Federal Communications Commission.

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Secretary.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 051202320–5320–01; I.D. 040605D]

Atlantic Highly Migratory Species; Commercial Shark Management Measures

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

ACTION: Petition for rulemaking; decision.

SUMMARY: NMFS has decided not to initiate the rulemaking requested by the North Carolina Department of Environment and Natural Resources, Division of Marine Fisheries (Petitioner), to amend the current time/area closure for Atlantic sharks off the Mid-Atlantic region. NMFS does not have any new information to support the Petitioner's proposal of a closure inside of 15 fathoms along the North Carolina coast nor the assertion that such a closure would still attain the management goal of protecting juvenile sandbar and prohibited dusky sharks.

NMFS will consider new information concerning the impacts of the current time/area closure (which has been in place for one time period from January 1 to July 31, 2005) and the results of upcoming large coastal shark (LCS) and dusky shark stock assessments to determine whether changes to the time/area closure are appropriate. In addition, NMFS will monitor any changes to shark regulations by coastal states and will continue to work with the Atlantic States Marine Fisheries Commission (ASMFC) in terms of development of an interstate shark plan, which may warrant a review of existing Federal regulations and consideration of further changes to the time/area closure.

ADDRESSES: Copies of NMFS' decision on the North Carolina Department of Environment and Natural Resources, Division of Marine Fisheries' petition are available from Karyl Brewster-Geisz, Highly Migratory Species Management Division, NMFS, 1315 East-West Highway, Silver Spring, MD 20910; telephone 301–713–2347. Copies of NMFS' decision regarding the petition are also available on the internet at *http://www.nmfs.noaa.gov/sfa/hms*.

FOR FURTHER INFORMATION CONTACT: Karyl Brewster-Geisz or Margo Schulze-Haugen by phone: 301–713–2347 or by fax: 301–713–1917.

SUPPLEMENTARY INFORMATION:

Background

In 2002, NMFS conducted an LCS stock assessment that was peer-reviewed by three independent reviewers (67 FR 64098, October 17, 2002). While the peer reviews indicated areas that could be improved, they concluded that the stock assessment constituted the best available science. Based on the results of this stock assessment and the status determination criteria in the 1999 Fishery Management Plan (FMP) for Atlantic Tunas, Swordfish, and Sharks, NMFS determined that the LCS complex was overfished and overfishing was occurring. NMFS also determined that sandbar sharks were not overfished and overfishing was occurring, and that blacktip sharks were fully rebuilt. In addition to providing information regarding the status of the stocks, the stock assessment noted, among other things, that a reduction in catches of LCS may be necessary to recover the complex as a whole to the biomass expected to yield maximum sustainable yield (BMSY); that reductions in catch of species other than sandbar and blacktip sharks appeared to be the most appropriate; that individual species are responding differently to exploitation; and that juvenile survival is the vital rate that most affects overall population growth rates, thus supporting the need to protect reproductive females and juveniles.

The 2002 LCS stock assessment did not individually assess the status of dusky sharks. However, in the 1999 FMP, NMFS noted that dusky sharks are highly susceptible and vulnerable to overfishing. This vulnerability is due to several factors including: (1) their age of maturity is approximately 19 years (approximately 12 ft or 3.7 m FL); (2) they have few pups per litter (6 to 14 per litter); (3) they have a long gestation period (approximately 16 months); and (4) approximately 82 percent of those caught in commercial fisheries are brought to the vessel dead, making dusky sharks highly susceptible to dying on longline gear. This vulnerability has resulted in this species being listed as a species of concern under the Endangered Species Act (ESA) since 1997, and in 1999, being placed on the prohibited species list (due to litigation, the dusky shark prohibition did not go into effect until mid–2000). NMFS continues to be concerned about all life stages for dusky sharks and is expecting a final dusky shark assessment to be released later this year.

Shortly after the 2002 LCS stock assessment was released, NMFS began the process of amending the FMP for Atlantic Tunas, Swordfish, and Sharks (67 FR 69180, November 17, 2002). Consistent with the 1999 FMP and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the objectives of Amendment 1 were, among other things, to implement management measures to rebuild the LCS complex that were based on the best available science, to amend the rebuilding timeframe based on the best available science given that the 1998 stock assessment, on which the previous rebuilding timeframe was based, was found to be faulty, and to review shark management measures, in general.

During the Amendment 1 process, NMFS held seven scoping meetings in February and March 2003 (68 FR 3853, January 27, 2003), held six public hearings on draft Amendment 1 and the proposed rule (68 FR 45196, August 1, 2003, and 68 FR 54885, September 19, 2003), held one Advisory Panel meeting specific to draft Amendment 1 and the proposed rule (68 FR 51560, August 27, 2003), attended four Regional Fishery Management Council meetings (New England, Mid-Atlantic, and two for the Gulf of Mexico), and attended one ASFMC meeting. In addition to the comments at the public hearings and Council meetings, NMFS received over 30 written comments on draft Amendment 1 and the proposed rule. The final rule published on December 24, 2003 (68 FR 74746). Among other things, final Amendment 1 and its final rule revised the LCS rebuilding timeframe to 26 years, adjusted the LCS commercial quota, established trimester seasons and regional subquotas, removed the commercial minimum size, changed the recreational bag limit and minimum size, established a time/area closure off North Carolina, required line cutters and dipnets on bottom longline vessels, required vessel monitoring systems (VMS) on gillnet and bottom longline vessels during part of the year, and established criteria to use to modify the prohibited species list. Major changes from the proposed rule as a result of public comment included: delaying the effective date for the implementation of trimester seasons; a change in the reduction of the LCS

quota from 40 to 45 percent; a decision to maintain existing regulations for the gillnet fishery; and a reduction in the proposed time/area closure from approximately 38,200 to 4,490 nm^2.

As part of adjusting the commercial LCS quota in Amendment 1, NMFS also established a procedure to calculate the base commercial quota based on information from the stock assessment. Under this procedure, NMFS establishes the base commercial quota dependent on estimates of maximum sustainable yield (MSY) and what is needed to reach MSY, commercial landings (including landings from states), dead discards, and recreational harvest. This base quota is then split between the three different regions and three seasons. Before each season, NMFS adjusts the Federal shark quotas for each region based on the total landings reported by Federal dealers. These dealer reports include landings from both state and Federal waters.

The time/area closure was implemented to reduce discards of prohibited dusky and juvenile sandbar sharks under the rebuilding plan for LCS. The location of the time/area closure is in an area off North Carolina that has also been identified as essential fish habitat (EFH) for both sandbar and dusky sharks and as a habitat area of particular concern (HAPC) for sandbar sharks. The HAPC serves as important nursery and pupping grounds in areas adjacent to Hatteras and Ocracoke Islands and offshore of those islands. Other areas identified as HAPCs for similar reasons, such as the mouth of Great Bay, NJ, lower and middle Delaware Bay, and lower Chesapeake Bay, MD, were not included as time/area closures because they are predominantly in state waters and fishing effort is low in those areas. The HAPC off North Carolina is one of only four areas identified as an HAPC and is the only area that extends significantly into Federal waters (the HAPC in the Chesapeake Bay has a slight overlap with Federal waters near the mouth of the Bay).

During the public comment period for draft Amendment 1, commenters stated, among other things, that most nursery grounds are in nearshore waters, that closing inshore of 20 fathoms should be enough to protect neonate and juvenile sharks, that only state waters should be closed to protect juvenile sharks, that using dusky shark data when fishermen targeted them for the area closure was unfair, and that the time period for the closure was too long. As a result of these comments, NMFS re-analyzed the data in regard to the time/area closure including looking at the impacts of closing only waters inshore of 20 fathoms, reducing the time period, and considering dusky shark data only after they became prohibited. NMFS found that fishermen caught both dusky sharks and juvenile sandbar sharks at depths of up to 50 fathoms and that limiting the closure to depths inshore of 20 fathoms would greatly reduce the benefits of a time/area closure. NMFS also found that, of all the sharks observed in the fishery, the majority of juvenile sandbar sharks, all of the neonate sandbar sharks, and the majority of dusky sharks (all life stages) were caught in the time/area closure that was finalized. This time/area closure was first effective from January 1, 2005, to July 31, 2005.

The Petition

On March 7, 2005, NMFS received a request from the North Carolina Department of Environment and Natural Resources, Division of Marine Fisheries (Petitioner), to initiate rulemaking for a regulatory amendment to 50 CFR 635.2 regarding the definition of the ''Mid-Atlantic shark closed area.'' The Petitioner seeks rulemaking to reduce the current closed area by changing the boundary from 55 fathoms from January to July in the middle part of the state to only include waters out to 15 fathoms coastwide for North Carolina by January 1, 2006. The Petitioner stated that this action would allow North Carolina fishermen access to the larger sharks in deeper waters from 15 to 55 fathoms and minimize discards of juvenile and protected sharks to a reasonable extent. The Petitioner stated that the available data suggest that juvenile sharks occur predominately near shore. Thus, the Petitioner proposed that closing out to 15 fathoms year-round along the entire North Carolina coastline instead of out to 55 fathoms for the middle part of North Carolina would still attain the management goal of protecting juvenile sandbar and prohibited dusky sharks. The Petitioner believes that the offshore extent of the current closed area encompasses the primary shark fishing grounds off North Carolina and severely restricts access to the shark quota off North Carolina, particularly during the first trimester.

The Petitioner also asserted that the current time/area closure off North Carolina is not justified based on available data and has been implemented in violation of at least three National Standards (e.g., #4, 8, and 10) of the Magnuson-Stevens Act. The Petitioner noted that the proposed change could address the above concerns and have positive significant economic benefits to fishermen, dealers, and fishing communities in the South Atlantic.

NMFS published a notice of receipt of the petition for rulemaking in the **Federal Register** (May 10, 2005, 70 FR 24494) and invited public comments for 60 days ending on July 11, 2005. NMFS received 18 letters, including letters from one Council, the state of North Carolina, commercial fishermen, commercial fisheries organizations, and other interested individuals. Summaries of and responses to comments are provided under the Public Comments section below.

Agency Decision

After carefully considering the petition and all public comments, NMFS has decided not to initiate the requested rulemaking. Currently, NMFS does not have any new information to support the request by the Petitioner for a closure inside of 15 fathoms along the coast of North Carolina. The Petitioner has not submitted analyses to support their request. NMFS has already analyzed and rejected a closure out to 20 fathoms in response to comment during the Amendment 1 process because many juvenile sandbar sharks and dusky sharks were caught out to the 55 fathom line (see response to Comment 7). Without new information, NMFS has no basis to modify the existing time/area closure in the manner suggested by the Petitioner.

There are a number of items that could warrant modification of the time/area closure within a few years. First, NMFS will be conducting a stock assessment for LCS starting this year (September 15, 2005, 70 FR 54537). The results of this stock assessment are expected to be final in mid–2006. Second, NMFS expects a final dusky shark stock assessment to be released in early 2006. Third, because the time/area closure has now been in effect for one time period, NMFS can begin to examine the data and analyze the actual impacts of the closure, ecologically and economically. Pertinent, complete logbook data for the 2005 closure will be available in the summer of 2006. In addition, NMFS will analyze new, applicable data as it becomes available. Fourth, NMFS is working with the ASMFC to start work on an interstate coast-wide shark plan. If other states become more consistent with the Federal regulations, either through a coast-wide plan or on their own initiative, it is possible that the ecological benefits could warrant a review of existing Federal regulations, including the time/area closure. To note, the state of Florida is currently reviewing and the Commonwealth of

Virginia has currently modified their state regulations regarding sharks. Fifth, NMFS recently released a proposed rule that, among other things, would establish criteria to be considered when implementing or modifying time/area closures (70 FR 48804, August 19, 2005). This proposed rule should be final in 2006.

Given the nature of the issues raised by the Petitioner and the lack of additional information supporting the petition, NMFS believes that the results of the first three items above will provide valuable information when considering a modification to the existing time/area closure. Additionally, NMFS will continue to work with the ASMFC and/or individual states regarding consistent shark regulations and management measures. NMFS also encourages the Petitioner to work with NMFS scientists and industry in pursuing cooperative research on reducing bycatch of juvenile and sub-adult sandbar and dusky sharks. Results from such studies have been critical to providing alternate fishing practices in other areas that maintain target catch while also reducing bycatch.

Response to Comments

During the public comment period, individuals and groups provided comments on NMFS' notice in the **Federal Register** on the receipt of a petition for rulemaking by the Petitioner. Comments were sent via letter, FAX, and E-mail. The comments are summarized below, together with NMFS' responses. The comments and responses are categorized by major subject headings.

1. Observer Program

Comment 1: Commenters indicated that while the information during the mid and late 1990s provides excellent coverage of the fishery, the observer program has operated sporadically since 2000. In addition, commenters noted that the **Federal Register** notice stated that the time/area closure was based on observer data. The commenters felt that this statement was misleading, and that NMFS selectively examined a shorter time period of observer data from 2001 to 2002, which is less extensive than the earlier data in terms of geography and sample size. The commenters felt the Agency would have drawn a different conclusion and made more acceptable recommendations if it had used all available observer data.

Response: The observer program began in 1994, as a voluntary research program under which observers went to the docks and went on vessels that were willing to take them. Vessels cooperated with this program for the first few years; however, this type of program did not necessarily result in coverage that was representative of all vessels fishing. By the late 1990s, because of changing management measures based in part on observer data, the number of vessels willing to take an observer declined, and NMFS had concerns regarding the quality of the observer data and how representative the data was becoming. In January 2002, in order to obtain high-quality representative data, NMFS made participation in the observer program mandatory, and vessels which recorded past landings were selected to carry observers on a random basis. Thus, NMFS believes that the quality of information obtained from the observer program has improved over time.

In examining the current time/area closure, NMFS did not selectively examine observer data from 2001 to 2002, but rather, examined the entire observer timeframe through 2002. During the public comment period for draft Amendment 1, fishermen commented that NMFS should not use dusky shark data before dusky sharks became a prohibited species in 2000. Fishermen stated that they used to target dusky sharks and that they should not be penalized for targeting them before they were prohibited. In response to their comments, NMFS examined the shorter, as well as the longer, timeframes in final Amendment 1.

For sandbar sharks, the final Amendment examined only the longer timeframe (1994 to 2002) because sandbar sharks have been an allowed species since 1994. According to observer data from 1994 to 2002, 12,445 sandbar sharks were observed in the fishery as a whole and 6,755 were caught in the final time/area closure. Of those caught in the final time/area closure, 4,149 (61 percent) were neonates and juveniles. All neonate sandbar sharks and 81 percent of all juvenile sandbar sharks observed for the entire fishery (i.e., all of the Atlantic and Gulf of Mexico) were encompassed by the final time/area closure.

For dusky sharks, using the shorter timeframe (2001 to 2002), only 68 sharks were observed in the final time/area closure. However, this observed catch of dusky sharks remained high (62 percent) in comparison to the rest of the Atlantic and Gulf of Mexico. Using the longer timeframe (1994 to 2002), 1,392 dusky sharks were observed caught in the final time/area closure (79 percent), of which 92 percent were neonates or juveniles. Only 292 were observed caught in the Atlantic outside the time/area closure. These numbers reflect catches of dusky sharks in Federal waters only.

Comment 2: The observer program was biased because North Carolina was one of the few states helping with data prior to the mandatory observer program. Therefore, most of the data were collected from this area, skewing the data.

Response: When the observer program first started in 1994, the observers focused on states known to land a lot of sharks. These states included North Carolina and Florida. Over time, the observers included other states; however, as reflected in landing reports and permit holders, North Carolina and Florida continued to be major centers of shark fishing. Since the observer program became mandatory in 2002, the number of vessels selected from each state has been based on prior year's landings. This allows coverage to be representative of fishing effort.

Comment 3: North Carolina fishermen are forced to float gear for LCS during the summer season when 85 to 90 percent of all catches in this season are adult or, at the very minimum, sub-adults. Juvenile sharks migrate north during the summer; they are not in the time/area closure during the summer. In addition, by making fishermen fish outside of 50 fathoms to 85 fathoms, NMFS is forcing them to kill more dusky sharks since they are predominately in 50 to 85 fathoms.

Response: The observer data used in Amendment 1 indicate that dusky and sandbar sharks are caught on bottom longline gear in the time/area closure from January through July. The number of sharks caught in the closed area after July are relatively low; thus, NMFS did not extend the time/area closure past July. During Amendment 1, NMFS did not examine pelagic longline data since LCS are generally not caught in large numbers on pelagic longline gear compared with bottom longline gear. However, now that the time/area closure has been in effect from January through July 2005, NMFS can examine the impacts of the time/area closure on fishermen who use bottom longline gear as well as on fishermen who use pelagic longline gear, including their discard rates of dusky sharks.

2. Stock Assessments

Comment 4: Commenters stated that the status of the dusky sharks is unknown because there has been no stock assessment on that species. Commenters also noted that the peer-reviewed stock assessment of the sandbar shark population indicated that the status has improved and that no reduction in instantaneous fishing

mortality (F) appears necessary for sandbar sharks to achieve BMSY. Commenters indicated that, after reviewing the 2002 stock assessment, they found no definitive evidence that supports the NMFS' assertion that the LCS complex is overfished or that overfishing is occurring. In addition, commenters noted that peer reviewers of the 2002 LCS stock assessment were concerned about applying the results to the LCS complex as a whole. Given these results, commenters stated that while taking a precautionary approach in the face of uncertainty is prudent, NMFS took the precautionary approach to the extreme.

Response: As noted above, NMFS is concerned about the status of dusky sharks for a number of reasons, including its life history and susceptibility to fishing gear. A stock assessment for dusky sharks is anticipated for early 2006.

As for sandbar sharks, while the 2002 stock assessment indicates that sandbar sharks are no longer overfished, overfishing is occurring and, per the 1999 FMP, their status has not yet reached a stage where they can be called ''rebuilt.'' With regard to the complex as a whole, results of the 2002 LCS stock assessment met the overfishing and overfished criteria in the 1999 FMP. These results indicate that, while the stock status had improved since the 1998 stock assessment, the fishing mortality level was not sustainable. The details and point estimates of the different models used in the 2002 LCS stock assessment are given in Table 3.1 and Table 3.2 of the 2002 Emergency Rule to Implement Management Measures in the Atlantic Shark Fisheries Consistent with the 2002 Stock Assessments. As described in that document, the majority of the models indicated that the resource (the LCS complex) is overfished. Even in the models where the resource is not overfished, the models indicate that the rebuilding target biomass has not been met.

In addition, the LCS assessment was peer reviewed pursuant to a settlement agreement in shark litigation pending at that time. The overall conclusions of these reviews were that the stock assessment was state-of-the-art and a scientifically rigorous body of work that used the best scientific information available. The peer reviewers generally agreed that, while management measures taken as of 2002 may have halted the decline in these stocks, current exploitation rates (based on the stock assessment) would not stabilize them at, or allow them to rebuild to, MSY levels. The peer reviewers noted that ''inference by subtraction'' needs to be examined and NMFS intends to examine options to address this concern at the upcoming LCS assessment. While there was concern over this inference, one peer reviewer also noted that ''Whether the conclusions from the LCS complex assessment provide sufficient information on which to take management action depends on the level of risk one is willing to accept. It should be noted that many shark species have low productivity and are long-lived, so that failure to take action could result in long-term depletion of some species.'' Another peer reviewer indicated that for the LCS group, reductions in the total allowable catch for species other than sandbar and blacktip should be considered, and that for sandbar and other sharks, further reductions in fishing related mortalities should be achieved through the decrease of bycatch mortality. This, along with the rest of that review, the comments of the other reviewers, the stock assessment itself, and the status determination criteria outlined in the 1999 FMP, led NMFS to determine that the LCS complex has been exploited beyond sustainable rates, with populations at or below levels required to sustain MSY. NMFS does not believe the suite of measures in Amendment 1, including the existing time/area closure, are extreme.

In order to reduce bycatch of dusky and sandbar sharks, NMFS opted to close a specific area to protect a known nursery ground of these species. This is also in accordance with the 2002 stock assessment which recommends protections of reproductive females and juveniles. As noted above, the closure area should reduce dusky shark catch by 79 percent, and neonate and juvenile sandbar shark catch by 61 percent. In addition, the area off North Carolina is the only area where a large portion of a designated HAPC enters Federal waters. Thus, NMFS believed that closing an area that included a HAPC to protect juvenile sandbar sharks was warranted to reduce fishing mortality without increasing bycatch.

Comment 5: Commenters stated that one peer reviewer indicated that the 2002 shark evaluation workshop (SEW) report could not be judged in terms of scientific findings and management recommendations.

Response: NMFS believes that this remark was taken out of context; it was made in regard to the description of the way the 2002 stock assessment was completed and the statement of work for the review. The 2002 stock assessment was conducted in two parts. The first part included a meeting to discuss the data, possible models, and underlying assumptions. This was summarized and published as the ''Final Meeting Report of the 2002 Shark Evaluation Workshop.'' The second part was the actual assessment where the data and models were run, titled the ''Stock Assessment of Large Coastal Sharks in the U.S. Atlantic and Gulf of Mexico.'' Pursuant to a settlement agreement in litigation pending at that time, the statement of work asked the reviewers to review the SEW report in terms of scientific findings and management recommendations. There were no such findings or recommendations in the 2002 SEW Final meeting report; rather, all findings and recommendations were in the 2002 stock assessment. Thus, the peer reviewer was clarifying the documents that he was reviewing for the purposes of the peer review. NMFS believes that this particular remark was not a comment on the scientific merits of the 2002 stock assessment results.

Comment 6: Blacktip and sandbar sharks are the dominant species taken in the fishery. Managing by the least common denominator is problematic. The stock assessment recommends managing on a more species-specific basis.

Response: As stated in Amendment 1, NMFS does not have the information necessary yet to manage sharks on a species-specific basis. Until fishermen and dealers report on a species-specific basis more consistently (currently about 20 percent of LCS landings are unclassified despite regulations requiring LCS species-specific reporting) and until NMFS has reliable scientific evidence that fishermen can target certain species of sharks without substantial bycatch or bycatch mortality of other shark species, NMFS believes that establishing and enforcing species-specific quotas is not feasible. If the fishermen do not identify sharks correctly (and some fishermen have commented that they cannot identify all species of sharks), then having species-specific quotas would not be effective at preventing overfishing on depleted species while allowing increased fishing on healthy or rebuilt species. Furthermore, if fishermen cannot reliably target sandbar or blacktip sharks without catching and discarding a significant number of other sharks (e.g., dusky sharks), then having species-specific quotas may still result in fishery closures when one of the quotas is reached.

3. Amending Time/area Closure to the 15–fathom Line

Comment 7: Commenters indicated that a 1996 observer report concluded

that the area inshore of 15 fathoms should be closed to protect juvenile sharks and prohibited dusky sharks that occur in the region.

Response: The 1996 observer report referenced is the final report of the Marine Fisheries Initiative (MARFIN) study (NA57FF0286) published by Branstetter, 1997. The commenters also refer, through the 1996 observer report, to Musick *et al.*, 1993. The 1996 observer report notes that small sandbar sharks are less than 120 cm fork length (FL). However, the 1996 observer report also notes that male sandbar sharks reach maturity around 142 cm FL (170 cm total length [TL]) and females at < 150 cm FL (180 cm TL). Therefore, the 1996 study's recommendations relative to 120 cm FL would not have protected a substantial number of juveniles and sub-adults. Many of the figures in the 1996 observer report (e.g., Figures 9, 10, 11, 12, and 17) indicate that large numbers of juvenile sandbar sharks were caught off North Carolina in depths greater than 10 fathoms. While these figures describe the data in terms of less than or equal to 10 fathoms or greater than 10 fathoms, the 1996 observer report recommends in the text that 15 fathoms be used rather than 10 fathoms. This recommendation is due to one year (1996) where numerous small sandbar sharks (less than 120 cm FL) and small dusky sharks (less than 140 cm FL) were caught between 10 and 15 fathoms and few sharks were taken inshore of 10 fathoms.

The 1996 observer report also notes that dusky sharks comprised about ten percent of the catch in North Carolina waters, and consisted of two general size classes: young juveniles and sub-adults/adults. Figure 17 indicated that many of these dusky sharks are caught in waters greater than 10 fathoms. This and the text regarding small dusky sharks being caught out to 15 fathoms indicate that a 15–fathom boundary could allow many juveniles and sub-adults to be caught. Additionally, in the case of dusky sharks, NMFS is trying to reduce fishing mortality on all life stages (neonates, juvenile, and adults), not just juveniles.

Furthermore, as a result of public comment received on Amendment 1, NMFS examined the data to assess the ecological benefit of a closure out to only 20 fathoms. NMFS found that numerous juvenile sandbar sharks and dusky sharks were caught outside the 20 fathom line; many were caught at the 55 fathom line. As outlined in the response to Comment 15 under ''Time/Area Closure Comments'' in Amendment 1, NMFS included a buffer of approximately two miles to the seaward boundary of the time/area closure so that it extended to 60 to 80 fathoms. NMFS made this same data available to the state of North Carolina to analyze. No new interpretations of this data or analyses by the state of North Carolina have been presented to NMFS to date. Based on NMFS' previous analysis of a closure out to 20 fathoms, as requested by public comment on Amendment 1, NMFS believes that a large number of juvenile sandbar and dusky sharks would be caught outside of 15 fathoms.

Comment 8: One commenter questions why all dusky shark life stages were included when selecting the seaward boundary of the time/area closure.

Response: NMFS is concerned about all life stages of dusky shark, not just juvenile stages, because this species is highly susceptible and vulnerable to overfishing because of its life history traits. The dusky shark is currently listed as a species of concern under the ESA. A dusky shark stock assessment is currently underway. The area closed off North Carolina has most of the observed dusky shark catches for the entire bottom longline fishery.

Comment 9: A commenter asked if a quota reduction would have given the same result without having to establish the time/area closure off North Carolina.

Response: The 2002 stock assessment indicates that reductions in fishing effort and mortality are needed for the biomass to reach MSY. In Amendment 1, NMFS determined that it would need to reduce the catch by greater than 50 percent in order to rebuild LCS. In addition, the stock assessment recommended the protection of reproductive females and juveniles.

However, because Amendment 1 was implementing a number of regulations that could reduce fishing mortality including the time/area closure and gear restrictions, NMFS felt that reducing the catch by 45 percent, and improving compliance with the regulations including the recreational regulations would be sufficient to rebuild the stock within the rebuilding timeframe. In addition, because the time/area closure off North Carolina is an important nursery area for dusky and sandbar sharks, protection of these species in this area would only be accomplished through a closure rather than an overall reduction in LCS quota.

Comment 10: One commenter stated that to be excluded inside of 15 fathoms in the summer serves no purpose other than to put more pressure on everything but blacktip sharks; a closure out to the 15 fathom line would make sense during the winter months when more juveniles occur around the 15 fathom depth contour, but would not work during the summer months. The commenter claimed that blacktip sharks predominate inside 15 fathoms, yet NMFS insists that fishermen fish outside of it.

Response: The Petitioner requested changing the current time/area boundary to 15 fathoms, year-round. However, the current time/area boundary of 55 fathoms was chosen because the available data indicate that juvenile dusky and sandbar sharks occur in the current time/area closure during the months of January through July. Thus, the time/area closure location and timeframe was selected based on the distribution of these age classes. NMFS may consider changing the boundaries and timeframe of the closure if new information warrants any changes. NMFS did not examine the availability of blacktip sharks within or without the time/area closure since blacktip sharks are considered rebuilt and were not the species of concern.

4. National Standards

Comment 11: Commenters indicated that using only the 2001 to 2002 observer data constitutes a violation of National Standard 2.

Response: National Standard 2 states that conservation and management measures shall be based upon the best scientific information available. As described above, in developing Amendment 1, NMFS used all observer data when examining the time/area closure. As noted in the response to Comment 1 above, NMFS considered the longer and shorter timeframes for dusky sharks in response to comments from fishermen on draft Amendment 1. NMFS believes that using all available data, and taking into consideration public comment, is consistent with National Standard 2.

Comment 12: Commenters indicated that the closure off North Carolina discriminates against the fishermen in North Carolina in violation of National Standard 4.

Response: National Standard 4 states that conservation and management measures shall not discriminate between residents of different states, and if it becomes necessary to allocate or assign fishing privileges among fishermen, that such allocation be fair and equitable to all fishermen, be reasonably calculated to promote conservation, and be carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges. While the time/area closure may affect fishermen differently, as discussed in Amendment 1, it applies equally to all

fishermen in any state (and affects fishermen who travel from other states to fish in waters off North Carolina), and is needed as a conservation measure to reduce bycatch of juvenile sandbars and prohibited dusky sharks.

Comment 13: One commenter questioned how the time/area closure off North Carolina was consistent with National Standard 6.

Response: National Standard 6 requires NMFS to take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches. While other states also catch juvenile sharks, as described above, the waters off North Carolina are a known pupping and nursery ground for several species of sharks, particularly sandbar and dusky sharks. This is shown in the data with most of the juvenile sandbar sharks and prohibited dusky sharks for the entire fishery being caught in the existing time/area closure. While different states may have different impacts on shark stocks and life stages due to different trip limits and associated landings, NMFS accounts for all sources of mortality during the stock assessment process to develop Federal conservation and management measures consistent with the Agency's obligations under the National Standards and other provisions of the Magnuson-Stevens Act. As the fishery and stock status changes over time, NMFS will consider amending existing management measures to take into account this variability, consistent with National Standard 6. Additionally, in the proposed rule for the draft HMS FMP (August 19, 2005, 70 FR 48804), NMFS is proposing criteria to be considered when modifying time/area closures.

Comment 14: NMFS counts landings of sharks caught in state waters against the appropriate Federal shark quotas. However, different states have widely varying trip limits. Therefore, states with higher trip limits will have a larger impact (i.e., greater reduction) on the available Federal shark quota than states with lower trip limits in place to reduce the harvest of juveniles sharks. One commenter questioned how these measures are consistent with National Standards 4, 5 (efficiency in terms of harvesting adult fish), 6 (in terms of adult and juvenile harvest in HAPCs and the Economic Exclusive Zone [EEZ] off other states versus no harvest of adult or juveniles from January through July off North Carolina), and 8 (in terms of providing for sustained participation of the North Carolina shark fishing community).

Response: While NMFS is concerned about landings occurring in state waters, without taking preemptive action, NMFS does not have jurisdiction over state fishermen who fish exclusively in state waters. All fishermen with Federal shark permits are required to abide by Federal regulations, even in state waters, unless the state has more restrictive regulations. NMFS is working through the ASFMC to initiate an interstate coast-wide shark plan and has requested states that are not consistent with the Federal regulations to reconsider their regulations.

Consistency with National Standards 4 and 6 are addressed in the responses above. National Standard 5 states that conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose. The time/area closure combined with VMS requirements allow fishermen to travel through the closed area and allow the shark fishery to operate at the lowest possible cost (e.g., fishing effort, administration, and enforcement), while furthering conservation and management objectives and maintaining consistency with National Standard 5.

National Standard 8 states that conservation and management measures shall, consistent with the conservation requirements of the Magnuson-Stevens Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities in order to provide for the sustained participation of such communities and, to the extent practicable, minimize economic impacts on such communities. Consistent with National Standard 8, NMFS considered the impacts of the time/area closure on fishing communities in Amendment 1 and minimized adverse impacts to the extent practicable. Amendment 1 recognized that the time/area closure may impact particular communities; however, the measure was needed in order to ensure that overfished LCS are rebuilt and to prevent overfishing on LCS, as mandated by National Standard 1. NMFS initially proposed and took public comment on a much larger time/area closure (approximately 32,800 nm2 from VA to SC) than the current time/area closure. Based on comments from the public, NMFS conducted additional analyses and adjusted the final rule so that the time/area closure's seaward boundary followed the 55 fathom contour (4,490 nm2). This area was selected to include all observed catches of dusky and sandbar sharks while mitigating social and economic impacts on fishing communities in North Carolina to the extent practicable, consistent with National Standard 8. Finally, in the final rule, NMFS also delayed implementation of the time/area closure for a year to allow fishermen time to adjust to the new regulations (December 24, 2003, 68 FR 74746).

Comment 15: The time/area closure off North Carolina is in violation of National Standard 10.

Response: As stated in Amendment 1, the time/area closure does not cause fishermen to fish in an unsafe manner. NMFS urges fishermen to use caution, but cannot control what individual fishermen do in response to the time/area closure. VMS also adds safety by allowing fishermen to traverse the closed area and provide yet another method of locating a vessel in case of an emergency.

5. General Comments

Comment 16: The **Federal Register** notice indicated that the ''Advisory Panel (AP) members noted that the LCS stock assessments determined that sandbar and dusky sharks have been overfished and are not currently rebuilt.'' The Petitioner requested that NMFS re-issue the **Federal Register** notice removing the AP reference so that it would not solicit negative comments on the petition.

Response: NMFS did not re-issue the **Federal Register** notice for the petition for rulemaking. The selected reference was an accurate statement made by AP members during the AP meeting in March of 2005. In addition, it is an accurate representation of the stock assessment for the LCS complex.

Comment 17: The state of North Carolina has petitioned NMFS to modify the closure line from the current 55 fathom contour to the 15 contour. With VMS already required on shark vessels, this should not present an enforcement difficulty.

Response: The 15–fathom line is a zig-zag line that approaches the existing closure line in some places. As such, the 15–fathom line would open only parts of the existing closure, and despite VMS, would be difficult to enforce.

Comment 18: NMFS calculates maturity based on length, but maturity can also be based on size of shark fin size or pounds to fin weight.

Response: An accepted and relatively easy measure to determine maturity, based on scientific data, is fish length. Thus, NMFS uses fish length to assess maturity. Shark fin size or pounds to fin weight is not used by the scientific community as a measure of maturity. Additionally, such measurements would likely be more variable or hard to

measure at sea. Thus, in order to ensure reliable data collection on stages of maturity, NMFS is unlikely to change to a method that would introduce more variability in the data and potential error in determining maturity.

Comment 19: Commenters noted that there has been adoption of careful handling and release technologies for bycatch by shark bottom longline fishermen, which should help release bycatch alive. In addition, shark bottom longline fishermen may be required to attend workshops to familiarize themselves with these techniques starting in 2006.

Response: Dusky sharks have low survival on longline gear under current fishing practices (e.g., only approximately 18 percent of dusky sharks survive after being caught on longline gear). Thus, bycatch reduction methods must include the reduction of dusky sharks caught with longline gear, not just handling and releasing techniques. This warrants a time/area closure rather than other management measures, such as safe handling and releasing techniques or minimum size limits. Should alternative fishing practices be developed that improve the survival of dusky or other sharks, NMFS would review the necessity for the time/area closure and other management measures, as appropriate. As mentioned above, NMFS encourages the Petitioner to work with NMFS scientists and industry in pursuing cooperative research on reducing bycatch of juvenile and sub-adult sandbar and dusky sharks.

Comment 20: NMFS should consider how to develop economic relief for the directed shark vessel operators who have been marginalized financially by Amendment 1 that led to this time/area closure. The time/area closure encompasses the primary fishing grounds off North Carolina and severely restricts access to the shark fishing quota off North Carolina.

Response: NMFS delayed implementation of the time/area closure for a year to allow fishermen time to adjust to the new regulations (December 24, 2003, 68 FR 74746). In addition, during the proposed rule stage of Amendment 1, NMFS took comment on a much larger time/area closure (31,387 nm2 from VA to SC) than the current time/area closure. Based on comments from the public, NMFS conducted additional analyses and implemented a much smaller time/area closure. NMFS also provided, in section 8.5.9 of Amendment 1, a list of other options for economic relief for fishermen.

Comment 21: Proper and logical management dictates that NMFS should set aside an adequate incidental quota to reduce or eliminate regulatory discards by covering the inevitable incidental catches in the fisheries prior to allocating directed quotas.

Response: NMFS has considered this type of option and most recently accepted comments during the scoping process for the draft HMS FMP in 2004. NMFS may consider this type of option in the future.

Comment 22: North Carolina has been a willing and responsible partner with NMFS with regards to shark conservation. Measures to help conserve sharks were first implemented by North Carolina in February 1993, before NMFS enacted the Shark FMP in April 1993. Those measures remained in effect until July 1997 when North Carolina closed its state waters to shark fishing for species within the pelagic group. North Carolina was the only state to act upon a request from NMFS to close their waters to shark fishing. These measures were implemented to protect immature sharks and as mentioned, have remained in effect for nine years. North Carolina fishermen have fully cooperated with voluntary Federal observer programs to help managers collect accurate information on sharks.

Response: NMFS appreciates all the efforts that the state of North Carolina and its fishermen have taken to protect juvenile sharks. While NMFS has decided not to initiate rulemaking at this time, NMFS is committed to reviewing all shark management measures, including time/area closures, when new stock assessment and/or new information becomes available. NMFS would like to work with North Carolina to review new information as partners in shark management.

Comment 23: Any closure considered for conservation reasons should be imposed on all commercial and recreational gear that interacts with the species of concern. There is no justification for NMFS' continued use of closed areas to one gear type to be essentially used to reallocate the catches of species of concern to another similar gear type or user group.

Response: The current time/area closure is based on available data on bycatch and bycatch mortality by bottom longline gear in a known pupping and nursery area including and surrounding an identified HAPC. Mortality by other gear types (such as pelagic longline or handgear) may be considered in the future, as appropriate. Additionally, if finalized, the criteria proposed in the draft HMS FMP would provide a basis on which NMFS could consider modifying the existing time/area closure to include other gears.

Comment 24: Commenters requested that NMFS needs to leave the closure in place for species preservation and stock rebuilding. Sharks need to be protected since certain species are endangered, and they are all part of the ecological harmony that used to exist before commercial fishing.

Response: NMFS agrees that the current time/area closure is warranted and has decided not to initiate rulemaking until new data are available from the stock assessments of both dusky and sandbar sharks, the two species most affected by the time/area closure. Based on the status of those stock assessments, other information regarding the effectiveness of the closure, and actions of other states in an interstate coast-wide shark management plan, NMFS may consider revising the size, scope, and/or duration of the closure as well as potentially eliminating the closure, as appropriate.

Comment 25: Shark fishing off North Carolina needs to be completely banned. The commercial interests have gained control of our government agencies, which now allow excess killing of marine life. The time/area closure should be enlarged to ban shark fishing along the entire coast of the United States (and out to its deepest waters) with a complete moratorium on shark fishing for a five-year period. Fishermen can find other areas to deplete. Sharks are a part of our children's heritage, and NMFS has allowed fishermen, who profit from killing them, to take just about every last one of them. There should be fines of $15,000.00 for a first offense for killing sharks with a fine of $100,000.00 for a second offense.

Response: NMFS disagrees that a complete ban on shark fishing is necessary. NMFS has actively managed both LCS and small coastal sharks since the first FMP for sharks in 1993, and with additional measures thereafter in the 1999 FMP and Amendment 1 in 2003. Such measures include recreational and commercial limits and/or quotas, limited access permits, and enhanced reporting requirements, and other conservation and management measures that are expected to rebuild shark stocks.

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

Dated: December 8, 2005.

James W. Balsiger,

Acting Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

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