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*1000 potomac street nw*

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Please reply to ELDON V.C. GREENBERG  
egreenberg@gsblaw.com TEL EXT 1789

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**VIA FACSIMILE (301) 713-1940, E-MAIL (bill.hogarth@noaa.gov) AND MAIL**

Dr. William T. Hogarth  
Assistant Administrator for Fisheries  
National Oceanic and Atmospheric Administration  
1315 East-West Highway, Room 14555  
Silver Spring, MD 20910

**Winter Bluefin Tuna Fishery**

Dear Dr. Hogarth:

I am writing on behalf of the East Coast Tuna Association, the General Category Tuna Association, the North Shore Community Tuna Association and the Winter Bluefin Association (collectively, the "Tuna Associations") to supplement their letter to you of November 3, 2005, and to urge that the National Marine Fisheries Service ("NMFS") do all that is necessary to facilitate the conduct of the General Category winter fishery for Atlantic bluefin tuna ("ABT"). As explained in detail below, the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801, *et seq.* (the "Magnuson-Stevens Act"), imposes a mandatory duty upon NMFS to "provide fishing vessels of the United States with a reasonable opportunity to harvest" quotas established by the International Commission for the Conservation of Atlantic Tunas ("ICCAT"). In the present circumstances, the Tuna Associations submit that, in order to fulfill this duty, NMFS must: (1) ensure the General Category has a winter ABT fishery in December and January with a quota of at least 500 metric tons ("mt"); (2) maintain a two fish per day catch/trip limit of fish over 73 inches, as is currently in effect; and (3) eliminate restricted fishing days ("RFDs") in December and January until substantial progress is made towards General Category quota achievement.

The Tuna Associations collectively represent the interests of the vast majority of General Category permit holders. As explained in their letter of November 3, General Category landings through November 1 amounted to only 137.8 mt out of a total quota for the June 1, 2005-May 31, 2006 fishing year of 908.3 mt. *See 70 Fed. Reg.* 33033 (June 7, 2005). The Tuna Associations understand that, as of November 18, 154.9 tons had been landed. Subtracting that number from



908.3 mt, and excluding the 10 mt in the “Mudhole” fishery, the Tuna Associations calculate that, as of that date, approximately 743.4 mt remained available. It would be devastating to long-term participants dependent upon the fishery for their economic livelihood if quota of this magnitude were not available for harvest in the remaining two months of this fishing year. Making up such a loss through a quota adjustment in the 2006-2007 fishing year would come too late to relieve the serious economic consequences associated with the paucity of the harvest to date in this fishing year. Many fishermen will lose their fishing vessels, bluefin tuna dealers will be forced to leave the business and the Tuna Associations will be damaged economically and likely be forced to eliminate employees.

It is obvious in these circumstances that NMFS must do what is necessary to ensure that adequate quota is available, as well as ensure that other measures are in place to allow the fleet to maximize its fishing possibilities during the next two months. Otherwise, General Category permits holders will, contrary to law, have been deprived of fishing opportunities guaranteed under the Magnuson-Stevens Act. NMFS has both the authority and obligation under the law to make sure this does not happen.

**1. The Language and History of the Magnuson-Stevens Act Require NMFS to Take Appropriate Regulatory Action to Allow ICCAT Quotas to be Harvested by U.S. Fishermen.**

When Congress in 1990 vested authority in the Secretary of Commerce (the “Secretary”) to manage Atlantic highly migratory species, it made it clear that providing U.S. participants with a “reasonable opportunity” to harvest ICCAT quota was to be a central element of the regulatory regime. Thus, Section 110(b) of Pub. L. No. 101-627 added a new Section 304(f)(3)(E) to the Magnuson-Stevens Act, providing, “With respect to a highly migratory species for which the United States is authorized to harvest an allocation or quota under an international fishery agreement, the Secretary shall provide fishing vessels of the United States with a reasonable opportunity to harvest such allocation or quota.” In 1996, in Section 109(g) of the Sustainable Fisheries Act, Pub. L. No. 104-297, Congress modified and incorporated this provision as a new Section 304(g)(1)(D) of the Magnuson-Stevens Act. As the Magnuson-Stevens Act now reads, “[i]n preparing and implementing” any fishery management plan (“FMP”) or amendment for Atlantic highly migratory species, the Secretary “shall . . . with respect to a highly migratory species for which the United States is authorized to harvest an allocation, quota or at a fishing mortality level under a relevant international fishery agreement, provide fishing vessels of the United States with a reasonable opportunity to harvest such allocation, quota, or at such fishing mortality level.”

Several things are immediately apparent about Section 304(g)(1)(D) of the Magnuson-Stevens Act. First, and most importantly, the language of Section 304(g)(1)(D) is mandatory, that is, the Secretary is under a legal obligation to provide the requisite opportunity to harvest quota. As the Supreme Court has stated, “Shall is the language of command.” *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935); *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001). This clear and



unambiguous language necessarily must control agency action. *See generally Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). Second, there is no doubt that the obligation applies to actions “implementing” FMPs and not just to the provisions of FMPs themselves. Thus, it comes into play both with respect to in-season modification of retention limits under 50 C.F.R. § 635.23(a)(4) and with respect to in-season quota adjustments within the General Category under 50 C.F.R. § 635.27(a)(1)(ii). Third, in specifying that the obligation arises in the case of “allocations,” “quotas” and “fishing mortality levels,” Congress plainly wanted to ensure that, no matter how the authorization of the international body was framed, U.S. participants in the fishery would be able to pursue their fishing opportunities within that authorization. Fourth, the use of the term “reasonable” to qualify the nature of the opportunity provided must be read to mean that opportunity must be meaningful and realistic; the term manifestly does not give the Secretary discretion to restrict the fishery in such a way that harvest of the quota would be unlikely to occur.

Where the language of a statute is clear and unambiguous, it is not necessary to resort to legislative history to ascertain the statute’s meaning. *See, e.g., United States v. Oregon*, 366 U.S. 643 (1961); *Rubin v. United States*, 449 U.S. 424, 429-430 (1981). Here, however, the legislative history of Section 304(g)(1)(D) underscores its mandatory nature and its importance in the statutory scheme.

The measure originally appeared in the Senate bill (S. 2061) brought to the Floor on October 11, 1990. *See* 136 Cong. Rec. S. 14976, 14980 (daily ed., Oct. 11, 1990). In explaining the provision, Senator Kerry (D.-MA) stressed the “complementary” nature of the domestic regulation authorized under the law. Thus, he stated, “The United States ought to take the lead to establish strong international quotas that will promote recovery and conservation of the stocks. Once agreement is reached by the international community, U.S. fishermen ought to be allowed a reasonable opportunity to fish for the quota that is provided for in this agreement.” *Id.* at S. 14967. In a colloquy with Senators Bentsen (D.-TX), Hollings (D.-SC) and Roth (R.-DE), while Senator Kerry agreed that the provision did not deprive the Secretary of the “flexibility” to take appropriate action to achieve conservation goals when a resource is “threatened” or “in need of management,” he also stressed that the goal of the provision was “to have consistent management of our highly migratory species and a balanced approach to this fishery.” *Id.* at S. 14971. Senator Kerry further explained that the flexibility to be retained by the Secretary was primarily so that the bill would not “disrupt the present management of billfish,” *i.e.*, a fishery for which there is no ICCAT quota. *Id.* at 14972.

On the House side, a similar colloquy occurred. Congressman Studds (D.-MA) explained, “Once an international plan with a quota or allocation for the United States has been established, American fishermen must be provided with a reasonable opportunity to harvest that quota or allocation. Under the bill, the Secretary of Commerce does have the authority to take additional management measures within the framework of an international program, but not to change the U.S. allocation or to interfere with the opportunity of U.S. fishermen to harvest the American share of any international quota.” 136 Cong. Rec. H. 11889 (daily ed., Oct. 23, 1990).



While Congressman Saxton (R.-NJ) stated that this did not preclude “complementary” regulations designed to protect the species, there was no question that such regulation could not result in effectively denying U.S. fishermen the benefit of an international quota. *Id.* at 11890.

When the bill returned to the Senate on October 27, the colloquy continued. Senator Kerry pursued the theme of the “complementary” nature of domestic and international action, noting that, on the one hand, the bill would task the U.S. with pursuing a “strong international quota” and, on the other hand, the bill would “provide fishermen a reasonable opportunity to catch that quota.” 136 Cong. Rec. S. 17469 (daily ed., Oct. 27, 1990). Senator Bentsen then explained that the flexibility retained by the Secretary primarily related to fisheries, such as that for billfish, where no international quota had been established. *Id.* at S. 17470. Senator Hollings (D.-SC) agreed that the effect of the provision would not be to “upset the current bill fish plan.” *Id.* In short, the references in the legislative history to the continuing authority or “discretion” of the Secretary to “take appropriate action under the Magnuson Act . . . to protect highly migratory and other fishery resources,” *id.*, cannot be read to give the Secretary discretion to deny fishing opportunities to U.S. fishermen under an established ICCAT quota.

When the provision was considered by Congress again in 1996, there was much less discussion of its impact. The primary thrust of the 1996 amendment, which first appeared in the Senate bill (S. 39), was simply to restate the obligations embodied in Section 304(f)(3). Thus, the Senate Report noted, “The new Magnuson Act provisions that would be added as section 304(g) are similar to the existing provisions in section 304(f)(3) of the Magnuson Act.” S. Rep. No. 104-276 at 22 (1996). The Senate Report went on to explain that, under the provisions as modified, “In preparing and implementing a plan or amendment, the Secretary would be required to . . . provide U.S. fishing vessels with a reasonable opportunity to harvest any fish which the United States is authorized to harvest under an international fishery agreement.” *Id.* at 23. The modifications were non-controversial, and there was essentially no discussion of them when the bill was considered in the House and the Senate. *See* 142 Cong. Rec. S. 10794 (daily ed. Sept. 18, 1996); 142 Cong. Rec. H. 10906 (daily ed. Sept. 19, 1996); 142 Cong. Rec. H. 11436 (daily ed. Sept. 27, 1996). What is clear, however, is that the 1996 amendment removed any possible ambiguity as to whether the obligation on the Secretary might somehow just be limited to the development of FMPs and FMP amendments. Congressional action in 1996 left no doubt that implementing actions, including in-season adjustments to quotas and retention limits, are subject to the same obligation.

## **2. NMFS Must Ensure that Three Measures are in Place to Fulfill Its Obligations Under Section 304(g)(1)(D) of the Magnuson-Stevens Act.**

Under NMFS’ ABT regulations, the General Category has a “coastwide” quota, that is, a quota that is not geographically limited, except as expressly provided under the regulations. *See* 50 C.F.R. § 635.27(a)(1); 70 *Fed. Reg.* 33033 (June 7, 2005). With more than 700 mt of ABT unharvested at this point -- more than 33% of the 2055 mt total U.S. quota for 2005-2006 -- it is imperative that the NMFS ensure that three measures are in place to provide a “reasonable



opportunity” for the General Category to harvest ICCAT quota and to help achieve “optimum yield” (“OY”) for the fishery within the meaning of Section 301(a)(1) of the Magnuson-Stevens Act, 16 U.S.C. § 1851(a)(1).<sup>1</sup>

**A. NMFS Must Ensure that At Least 500 MT of ABT General Category Quota are Available in the December-January Time Period.**

Under 50 C.F.R. § 635.27(a)(1)(ii), NMFS is required, with respect to General Category quota, to “adjust each period’s apportionment based on overharvest or underharvest in the prior period.” The language of this regulation is mandatory: it specifies that NMFS “will” make such adjustment, without any consideration of discretionary criteria that would allow the agency to withhold quota. As the Tuna Associations understand it, NMFS’ longstanding practice is to treat this “rollover” as automatic, *i.e.*, not requiring any formal administrative action by the agency. Section 635.27(a)(1)(ii) reflects the requirements of Section 304(g)(1)(D) of the Magnuson-Stevens Act that U.S. harvesters be provided with a reasonable opportunity to harvest ICCAT quota.

It is obvious that the quota adjustment required under NMFS’ regulations must come into play in the present circumstances. The quota for the June-September period was 808.5 mt, while only 89.8 mt were initially allocated to the October-January period. *See 70 Fed. Reg.* at 33034. Given the level of harvest as of November 18, this means that the rollover quota for the October-January period stood at 653.6 mt at that point. Unless a substantial portion of this amount remains in the General Category, General Category vessels will come nowhere close to harvesting their 2005-2006 quota of 908.3 mt and will have been denied a reasonable opportunity to harvest their quota in this fishing year.

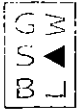
In sum, continuing to make at least 500 mt available to the General Category is required not only under Section 304(g)(1)(D) of the Magnuson-Stevens Act but also under NMFS’ ABT regulations.

**B. NMFS Must Maintain the ABT General Category Retention Limit of Two Fish Per Day for the December-January Time Period.**

NMFS’ 2005-2006 initial season specifications for the 2005-2006 fishing year limited General Category fishermen from harvesting more than one fish per day/trip during the period from September 1 through January 31. *See 70 Fed. Reg.* 33039, 33040, Table 1 (June 7, 2005). Under 50 C.F.R. § 635.23(a)(4), NMFS is authorized, in order “[t]o provide for maximum utilization of the quota for BFT,” to modify the daily retention limits for ABT on an in-season

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<sup>1</sup> Under the Final Fishery Management Plan for Atlantic Tuna, Swordfish and Sharks (April, 1999), OY is equated with following the ICCAT 1998 Rebuilding Program and the quotas established thereunder. *Id.* at ch. 3, p. 20. Thus, the requirements of Section 301(a)(1) and Section 304(g)(1)(D) of the Magnuson-Stevens Act are essentially merged in this case.



basis. Acting pursuant to this provision, NMFS has on two occasions this year, because of low catch rates, modified the daily retention limits to allow the landing of two ABT larger than 73 inches per day/trip. On August 18, 2005, it raised the limits for the month of September, *see* 70 *Fed. Reg.* 48490 (Aug. 18, 2005), and, on September 28, 2005, it raised the limits for the remainder of the year. *See* 70 *Fed. Reg.* 56595 (Sept. 28, 2005). NMFS should take no action to change the limits now in effect.

In issuing its initial 2005-2006 season specifications, NMFS, invoking its authority under Section 635.23(a)(4), adjusted the 2005 retention limits, increasing them for the period June 6-August 31 “to provide enhanced commercial General category and recreational Charter/Headboat fishing opportunities.” 70 *Fed. Reg.* at 33039-33040. NMFS noted particularly that, “if the action is not conducted expeditiously, at the opening of the season, then a subsector of General category fishermen . . . will lose the opportunity to enjoy the increased fishing opportunities while the fish are briefly offshore in the Gulf of Maine and northern New England fishing areas.” *Id.* at 33040. In short, NMFS recognized that, in order to provide a “reasonable opportunity” to harvest quota, an adjustment upward of the daily retention limit was needed.

In adjusting the limits again for September and the October-January period, NMFS underscored the need for the adjustment mechanism to compensate for periods when catch rates were low. In particular, when acting in late September, NMFS explained that the low catch rates in August and early September likely meant that the full quota for the September period would not be harvested, with the result that there would be a large “rollover” of quota into the October-January period. 70 *Fed. Reg.* at 56596. Adjustment was made for the remainder of the fishing year, *inter alia*, in order to “allow the coastwide General category season to extend into January, . . . allow for a southern Atlantic fishery to take place on an order of magnitude of prior years . . . [and] allow for maximum utilization of the U.S. landings quota of BFT while maintaining an equitable distribution of fishing opportunities to help achieve optimum yield in the General category BFT fishery . . .” *Id.*

Catch rates since late September have not improved, and the rationale of maximizing utilization of the U.S. landings quota is more important than ever. In such circumstances, there should be no change in the two fish per day/trip limit currently in effect. Otherwise, it would be effectively impossible for General Category permit holders to harvest the quota which should be available to them for the remainder of the year and so achieve “maximum utilization” of the ICCAT landings quota.

**C. NMFS, by In-Season Adjustment, Must Eliminate General Category RFDs for the December-January Time Period.**

Under 50 C.F.R. § 635.23(a)(4), NMFS is also authorized to modify RFDs to ensure that there is “maximum utilization” of ABT quota. Under the initial 2005-2006 season specifications, “all Fridays, Saturdays and Sundays from November 18, 2005, through January 31, 2006” were RFDs, during which General Category permittees were prohibited from fishing. *See* 70 *Fed.*



*Reg.* at 33034. NMFS recently lifted the RFD restrictions in November but left them in place for the remainder of the fishing year. *See 70 Fed. Reg.* 67929 (Nov. 9, 2005). However, because there is no useful purpose to be served by maintaining RFDs in the December-January timeframe, and because their maintenance would likely result in failure to harvest quota that should be available, RFDs should be eliminated in the winter fishery.

The use of RFDs in the winter fishery was originally premised upon the assumption that the quota would be something less than 90 mt. However, as explained in the Tuna Associations' November 3 letter, "given the volume of quota available for a winter fishery, there no longer is any need for the 3 restricted weekly fishing days." Indeed, the Tuna Associations believe that maintenance of the RFDs, particularly because of the often harsh weather conditions off the coast during the winter, will, as a practical matter, result in failure to harvest the entire quota.

When it issued its 2005-2006 season specifications, NMFS explained that the purpose of RFDs was to "extend the General category for as long as possible through the October through January time-period." *70 Fed. Reg.* at 33034. It further explained, "The purpose of the RFDs is to assist with the distribution and achievement of optimum yield, and to extend the late season General category fishery." *Id.* at 33035. However, NMFS recognized that "the weather is unpredictable during this time period . . . and that poor weather conditions may limit participation without the need for additional RFDs." *Id.* Thus, NMFS stated, "Should BFT landings and catch rates during the late season fishery merit the waiving of RFDs, under 50 CFR 635.23(a)(4), NMFS may adjust the daily retention limits . . ." *Id.*

More recently, when NMFS lifted the RFD restrictions in November, the agency recognized that such adjustment was necessary "to allow for maximum utilization of the coastwide General category BFT quota." *70 Fed. Reg.* at 67929. It did not lift RFDs for the remainder of the year, but it nonetheless stated, "If catch rates continue to be low, some or all of the remaining previously scheduled RFDs may be waived as well." *Id.*

Further, the Tuna Associations and NMFS are well aware that past catch rates for any fishing region during any season are not reliable as an indicator of future catch rates for a similar fishery at a similar time. The evidence of this reality is not limited to the performance of the northern fishery but includes the performance of the winter fishery as well (*e.g.*, low catch rates in 1998). It is this inability to accurately or reliably predict catch rates that requires NMFS to allow any regional or seasonal bluefin fishery to start with a minimum of restrictions until performance is identified. Starting a fishery with minimal effort restrictions is the only available option for consistency with the reasonable opportunity mandate. Implementing restrictive days off and bag limits at the initiation of a fishery maximizes the probability of quota underachievement and is inconsistent with the reasonable opportunity mandate.

In the Tuna Associations' view, NMFS should await real time landings and catch rate data before making a decision about whether RFDs are necessary. Given the amount of quota available this season, there is no need to restrain the fishery to extend the season. In the present



circumstances, RFDs are not only unnecessary, but, if they are maintained, they will also unduly constrain the fishery and virtually ensure that the entire quota will not be taken. Thus, there is every reason for NMFS to act now to lift these restrictions.

Finally, it is well known that the commercial reporting requirements for landing bluefin tuna under General Category permits allow real time tracking of catches to monitor progress towards quota achievement. Indeed, the requirement for tuna dealers immediately to tag/report a tuna landing within 24 hours by facsimile and the largeness of the product (*i.e.*, 7' tuna coffins) both discourage illegal activity and contribute to the fact that the giant bluefin tuna fishery is one of the best monitored fisheries in the United States. Given the unprecedented volume of available quota and given the highest catch rates ever experienced in the history of the General Category, it is not remotely possible that a high performance winter fishery could occur, escape the attention of managers and threaten quota compliance. NMFS will have ample opportunity to add RFDs if evidence emerges they are necessary to slow weekly catch rates.

### Conclusion

In sum, NMFS must ensure that there is a meaningful ABT winter season and a reasonable opportunity during this fishing year for the General Category to harvest its 2005-2006 quota, by allowing a quota of at least 500 mt in the winter fishery, maintaining the daily limit of two ABT and eliminating RFD restrictions.

Thank you for your consideration. I look forward to your prompt response.

Sincerely,

Eldon V.C. Greenberg

cc: Margo Schulze-Haugen  
Samuel Rauch, Esq.  
Caroline Park, Esq.  
Hon. Olympia Snowe  
Hon. Ted Stevens  
Rich Ruais  
Peter Manuel  
Peter Weiss  
John White