



FORMERLY THE NATIONAL COALITION FOR MARINE CONSERVATION (NCMC)

July 3, 2013

Kim Marshall
Fishery Policy Analyst
National Marine Fisheries Service
1315 East-West Highway, SSMC3
Silver Spring, MD 20910

Subject: Billfish Conservation Act Implementing Regulations;
NOAA-NMFS-2013-0004

Dear Ms. Marshall,

The Billfish Conservation Act of 2012 is important new fisheries law that will provide enduring conservation benefits for these vulnerable species, *if* properly implemented and enforced. For that reason, we are grateful for the opportunity to respond to the National Marine Fisheries Service's *Advance Notice of Proposed Rulemaking*, in particular your request for comment regarding what restrictions can and should be imposed on the transportation and sale of marlin, sailfish and spearfish caught by United States vessels and landed in Hawaii and the Pacific Insular Area under the Section 4(c) exemption.

The BCA prohibits the importation and sale of any species of Atlantic or Pacific billfish in the U.S., with a limited exemption for traditional island fisheries and markets in the western Pacific. By doing so, the Act ends the sale of billfish, whether of foreign or domestic origin, on the U.S. mainland, in accordance with long-standing fishery management policies intended to de-commercialize these species under the Magnuson Stevens Fishery Conservation and Management Act (MSA).¹ Hawaii and the Pacific island territories (Guam, Samoa, Marshall Islands *et al*) will continue to regulate their

¹ The U.S. Atlantic Billfish Fishery Management Plan, approved by the five east coast Regional Fishery Management Councils, outlawed the sale of billfish caught in the Atlantic Ocean in 1990 and the West Coast Highly Migratory Species Fishery Management Plan, adopted by the Pacific Fishery Management Council in 2004, prohibits the sale of marlin caught within the west coast EEZ.

“traditional fisheries and markets” for billfish under the MSA through an exemption for the local sale and consumption of billfish.

Wild Oceans urges the National Marine Fisheries Service to initiate a federal rulemaking to prohibit the sale of billfish anywhere in the U.S. outside of Hawaii and the Pacific Insular Area (PIA). The intent of the BCA section 4(c) exemption to the general prohibition on sales is to allow for “traditional fisheries and markets” in Hawaii and neighboring island territories in a manner that supports the Act’s over-riding purpose, which is to conserve billfish. Interpreting the law to allow these fish to be transported for sale in the mainland market, where foreign imports are now prohibited, would clearly and substantially undermine the Billfish Conservation Act in a number of ways.

The Act must be implemented in a manner that prohibits the import and sale of all billfish, of any origin, in the continental U.S.. We believe this is the most reasonable interpretation of the law because it a) most closely follows Congressional intent, b) most effectively upholds the Act’s purpose, which is to *increase* conservation protections for billfish, c) is most consistent with established international trade law, d) facilitates robust enforcement while reducing costs, and e) fully respects the needs of traditional island fisheries and cultures.

The Intent of the BCA and Section 4(c)

Since it was first introduced into Congress in July 2011, the intent of the Billfish Conservation Act was that the sale of billfish would be prohibited throughout the U.S. with an exemption for “traditional fisheries and markets” in Hawaii and the PIA. The exemption in Section 4(c) of HR 2706, as amended on August 1, 2012 by the House Committee on Natural Resources, reads:

(c) EXEMPTIONS FOR TRADITIONAL FISHERIES AND MARKETS.—

(1) Subsection (a) does not apply to billfish caught by US fishing vessels and landed in the State of Hawaii or Pacific Insular Areas as defined in section 3(35) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1802(35)).

(2) Subsection (a) does not apply to billfish landed by foreign fishing vessels in the Pacific Insular Areas when the foreign caught billfish is exported to non-US markets or retained within Hawaii and the Pacific Insular Areas for local consumption.

The language is admittedly less than explicit regarding transportation and sales of fish outside Hawaii and the PIA. However, the intent of this provision was explained by the Committee on Natural Resources after mark-up and before the bill went to a vote in the full House of Representatives, making it clear that the exemption is for *local* sale and consumption of billfish.

In the report accompanying HR 2706 and recommending passage by the full House on September 10, 2012 [Report 112-656], the committee states:

*“H.R. 2706 would prohibit the sale of billfish or billfish products or possession of billfish or products containing billfish for the purposes of sale. The prohibition would not apply to the State of Hawaii and Pacific Insular areas **as long as the billfish were only sold in Hawaii or a Pacific Insular area**. The bill would make these prohibitions subject to Magnuson-Stevens Fishery Conservation and Management Act penalties.”* (emphasis added)

Rep. Doc Hastings (R-WA), chairman of the Committee on Natural Resources, declared on the House floor when asking for unanimous consent to pass the legislation [Congressional Record, September 10, 2012: H5732-5733]:

*“Now, I note, Mr. Speaker, that concern had been raised at the June hearing that U.S. fishermen in Hawaii and the Pacific insular areas might be disadvantaged by these new rules and that the local consumption of billfish products might be made illegal. The bill was amended during committee consideration to address this concern; and the legislation, as amended, now protects these U.S. fishermen and **the existing limited, traditional local consumption of billfish products** while still providing additional and increased protection for billfish populations in the United States.”* (emphasis added)

Following Mr. Hastings, Rep. Jeff Miller (R-FL), the original sponsor of HR 2706, removed any doubt as to the bill’s intent when he said:

*“By **eliminating the sale in the continental U.S.**, passage of this bill will support the billfish population growth, a healthy ocean ecosystem, and improve recreational fishing opportunities.”* (emphasis added)

HR 2706, as approved by the House, was subsequently adopted without amendment by the Senate on September 22, 2012, with the above interpretations of the “Hawaii exemption” uncontested.²

² Although there is no disagreement or conflict in the legislative history, it is worth noting that, according to the Congressional Research Service [Statutory Interpretation: General Principles and Recent Trends, March 30, 2006], “When the two Houses have disagreed on the meaning of identical language in a bill that did not go to conference, the explanation that was before both Houses (*i.e.*, the explanation of the originating House) prevails if the court relies on legislative history.”

The Purpose of the BCA is to Increase Protections

The clear intent of the BCA is to prohibit the sale of billfish in the U.S. because of global declines in billfish populations and the need to enhance existing U.S. efforts to conserve these fish throughout their range. As the *ANPR* notes, “The BCA increases the protection for Atlantic billfish by prohibiting the import and sale of all billfish in the U.S., no matter where harvested, unless exempted pursuant to section 4(c) of the BCA.” In order to *increase* protection for billfish, the law must be interpreted to prohibit all sales of billfish on the U.S. mainland.

The “Hawaii exemption” is to allow for “traditional fisheries and markets” in a manner that still supports the Act’s overriding intent to conserve billfish. In particular, the Act is aimed at ending importation of foreign-caught billfish from the Pacific Ocean – possibly more than 30,000 billfish a year³ – into markets on the U.S. mainland. If billfish caught under the Hawaii-exemption are permitted to be sold in mainland markets, the conservation benefits of the Act would be severely curtailed. With imports removed and demand unabated, Hawaiian transportation and sales of billfish to the mainland could replace imports without competition or constraint, thereby negating the conservation benefits of reduced imports of Pacific billfish and thus the intent of the BCA to *increase* protections.

Consistency with International Trade Rules

The BCA closes U.S. markets outside of Hawaii and the PIA to foreign-caught billfish, while allowing limited sales of billfish within those areas by both domestic and foreign fishermen. If domestic fisheries are permitted access to mainland markets outside Hawaii and the PIA, where foreign sales are prohibited, the U.S. would be viewed as giving its own fishermen a market advantage at the expense of foreign fishermen while at the same time diminishing the conservation rationale for the legislation.

The General Agreement on Tariffs and Trade (GATT) accepts that a country may protect its own conservation interests from harm caused by imported products, but only as long as it does so in a manner that does not discriminate between domestic and imported products. Allowing sales of billfish caught under the section 4(c) exemption beyond the exempted area would likely put us in violation of international trade rules, or at the very least make the BCA, its implementation and, most importantly, its benefits to billfish conservation vulnerable to legal challenge.

³ The U.S. Food & Drug Administration estimated close to 3 million pounds of billfish imported into the U.S. in 2006, according to a trade study by the International Game Fish association, June 2007. Using an average of 81 pounds dressed weight per fish [the average in the Hawaiian longline fishery, according to *NOAA Pacific Island Fisheries Science Center Information Management System, Longline Logbook Data, 2/24/2010.*], that corresponds to a total of 36,259 billfish.

Cost-Effective Enforcement of the BCA

With a strict prohibition on any sales of billfish on the continental U.S., regardless of origin, the task of enforcing the BCA will be made simple and straightforward at no additional cost. Indeed, there is added value in that the difficulties we've experienced with enforcing the existing ban on Atlantic billfish (while Pacific billfish were legal) will disappear. The chances of prohibited billfish, Atlantic or Pacific, entering illegitimately into U.S. markets and undermining our conservation goals will be minimal at best.

In developing implementing regulations for the BCA's general prohibition on sales, NMFS should require that any billfish sold within Hawaii and the PIA under the section 4(c) exemption be supported by paperwork evidencing that it qualifies for exemption, but this should be no burden for the region's seafood dealers and processors and is readily enforceable.

Respecting Traditional Fisheries and Markets

The sponsors and supporters of the BCA provided an exemption for "traditional fisheries and markets" in order to allow for a way of life and a cultural tradition – the local sale and consumption of billfish – to continue under careful U.S. regulation. The BCA and its prohibition on sales of all billfish outside of Hawaii and the PIA carefully balances national and regional interests, by sustaining traditional fisheries and island cultures while advancing the overall U.S. objective of increasing protections for depleted global populations of billfish.

It is not the intent of the BCA or its exemption for "traditional fisheries and markets" to prohibit imports of billfish but then permit large-scale domestic fisheries based out of the Pacific islands. Nor is it the intent of the BCA to facilitate the export of local island traditions to the mainland, where fishery managers, fishermen, the public and now Congress have made it clear that they want to keep marlin, sailfish and spearfish out of commercial markets.

* * * * *

We conclude our comments by referencing one of the *Findings* in the Billfish Conservation Act:

3) Ending the importation of foreign-caught billfish for sale in the United States aligns with U.S. management measures of billfish and protects the significant economic benefits to the U.S. economy of recreational fishing and marine commerce and the traditional cultural fisheries.

The BCA complements conservation and management of billfish in the United States, which long ago established the goal of removing billfish from commerce, reserving these fish for the catch-and-release recreational fishery. The exception is in Hawaii and neighboring territories, and that exception is recognized in the BCA, which allows sales only in the Pacific islands, for local consumption. Only when interpreted in this way does the BCA give us the win-win-win of further enhancing billfish conservation, protecting the U.S. economy and preserving traditional fisheries.

Thank you for considering our views, and we look forward to working with the agency on future rulemaking.

Sincerely,



Ken Hinman
President