taking into account ecosystem protection, and, in the case of an overfished fishery like bluefin, “provides for rebuilding to a level consistent with producing the maximum sustainable yield in such fishery” (16 U.S.C., 1802(28)(A), (C)).

The Magnuson Act also requires NMFS to “avoid or minimize bycatch” and “minimize the mortality of bycatch which cannot be avoided.” 16 U.S.C. § 1853(a)(11). When determining whether a measure to minimize bycatch or bycatch mortality is “practicable,” NMFS considers a number of factors, including: effects of bycatch on the bycatch species, ecosystem effects, changes in bycatch of other species and resulting ecosystem effects, changes in fishing practices and behavior, changes in distribution of costs and benefits of fishing, changes in the economic, social, or cultural value of fishing activities and non-consumptive uses of fishery resources. 50 C.F.R. § 600.350(d)(3)(i). To the extent that there is uncertainty regarding any of these factors, fishery managers are expected to apply the precautionary approach, as defined by the Food and Agriculture Organization of the United Nations (“FAO”) Code of Conduct for Responsible Fisheries (Article 6.5). 50 C.F.R. § 600.350(d)(3)(ii). That Code dictates that “[t]he absence of adequate scientific information should not be used as a reason for postponing or failing to take measures to conserve target species, associated or dependent species and non-target species and their environment.” FAO Code of Conduct for Responsible Fisheries, Art. 6.5.

The Magnuson-Stevens Act also requires that all “[c]onservation and management measures shall be based upon the best scientific information available.” 16 U.S.C. § 1851(a)(2).

All in all, NMFS must manage fisheries to maintain a long-term, sustainable population. While the agency may consider economic factors, it may not trade the long-term sustainability of a fishery for short-term economic gain. In weighing measures to end overfishing against their economic consequences, NMFS must prioritize ending overfishing. *Natural Resources Defense Council v. Daley*, 209 F.3d 747, 753 (D.C. Cir. 2000) (“we reject the District Court's suggestion that there is a conflict between [the Magnuson Act's] expressed commitments to conservation and to mitigating adverse economic impacts. . . . [U]nder the [Magnuson-Stevens Act], the Service must give priority to conservation measures.”); *see also* 16 U.S.C. § 1851(a)(8) (management measures must minimize economic impacts on fishing communities and provide for sustained participation in the fishery to the extent this is consistent with preventing overfishing and rebuilding overfished stocks). This makes a great deal of sense since allowing overfishing and excessive bycatch to continue in the name of short-term

economic gain will eventually lead to the species' commercial extinction and the demise of the fishery itself.

1. NMFS Must Maintain the Gulf of Mexico GRAs.

While Amendment 7 made strides in improving bluefin tuna management, the need to protect bluefin has not diminished. The western population of Atlantic bluefin tuna remains overfished and well below its already severely diminished 1974 numbers. Thanks to overly aggressive catch limits, the population is projected to decline by 8% by 2020. Protecting bluefin tuna from excessive catch is as crucial now as ever. Protecting bluefin in the Gulf of Mexico is particularly significant to rebuilding the western population, since the Gulf is home to its major known spawning grounds and all bluefin caught in the Gulf belong to the western population.

NMFS's move towards relying on the IBQ system as its mechanism for minimizing bluefin bycatch in the Gulf of Mexico, and its proposal to allowing greatly increased bluefin catch in the Gulf in the guise of "testing" the effectiveness of that plan, ignore the key importance of avoiding bluefin bycatch in the Gulf. Allowing even "incidental" catch of spawning bluefin is contrary to the basic need to protect the breeding adults that support the population, as well as the U.S.'s legal and treaty obligation to prevent the re-emergence of a *de facto* fishery for bluefin on their Gulf of Mexico spawning grounds. Opening the Gulf of Mexico spawning grounds poses an unacceptable risk to the western Atlantic breeding population. Available evidence from NMFS tagging studies and observer data show that more than half of all bluefin caught on longlines in the Gulf of Mexico die before being hauled back to the boat. Furthermore, available evidence indicates that none of the alternative approaches chosen for the proposed rule are nearly as effective as the Gulf GRAs at preventing bycatch. While IBQs have undoubtedly helped decrease bycatch mortality of bluefin tuna, the Gulf GRAs have reduced bycatch by a far greater number. The average longline catch of bluefin in the Atlantic in 2015 and 2016 declined by 48% compared to 2006-2012; in the Gulf of Mexico, it declined by 88%.

There is also no evidence to indicate that the Gulf GRAs have had any negative impact on the ability of fishing vessels to catch target species. In fact, yellowfin tuna catch increased by more than a third in 2016. While the pelagic longline fleet has shrunk for the past decade, it has done so for reasons that have nothing to do with the GRAs—e.g., vessels participating in the Deepwater Horizon Oceanic Fish Restoration Project's longline repose program and attrition due to an aging fleet.

In sum, opening up the GRAs would harm the western Atlantic bluefin tuna population and encourage targeted fishing of bluefin tuna in violation of U.S. treaty obligations and other legal requirements, while offering little or no benefit in terms of increasing catch of legitimate target species. Maintaining the Gulf of Mexico GRAs is necessary to rebuild the western Atlantic bluefin tuna stock. Removing these proven management measures would once again foster excessive mortality of spawning adults that are vital to sustaining the bluefin population. NMFS must continue to minimize or eliminate catch of spawning adults in the Gulf and place strong restrictions on bluefin

bycatch in other areas. If NMFS considers altering the spatiotemporal extent of the areas at all, it should consider joining the two areas into one and extending the effective period to include March, in order to protect more spawning bluefin tuna.

2. NMFS Should Adopt a Six-Month Weak Hook Requirement in the Gulf of Mexico.

The year-round weak hook requirement in the Gulf of Mexico has reduced dead discards of bluefin tuna by nearly 75%. However, concerns have been raised that the use of weak hooks may increase catch of white marlin and decrease catch of targeted swordfish. While such concerns have not been substantiated, NMFS's preferred alternative of applying the weak hook requirement in January through June may still achieve significant conservation benefits for bluefin tuna. This 6-month requirement would protect spawning bluefin tuna during the time of year when longline catch rates are highest while allowing use of regular hooks during other months when catch of white marlin is higher.

3. NMFS Must Complete a Scientifically Rigorous Evaluation of Other GRAs and Closed Areas Before Making Any Changes to Them.

As with its Gulf GRA proposal, NMFS's proposal to allow fishing within the Northeastern United States Pelagic Longline Closed Area to supposedly evaluate its effectiveness lacks any valid scientific basis. Available data do indicate that bluefin tuna distribution may have shifted seaward since the area was established. These data show that a seaward expansion of the area may be warranted. Data also show that extending the duration of the closure from June to both June and July may be warranted to ensure the closure encompasses the months of highest bycatch. Any measures that decrease the spatial or temporal scope of the closure must be supported by well-designed research and rigorous analysis showing that such a reduction would not result in increased bluefin bycatch. Rather than selecting one of the options presented in this rulemaking, it would be far more appropriate to use NMFS's current scoping process (NOAA-NMFS-2019-0035, Issues and Options for Research and Data Collection in Closed and Gear Restricted Areas in Support of Spatial Fisheries Management) to develop a scientifically sound research plan to evaluate how to improve the effectiveness of closed areas. NMFS's proposal, in contrast, would expressly allow increased bycatch and likely significantly increased mortality without adding valid scientific knowledge.

C. Maintaining Measures that Reduce Bycatch Is Necessary to Comply with the Endangered Species Act.

NMFS's management of the pelagic longline fishery is also subject to the requirements of the Endangered Species Act ("ESA"). ESA Section 7(a)(1) requires that all federal agencies use their authorities in furtherance of conserving listed species. 16 U.S.C. § 1536(a)(1). ESA Section 7(a)(2) requires federal agencies to ensure that no action they authorize, fund, or carry out is likely to "jeopardize the continued existence of

any endangered species or threatened species or result in the destruction or adverse modification of [critical habitat].” *Id.* Therefore, NMFS must ensure that the operation of the pelagic longline fishery is not likely to pose jeopardy or adverse modification to species protected under the ESA.

The pelagic longline fishery incidentally injures and kills substantial numbers of threatened and endangered species, including loggerhead and leatherback sea turtles, as well as the recently listed oceanic whitetip shark.¹ NMFS is obligated both to avoid the likelihood that these incidental takes will jeopardize the species and to actively promote their conservation and recovery to the point where listing is no longer necessary. Time-area closures that prohibit the use of pelagic longline gear in the Gulf of Mexico GRAs and Northeastern U.S. Pelagic Longline Closed Area likely contribute to reducing take of threatened and endangered species in this fishery. Any changes to these measures would require ESA consultation to ensure that they do not decrease the likelihood of survival or recovery of the many species affected by pelagic longlining.

III. Conclusion

NMFS has made significant progress in achieving its obligations to conserve and manage Atlantic bluefin tuna since the implementation of Amendment 7. Limiting the use of pelagic longline gear during key periods, especially in the Gulf of Mexico, has drastically reduced the number of bluefin tuna killed every year. Despite this progress, Atlantic bluefin tuna have a long way to go to reach healthy population levels. Maintaining successful management measures like the Gulf of Mexico GRAs is essential. There is no rational basis for removing or weakening management measures that have proven extremely successful in protecting bluefin while having minimal impact on catch of target species – especially when Atlantic bluefin tuna remains overfished and in need of rebuilding. Allowing any increase in bycatch of bluefin tuna, by removing GRAs, providing conditional access, or by allowing vessels to catch a certain amount before reaching an undefined “trigger,” would be contrary to Magnuson Act, ATCA, and ICCAT obligations, particularly for the Gulf of Mexico. The agency should not spend valuable time and resources analyzing whether to remove or weaken measures that have proven

¹ In addition, this fishery catches and kills a substantial number of dusky sharks, scalloped hammerheads, and shortfin makos, all of which are overfished and experiencing overfishing. The rebuilding plans for these species assume that NMFS will continue to implement current time-area closures for pelagic longline gear. For example, NMFS promulgated a revised rebuilding plan for dusky sharks (Amendment 5b to the HMS FMP), which assumes the continued operation of these time-area closures and partly relies on those measures to justify its assumption that Amendment 5b will aid in rebuilding the population. Removing or decreasing the temporal or spatial extent of time-area closures that help reduce bycatch of dusky sharks, scalloped hammerheads, and shortfin makos would further undermine the validity of NMFS’s rebuilding plans and require NMFS to re-evaluate their effectiveness. In addition, the CITES Conference of Parties listed the shortfin mako on CITES Appendix II in August 2019, underscoring the need to protect the species.

effective at achieving their imperative. Instead, it should analyze options to further increase the effectiveness of GRAs, including by expanding their spatial and temporal extents.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Andrea A. Treece', with a long horizontal flourish extending to the right.

Andrea A. Treece
Staff Attorney, Oceans Program



Via electronic mail

February 12, 2020

Mr. Randy Blankinship
Chief, Atlantic HMS Management Division
Office of Sustainable Fisheries, F/SF1 Fisheries Service
263 13th Ave. South
Saint Petersburg, FL 33701
randy.blankinship@noaa.gov

RE: NOAA-NMFS-2018-0035; Final Environmental Impact Statement regarding Atlantic bluefin tuna area-based and weak hook management measures

Dear Mr. Blankinship:

On behalf of Healthy Gulf, The Ocean Foundation, and Earthjustice, we submit these comments on the *Final Regulatory Amendment to Modify Pelagic Longline Bluefin Tuna Area-Based and Weak Hook Management Measures* (NOAA-NMFS-2018-0035), including the accompanying final environmental impact statement (FEIS). The National Marine Fisheries Service's (NMFS's) decision to roll back proven, successful conservation measures lacks any basis in the best available science, legal requirements, or treaty obligations. NMFS's decision to adopt Alternative C3, which will reintroduce pelagic longline fishing to the Gulf of Mexico Gear Restricted Areas (GRAs), is particularly egregious. That measure, if promulgated, will:

- Increase mortality of the severely depleted western Atlantic population of bluefin tuna at the time and area of their peak spawn;
- Establish an unscientific "review process to evaluate the continued need" for the Gulf GRAs, with no additional monitoring measures, oversight, or research methodology, masking what is a deliberate and unsubstantiated reopening of the GRAs;
- Foster a *de facto* fishery on spawning bluefin tuna, in violation of the International Convention for the Conservation of Atlantic Tunas (ICCAT) prohibition on targeting bluefin tuna in the Gulf of Mexico;
- Ignore requirements under the Endangered Species Act (ESA) to undergo consultation on projected impacts of the action on threatened and endangered species, including loggerhead and leatherback sea turtles and oceanic whitetip sharks;
- Reduce projected revenue in the Gulf pelagic longline fishery by up to 21%; and

- Threaten future fishing opportunities of the approximately 30,000 U.S. fishermen that are authorized to legally target bluefin tuna commercially and recreationally.

If enacted, NMFS's final rule would remove elements of Amendment 7 to the Consolidated Atlantic Highly Migratory Species Fishery Management Plan that are essential to conserving Atlantic bluefin tuna and fostering a sustainable fishery in the long term. The very measures NMFS proposes to eliminate have proven successful in protecting spawning bluefin and enjoy strong public support. Amendment 7 was developed during 6 years of careful consultation with NMFS's scientists and stakeholders, and its success has exceeded all expectations, with a 70% reduction in bluefin interactions in the GOM spawning ground and a 95% reduction in wasteful dead discards of bluefin tuna.

Our groups explained our concerns with NMFS's proposals in prior comments. NMFS has made no substantive changes between the draft and final rule to address those concerns and has failed to offer adequate explanations for its decisions that are supported by science or comply with applicable law. The response NMFS offered to counter our comment regarding the proven effectiveness of the Gulf GRAs undermines NMFS's argument. In our comments on the proposed rule, we explained that bluefin mortality data show higher reductions during the months of April and May, when pelagic longline fishing is prohibited within the GRAs, than during the months of February and March. The fact that mortality dropped markedly while the GRAs are in effect demonstrates that the reductions resulted from the GRAs rather than the Individual Bluefin Quota (IBQ) program. In an attempt to rebut this conclusion, NMFS compiled additional data and presented it in Appendix E of the FEIS. The conclusion NMFS reached was identical to ours: "the percent reduction in total interactions, mortality, discards and dead discards was greater in April-May than in February-March." Table E.3 shows an 88% reduction in mortality in April and an 81% reduction in May, compared to 69%, 68%, 50%, and 11% in January, February, March, and June, respectively. If anything, NMFS's additional analysis corroborates our conclusion that the gear restricted areas play an important part in reducing bluefin interactions—one that cannot be achieved with the IBQ alone.

Overall, NMFS fails to offer any scientific or economic data to support its decision to remove the Gulf of Mexico gear restricted areas, even on an allegedly experimental basis. Instead of grounding its decision in the best available data or applicable law, NMFS states that removing these highly effective management measures would act "in furtherance of the Department of Commerce strategic plan objectives to review agency regulations and remove or modify rules that unnecessarily burden businesses and economic growth." FEIS Executive Summary, p. ii. NMFS's bare political justification for this action cannot overcome its clear legal obligations.

As we have explained in past comments, NMFS's management of bluefin tuna is subject to non-discretionary duties under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), Atlantic Tunas Convention Act (ATCA), and ESA. Courts have made clear that the MSA does not allow NMFS to remove management measures necessary to conserve a fish

population in the interest of satisfying political objectives or promoting greater economic gains. In weighing measures to end or prevent overfishing against their economic consequences, NMFS must prioritize ending and preventing overfishing. *Natural Resources Defense Council v. Daley*, 209 F.3d 747, 753 (D.C. Cir. 2000) (“we reject the District Court's suggestion that there is a conflict between [the Magnuson Act's] expressed commitments to conservation and to mitigating adverse economic impacts. . . . [U]nder the [Magnuson-Stevens Act], the Service must give priority to conservation measures.”). Decades of experience and data show that protecting spawning bluefin in the Gulf is essential to rebuilding the western Atlantic bluefin population. ICCAT recognized this in 1982 when it recommended a ban on directed fishing for bluefin on their Gulf of Mexico spawning grounds.

Contrary to its current semantic argument that authorizing the retention of bluefin “bycatch” does not foster a *de facto* fishery for bluefin, NMFS itself determined that providing incidental catch quotas “may have permitted a directed fishery for Atlantic bluefin tuna in the Gulf of Mexico, contrary to the intent of the regulations and the United States’ obligations” to ICCAT. *See, e.g.*, 53 Fed Reg. 10415, 10415 (Mar. 31, 1988). In fact, maintaining the prohibition on pelagic longlining in the Gulf of Mexico GRAs during the bluefin spawning period is necessary to keep the U.S. in compliance with ICCAT recommendations and ATCA by preventing bycatch of spawning bluefin tuna and preventing the *de facto* bycatch fishery for bluefin tuna that used to take place in the Gulf from re-emerging.

Moreover, NMFS’s decision to open the GRAs to pelagic longlining without completing ESA consultation, even though the agency knows that this fishing method adversely affects threatened and endangered species, violates the ESA. 16 U.S.C. § 1536(a)(2); *see, e.g., Conservation Law Foundation v. Ross*, 2019 WL 5549814 at *11-13 (D.D.C. Oct. 28, 2019) (NMFS Office of Sustainable Fisheries may not avoid completing ESA consultation on action that may affect listed species based on its own assumption that the action it proposed will not adversely affect the species; only the NMFS Office of Protected Resources has authority to make that determination). As the Department of the Interior noted in its comments on the draft EIS, opening the GRAs to longlining is likely to harm listed species: “At a time when sea turtle strandings are increasing [and] the Migratory Bird Treaty Act has a more limited role in regulating incidental takes, relaxing restrictions may increase adverse effects to listed species.” Letter from J. Stanley, Dep’t of Interior, to J. Cudney, NMFS re Draft EIS (Sept. 30, 2019). The law simply does not allow NMFS to remove necessary fishery conservation measures and ignore effects on other, listed species simply for the sake of indiscriminate deregulation. Removing these regulations without any rational, lawful basis for doing so is illegal. And doing so when those regulations involve the management of a stock that the government has been struggling to recover for 40 years is malpractice.

In conclusion, the Gulf gear restricted areas have been incredibly successful in reducing catch and discards of bluefin tuna with minimal impact on the fishing industry. NMFS has failed to offer any acceptable scientific, legal, or even economic reasons for removing these measures just

a few years after they were implemented and proven effective. Therefore, we strongly urge NMFS not to promulgate regulations to implement this rule.

Thank you for your careful consideration of these comments.

Sincerely,



Shana Miller
Senior Officer, International Fisheries Conservation
The Ocean Foundation



Raleigh Hoke
Campaign Director
Healthy Gulf



Andrea A. Treece
Staff Attorney, Oceans Program
Earthjustice