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Dated: December 28, 2009.

Robyn Thorson,

Director, Fish and Wildlife Service.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 0906221072-91425-02]

RIN 0648-AX95

Atlantic Highly Migratory Species; Atlantic Commercial Shark Management Measures

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

ACTION: Final rule; fishing season notification.

SUMMARY: This final rule establishes the annual quotas and opening dates for the 2010 fishing season for sandbar sharks, non-sandbar large coastal sharks (LCS), small coastal sharks (SCS), and pelagic sharks based on any over- and/or underharvests experienced during the 2008 and 2009 Atlantic commercial shark fishing seasons. NMFS needs to take this action to establish the 2010 adjusted fishing quotas and to open the commercial fishing seasons for the Atlantic sandbar shark, non-sandbar LCS, SCS, and pelagic shark fishery based on over- and underharvests from the 2009 fishing season. This action is expected to affect commercial shark fishermen in the Atlantic and Gulf of Mexico regions.

DATES: The 2010 Atlantic commercial shark fishing season for the shark research, blue sharks, porbeagle sharks, and pelagic sharks (other than porbeagle and blue sharks) in the northwestern Atlantic Ocean, including the Gulf of Mexico and the Caribbean Sea, will open on January 5, 2010. The non-sandbar LCS in the Gulf of Mexico region will open on February 4, 2010. NMFS will keep the SCS fishery closed until the effective date of the final rule for Amendment 3. NMFS will open the non-sandbar LCS fishery in the Atlantic region on July 15, 2010. The 2009 Atlantic commercial shark fishing season and quotas are provided in Table 1 under **SUPPLEMENTARY INFORMATION**.

ADDRESSES: Highly Migratory Species Management Division, 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT:

Karyl Brewster-Geisz or Guý DuBeck by phone: 301-713-2347, or by fax: 301-713-1917.

SUPPLEMENTARY INFORMATION:

Background

The Atlantic shark fishery is managed under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The 2006 Consolidated Highly Migratory Species (HMS) Fishery Management Plan (FMP) and its amendments under the Magnuson-Stevens Act are implemented via regulations at 50 CFR part 635.

On October 28, 2009, NMFS published a proposed rule (74 FR 55526) announcing the fishing season for 2010 and the 2010 proposed quotas based on shark landings information as of September 15, 2009. The proposed rule contained details regarding the alternatives considered and a brief summary of the recent management history. Those details are not repeated here. Several comments from the public were received on the proposed rule. Those comments along with the Agency's responses are provided below. This final rule serves as notification of the 2010 fishing season and 2010 quotas, based on shark landings updates as of October 31, 2009, pursuant to 50 CFR 635.27(b)(1)(vii). This action does not change the annual base and adjusted base annual commercial quotas as established under Amendment 2 to the 2006 Consolidated HMS FMP and its June 24, 2008 final rule (73 FR 35778, corrected at 73 FR 40658, July 15, 2008). Any such changes would be performed through an amendment. Rather, this action adjusts the commercial quotas based on overharvests in 2008 and 2009.

Response to Comments

During the proposed rule stage, NMFS received over a dozen written comments from fishermen, dealers, environmental groups, and other interested parties. NMFS also heard numerous comments from the fishermen and dealers who attended the three public hearings. The significant comments on the October 28, 2009, proposed rule (74 FR 55526) received during the public comment period are summarized below, together with NMFS responses.

SCS Alternatives

Comment 1: NMFS received many comments supporting alternative A1, the no action alternative. Commenters stated that since the current SCS quota of 454 metric tons (mt) dressed weight (dw) has not been taken and is still available, NMFS should open the

fishery on or about January 1.

Commenters also felt that the SCS quota should not be reduced because they believe that blacknose shark data is not based on the best available science and because NMFS did not consider the Turtle Excluder Devices (TEDs) or the reduction in shrimp effort from Maine to Texas in the stock assessment.

Response: NMFS is currently in the proposed rule stage of Amendment 3 to the Consolidated Highly Migratory Species (HMS) Fishery Management Plan (FMP) (73 FR 36392, July 24, 2009). Amendment 3 considered, among other things, measures that would significantly reduce the non-blacknose SCS and blacknose shark quotas in order to rebuild blacknose shark stocks and prevent overfishing of blacknose sharks. Amendment 3 would also establish annual catch limits (ACLs) and accountability measures (AMs), which must be set at levels consistent with the plan for ending overfishing and rebuilding blacknose sharks. NMFS will not select final alternatives for implementation until it finalizes the Environmental Impact Statement (FEIS) for Amendment 3, prepares a Record of Decision (ROD) and publishes a final rule implementing the amendment. Should NMFS select the preferred alternatives to reduce quotas for blacknose and non-blacknose SCS under proposed Amendment 3 there may be no non-blacknose SCS and/or blacknose shark quotas available, if NMFS opened the SCS fishery on or about January 1, depending on the level of harvest occurring prior to selection and implementation of Amendment 3. Any subsequent overharvest of potential reduced blacknose and non-blacknose SCS quotas that may be implemented under Amendment 3 would lower quotas for the 2011 fishing season. Additionally, under the Magnuson-Stevens Act, any fishery that was declared to be overfished by 2009 must establish a mechanism for specifying ACLs and establish ACLs and AMs effective for the 2010 fishing season. Delaying the 2010 SCS fishing season would allow the SCS fishing to open under the potentially reduced quotas implemented in Amendment 3 consistent with ACLs.

NMFS used the best available science and a rigorous Southeast Data Assessment and Review (SEDAR) stock assessment process to make the determination that blacknose sharks are overfished with overfishing occurring. The independent review panel determined that the data used in the SCS stock assessment were considered the best available at the time. They also determined that appropriate standard

assessment methods based on general production models and on age-structured modeling were used to derive management benchmarks given the data available. Therefore, NMFS believes that the 2007 SCS stock assessment represents the best available science consistent with National Standard 2 of the MSA, 16 U.S.C. 1851(a)(2). The next blacknose shark stock assessment is scheduled for 2010, and NMFS will revisit shrimp bycatch and effort along with SCS quotas, as appropriate, once the assessment is complete.

Comment 2: The North Carolina Division of Marine Fisheries (NCDMF) supports alternative A2 only if NMFS plans on implementing a small SCS quota (56.9 mt) from Amendment 3. If a larger SCS quota is implemented, then NCDMF supports A1.

Response: NMFS is currently reviewing all the comments received on draft Amendment 3, the Draft Environmental Impact Statement (DEIS) and proposed implementing regulations. Based on public comment and resulting analyses, it is possible that the proposed quotas in Amendment 3 could change. NMFS expects to implement Amendment 3 in mid- to late spring. Thus, NMFS would not know which blacknose shark quota will be finalized before the 2010 shark specifications, which need to be implemented in early January to start the 2010 shark fishing season. Additionally, as described above, under the Magnuson-Stevens Act, any fishery that was declared to be overfished by 2009 must have ACLs implemented by the 2010 fishing season. Delaying the 2010 SCS fishing season would allow the SCS fishing to open under the new quotas for ending overfishing and rebuilding blacknose sharks and consistent with the ACLs implemented in Amendment 3.

Non-Sandbar LCS Alternatives

Comment 3: Florida fishermen and related industries did not support a July 15 opening for the non-sandbar LCS fishery in the Atlantic region since those fishermen do not have other fisheries to fish early in the year, unlike fishermen in the mid- and north Atlantic. These commenters supported the no action alternative (B1). These commenters felt that there are more shark fishermen in Florida and that NMFS should not give preference to other states. These commenters also felt that a delay would not provide an equal opportunity for Florida fishermen to harvest the quota, since the sharks migrate north or into state waters in July. North Carolina fishermen, NCDMF, and ASMFC supported the July 15 opening (alternative B2) because it offers mid-

and north Atlantic fishermen an opportunity to harvest the quota, which these fishermen could not do in 2009.

Response: In the Atlantic region, the non-sandbar LCS fishery closed on July 1 (74 FR 30479, June 26, 2009), which did not allow fishery participants in the North Atlantic to have a fishing season as the quota was taken before the sharks moved northward into their waters. Assuming fishing effort remains the same in 2010 as in 2009, given the reduced 2010 non-sandbar LCS quota in the Atlantic region because of the overharvest in 2009, fishermen in the North Atlantic would most likely not have a non-sandbar LCS fishery in 2010 if it again opens on January 1.

During the comment period on Amendment 2 to the Consolidated HMS FMP, NMFS received comments from the Atlantic States Marine Fisheries Commission (ASMFC) and the State of Florida stating that NMFS should open the non-sandbar LCS fishery season in July instead of January 1, in order to provide an equal opportunity to harvest the quota for all fishermen in the Atlantic region. They stated that this July opening would allow the season to be open when sharks are present in all areas and to prevent fishing mortality during shark pupping season. NMFS believes that delaying the non-sandbar LCS fishery in the Atlantic region would allow the mid- and north Atlantic fishermen an opportunity to fully participate in the LCS fishery in 2010. The fishermen in these regions did not have that opportunity in 2009 due to the federal mid-Atlantic shark closure off North Carolina, various new state water closures, and the lack of sharks because the sharks had not yet migrated northward by the time the fishery was closed. Florida and south Atlantic fishermen harvested the majority of the non-sandbar LCS quota in 2009. While sharks may not be as plentiful in the south Atlantic area in July as they are in January, historical landings indicate that fishermen in that area still have opportunities to catch sharks in July. Additionally, assuming the fishery remains open for most of the remainder of the year, fishermen in the south Atlantic area, unlike fishermen in the mid- and north Atlantic areas, would continue to have an opportunity to fish for sharks later in the year as the sharks migrate south into warmer waters.

However, NMFS recognizes that the delay may have negative impacts on fishermen in the south Atlantic area that may not be felt by fishermen in other areas. As such, NMFS is currently exploring causes of last year's early closures of the non-sandbar LCS fisheries and may take additional

measures in a future rulemaking to help ensure the non-sandbar LCS shark seasons continue year-round while continuing to ensure that all fishermen in all regions have an equal opportunity to harvest the quota.

Comment 4: Fishermen and related industries in all areas affected by this rule disagreed with the proposed non-sandbar LCS delay in the Gulf of Mexico region (alternative B3). Reasons stated by the commenters in support of opening on or about January 1, included: increased economic stability for Gulf of Mexico fishermen, increased market prices for all fishermen with a split season, increased safety, increased food quality as they would not be unpacking fish in warm weather, and equal fishing opportunities.

Response: NMFS agrees with the comments regarding the proposed delay in opening the non-sandbar LCS fishery in the Gulf of Mexico. Based on the concerns and comments from Gulf of Mexico fishermen, NMFS changed the preferred alternative to B2, which would open the non-sandbar LCS fishery in the Gulf of Mexico region upon the effective date of the 2010 shark specifications. While NMFS thought the state water closures disadvantaged Louisiana fishermen in 2009, Louisiana fishermen did not express concern over the state water closure during the shark fishing season. Indeed, Louisiana reported significant landings for the 2009 non-sandbar LCS fishery from January until April.

Comment 5: Some fishermen expressed a concern that the shark meat will spoil during fishing trips if there is a July opening. The commenters noted that many fishermen do not have coolers on their small boats.

Response: The Food and Drug Administration (FDA) published regulations (December 18, 1995; 60 FR 65092) that mandate the application of the Hazard Analysis Critical Control Point (HACCP) principles to ensure the safe and sanitary processing of seafood products. Although these regulations do not apply to fishing vessels or transporters, the processors of domestic seafood must take responsibility for the incoming product. Dealers should consult the FDA Center for Food Safety and Applied Nutrition Fish and Fisheries Products Hazards and Controls Guidance, for further information.

General Comments

Comment 6: NMFS received many comments requesting that NMFS manage the shark fisheries as it had before Amendment 2. For example, some commenters requested splitting the quota by region and by season in

order to keep the market viable, achieve equitable fishing opportunities among all participants, and protect pupping females. NMFS also received comments to increase the trip limit back to 4,000 lb dw to decrease the volume of dead discarded sharks.

Response: NMFS continually reviews the management practices in HMS fisheries to improve the manageability of the fishery while also meeting the requirements of the Magnuson-Stevens Act, the National Standard Guidelines, and the 2006 Consolidated HMS FMP and its amendments. NMFS will examine these commenters' proposals and related specific issues and may propose them in future actions, if appropriate.

Comment 7: NMFS received a comment regarding the early closure of the LCS fishery in 2009. The commenter suggested that total allowable catch (TAC) is lower than maximum sustainable yield (MSY) and that is why the quotas are being caught with less effort.

Response: The 2005/2006 LCS complex, blacktip and sandbar shark stock assessments represent the best available science for the establishing the TAC in the LCS fishery. This stock assessment found that the status of sandbar sharks is overfished with overfishing occurring, the status of blacktip sharks in the Atlantic region is unknown, and the status of blacktip sharks in the Gulf of Mexico region is healthy. Furthermore, the stock assessment provided a TAC for sandbar sharks that would have a 70 percent chance of rebuilding sandbar sharks by the year 2070 and that was substantially lower than the previous landings of sandbar sharks. As described in Amendment 2 to the Consolidated HMS FMP, NMFS split this TAC to provide for dead discards from commercial and recreational fishermen and a commercial quota, which is used in the shark research fishery. NMFS also needed to balance the amount of sandbar sharks that would be caught when fishing for other LCS in this multi-species fishery. Additionally, because of the "unknown" status of blacktip sharks in the Atlantic, NMFS aimed to not increase the blacktip shark landings. For these and other reasons, as described in Amendment 2, NMFS established the resulting quotas for the sandbar and non-sandbar LCS fisheries. These quotas are designed to rebuild sandbar, dusky and porbeagle sharks while providing an opportunity for the sustainable harvest of blacktip sharks and other sharks in the LCS complex. As described in both Amendment 2 and draft Amendment 3, for sharks in

general, NMFS considers the TAC to be equivalent to the annual catch limit (ACL) required in the Magnuson-Stevens Act and described in the guidelines to National Standard 1 (50 CFR 600.310). Also, as described in both Amendment 2 and draft Amendment 3, because the commercial landings quotas are only a portion of both the TAC (or ACL) and the MSY, these quotas are intentionally lower than both the TAC (or ACL) and the MSY provided in the 2006/2007 stock assessment. Thus, NMFS does not believe that the quota was taken early in 2009 just because the quotas are set below the TAC and MSY.

Comment 8: NMFS should stop all shark fishing.

Response: The purpose of this rulemaking is to adjust quotas based on over- and underharvests from the previous year and opening dates for the 2010 shark season. The final rule is not reanalyzing the overall management measures for sharks, which was done in Amendment 2 to the Consolidated HMS FMP. Accordingly, this comment is outside the scope of this rulemaking.

Comment 9: NMFS received comments from environmental constituents regarding the quotas of certain overfished species. Commenters indicated that the 2010 quota proposed for porbeagle sharks was actually a quota increase from 1.4 mt to 1.5 mt, despite the fact that NMFS has no justification for apparently increasing the quota for a species that is so substantially reduced that fishermen were unable to land the 2009 quota. NMFS does not list mako sharks among species that are overfished with overfishing occurring, even though the findings by NMFS state that shortfin mako sharks are subjected to overfishing and approaching an overfished condition.

Response: The stocks and status of the porbeagle and shortfin mako sharks are closely monitored by NMFS to ensure the quotas are not exceeded. As a result of the 2005 Canadian stock assessment for the North Atlantic porbeagle shark, NMFS has determined that porbeagle sharks are overfished, but overfishing is not occurring. While the United States is not responsible for a large proportion of the porbeagle sharks landed in the Northwest Atlantic, NMFS established a total allowable catch (TAC) for porbeagle sharks of 11.3 mt dw. From this TAC, NMFS established a commercial quota of 1.7 mt dw. The quota finalized in this rule of 1.5 mt dw is lower than the baseline quota due to an overharvest of porbeagle sharks in 2008 that occurred after the 2009 quotas had been finalized. NMFS understands this is an increase from 2009, but the

2010 commercial quota is still below the 1.7 mt dw commercial baseline quota for porbeagle sharks. Currently, NMFS is in the draft stage for Amendment 3 and has published a proposed implementing rule, which includes measures to end overfishing of shortfin mako sharks on an international level. Based on the 2008 SCRS stock assessment on the North Atlantic shortfin mako shark population, NMFS determined that the species in the U.S. is experiencing overfishing and approaching an overfished status. Since U.S. commercial harvest of Atlantic shortfin mako sharks has historically been less than ten percent of the total international landings, domestic reductions of shortfin mako shark mortality alone would not end overfishing of the entire North Atlantic stock. Therefore, NMFS believes that ending overfishing and preventing an overfished status would be better accomplished through international efforts where other countries that have large takes of shortfin mako sharks could participate in mortality reduction discussions.

Comment 10: Some commenters did not agree with the idea that the shark quota should last year-round. They asked which other fisheries are year-round fisheries and why does the shark fishery have to be open year-round.

Response: The HMS fisheries that are open year-round are pelagic sharks, swordfish, and 'BAYS' tunas (bigeye, albacore, yellowfin, and skipjack). The intent of Amendment 2 was to have a single year-round non-sandbar LCS shark season. The January 1 opening date could overlap with open seasons for other BLL and gillnet fisheries, and also provides fishermen a full calendar year to harvest available quota. NMFS believes that having a commercial season that opens January 1 and remains open most of the year, until 80-percent of the quota is achieved, would prevent fishermen from engaging in derby fishing and reduce resulting safety concerns. Furthermore, NMFS has heard comments for many years that fishermen and dealers cannot build a market for shark meat because the fishery is not open long enough (many dealers do not accept any shark meat after the LCS fishery is closed) and is unstable. Having the fishery open most of the year should alleviate the concerns and could increase the marketability of shark. Also, during many public hearings this year, NMFS has heard from HMS fishermen that any amount of fish coming in is helpful given the current economic situation in the country. Having the shark fishery open year round, even at incidental levels,

could benefit fishermen who are financially struggling and do not have other opportunities to fish.

Comment 11: Commenters stated that the fishery needs to be declared a disaster because that is the only way to get compensation.

Response: Section 312(a) of the Magnuson-Stevens Act provides the mechanism through which a fishery resource disaster may be declared. It states: "At the discretion of the Secretary or at the request of the Governor of an affected State or a fishing community, the Secretary shall determine whether there is a commercial fishery failure due to a fishery resource disaster as a result of natural causes, man-made causes beyond the control of fishery managers to mitigate through conservation and management measures, including regulatory restrictions (including those imposed as a result of judicial action) imposed to protect human health or the marine environment, or undetermined causes." Any issues related to this disaster declaration process are outside the scope of this rulemaking and would be handled through separate agency processes.

Comment 12: NMFS needs to implement individual fishing quotas (IFQs) in every fishery.

Response: While NMFS agrees that IFQs may be beneficial in many fisheries, it would take NMFS several years to implement an IFQ system for the shark fishery. NMFS would need to work with all stakeholders to devise the best allocation scheme possible, which would take considerable time. However, as described in the advance notice of proposed rulemaking (ANPR) published in (74 FR 26174, June 1, 2009), NMFS

is considering changes in the permitting system for HMS, including sharks.

Changes From the Proposed Rule

NMFS is changing the preferred alternative for the non-sandbar LCS fishery from the proposed rule based on public comment. In the proposed rule, the preferred alternative was alternative B3, which would open the non-sandbar LCS in the Atlantic and Gulf of Mexico regions on July 15. The preferred alternative in the final rule would be alternative B2, which would open the non-sandbar LCS fishery in the Atlantic region on July 15 and open the non-sandbar LCS fishery in the Gulf of Mexico region upon the effective date of the final rule. NMFS received public comment from fishermen and dealers in all regions indicating that a delay in the start of the shark fishing season in the Gulf of Mexico would be detrimental to the fishermen. Comments stated that fishermen in the Gulf of Mexico would not be able to fish for anything else in the area, since other fisheries are closed in January. Also, shark dealers indicated that they would ideally prefer shipping shark products in January, along with any other fish products, to other markets for economic reasons. Commenters also noted that a split opening for the Gulf of Mexico and Atlantic regions would not cause a market glut of shark products and the fishermen might receive better prices for the products in 2010. In the proposed rule, NMFS believed that the state water closure in Louisiana would affect the distribution of the non-sandbar LCS quota in the region. This was not the case in 2009. Louisiana reported significant landings for the 2009 non-sandbar LCS fishery from January until April. As result of

the comments received by the agency and the factors discussed, NMFS chose to change the preferred alternative from B3 to B2.

At the time the proposed rule published, shark landings updates (through September 15, 2009) indicated that the commercial Atlantic shark quota had been exceeded by 13 mt dw during the 2009 commercial shark fishing season. Since then, additional landings have been reported which have the effect of reducing the proposed quota by a total of 18.1 mt dw. As stated in the proposed rule, NMFS is adjusting the quota accordingly. Specifically, based on reports received by October 31, 2009, 205.9 mt dw of non-sandbar LCS in the Atlantic region were landed, which exceeds the 187.8 mt dw (414,024 lb dw) annual base quota by 18.1 mt dw. Therefore, the 2010 annual commercial non-sandbar LCS in the Atlantic region quota will be reduced by this amount to account for this overharvest (187.8 mt dw annual base quota – 205.9 mt dw of 2009 landings = – 18.1 mt dw overharvest). The 2010 adjusted annual commercial non-sandbar LCS in the Atlantic region quota will be 169.7 mt dw (374,121 lb dw) (187.8 mt dw annual base quota – 18.1 mt dw 2008 overage = 169.7 mt dw 2010 adjusted annual quota).

2010 Annual Quotas

This final rule adjusts the commercial quotas due to overharvests in 2008 and 2009. The 2010 annual quotas by species and species group are summarized in Table 1. All dealer reports that are received by NMFS after October 31, 2009, were used to adjust the 2011 quotas, as appropriate.

TABLE 1—2010 ANNUAL QUOTAS AND OPENING DATES FOR NON-SANDBAR LCS AND SANDBAR SHARKS. ALL QUOTAS AND LANDINGS ARE DRESSED WEIGHT (DW), IN METRIC TONS (MT), UNLESS SPECIFIED OTHERWISE

| Species group | Region | 2009 Annual quota (A) | Preliminary 2009 landings ¹ (B) | Overharvest (C) | 2010 Base Annual quota ² (D) | 2010 Final quota (D–C) | Season opening dates ³ |
|-------------------------------------|---------------------|------------------------|--|------------------|---|------------------------|-----------------------------------|
| Non-Sandbar Large Coastal Sharks. | Gulf of Mexico .. | 390.5 (860,896 lb dw). | 319.2 (703,784 lb dw). | ..... | 390.5 (860,896 lb dw). | 390.5 (860,896 lb dw). | February 4, 2010. |
| | Atlantic | 187.8 (414,024 lb dw). | 205.9 (453,988 lb dw). | 18.1 | 187.8 (414,024 lb dw). | 169.7 (374,121 lb dw). | July 15, 2010. |
| Non-Sandbar LCS Research Quota. | No regional quotas. | 37.5 (82,673 lb dw). | 37 (81,572 lb dw). | ..... | 37.5 (82,673 lb dw). | 37.5 (82,673 lb dw). | January 5, 2010. |
| Sandbar Research Quota. | ..... | 87.9 (193,784 lb dw). | 79.9 (176,058 lb dw). | ..... | 87.9 (193,784 lb dw). | 87.9 (193,784 lb dw). | January 5, 2010. |
| Small Coastal Sharks ⁴. | ..... | 454 (1,000,888 lb dw). | 235.8 (519,754 lb dw). | ..... | 454 (1,000,888 lb dw). | 454 (1,000,888 lb dw). | On or about April 30, 2010. |
| Blue Sharks ..... | ..... | 273 (601,856 lb dw). | 2.2 (4,793 lb dw). | ..... | 273 (601,856 lb dw). | 273 (601,856 lb dw). | January 5, 2010. |
| Porbeagle Sharks. | ..... | 1.4 (3,086 lb dw). | 0.8 (1,733 lb dw). | ⁵ 0.2 | 1.7 (3,748 lb dw). | 1.5 (3,307 lb dw). | January 5, 2010. |

TABLE 1—2010 ANNUAL QUOTAS AND OPENING DATES FOR NON-SANDBAR LCS AND SANDBAR SHARKS. ALL QUOTAS AND LANDINGS ARE DRESSED WEIGHT (DW), IN METRIC TONS (MT), UNLESS SPECIFIED OTHERWISE—Continued

| Species group | Region | 2009 Annual quota (A) | Preliminary 2009 landings ¹ (B) | Overharvest (C) | 2010 Base Annual quota ² (D) | 2010 Final quota (D–C) | Season opening dates ³ |
|--|--------|------------------------|--|-----------------|---|------------------------|-----------------------------------|
| Pelagic Sharks Other Than Porbeagle or Blue. | | 488 (1,075,856 lb dw). | 86.4 (190,532 lb dw). | ..... | 488 (1,075,856 lb dw). | 488 (1,075,856 lb dw). | January 5, 2010. |

¹ Landings are from January 23, 2009, until October 31, 2009, and are subject to change.

² 2010 annual base quotas for sandbar and non-sandbar LCS are the annual adjusted base quotas that are effective from July 24, 2008, until December 31, 2012 (50 CFR 635.27(b)(1)(iii) and (iv)).

³ The opening dates for the shark research, blue sharks, porbeagle sharks, pelagic sharks other than porbeagle or blue fisheries, and non-sandbar LCS in the Gulf of Mexico region is dependent upon the publication date of this final rule. The on or about April 30 proposed opening date for SCS is dependent on the effective date for the final rule implementing Amendment 3. The non-sandbar LCS fishery in the Atlantic region will open on July 15, 2010.

⁴ The quota in the table is based on current SCS quota regulations. NMFS is in the draft amendment and proposed rule stage of Amendment 3 to the Consolidated HMS FMP that proposes new non-blacknose SCS and blacknose shark quotas starting in the 2010 SCS fishing season.

⁵ NMFS intends to adjust the 2010 quota for porbeagle sharks to account for the 0.2 mt dw overharvest that happened in 2008 after the 0.3 mt dw overharvest was accounted for in the final rule establishing the 2009 quota.

1. 2010 Quotas for Non-Sandbar LCS and Sandbar Sharks Within the Shark Research Fishery

Since no overharvests of the non-sandbar LCS and sandbar shark quotas within the shark research fishery occurred during the 2009 fishing year, pursuant to Amendment 2 to the 2006 Consolidated HMS FMP, the 2010 adjusted base annual quotas within the shark research fishery will be 37.5 mt dw (82,673 lb dw) for non-sandbar LCS and 87.9 mt dw (193,784 lb dw) for sandbar sharks.

2. 2010 Quotas for the Non-Sandbar LCS in the Gulf of Mexico Region

Since no overharvests of the non-sandbar LCS quota for the Gulf of Mexico region occurred during the 2009 fishing year, pursuant to Amendment 2 to the 2006 Consolidated HMS FMP, the 2010 adjusted base annual quota for non-sandbar LCS in the Gulf of Mexico region will be 390.5 mt dw (860,896 lb dw).

3. 2010 Quotas for the Non-Sandbar LCS in the Atlantic Region

Since an overharvest of 18.1 mt dw for the non-sandbar LCS quota for the Atlantic region occurred during the 2009 fishing year, pursuant to Amendment 2 to the 2006 Consolidated HMS FMP, the 2010 adjusted base annual quota for non-sandbar LCS in the Atlantic region will be 169.7 mt dw (374,121 lb dw).

4. 2010 Quotas for SCS and Pelagic Sharks

Since no overharvests of small coastal sharks, blue sharks, and pelagic sharks other than porbeagle or blue sharks occurred during the 2009 fishing year, pursuant to Amendment 2 to the 2006

Consolidated HMS FMP, the 2010 annual base quotas for small coastal sharks, blue sharks, and pelagic sharks other than porbeagle or blue sharks will be 454 mt dw (1,000,888 lb dw), 273 mt dw (601,856 lb dw), and 488 mt dw (1,075,856 lb dw), respectively. This final rule would not change the overall annual commercial quotas for porbeagle sharks and SCS. However, NMFS has proposed changes to the SCS quota in Amendment 3 (73 FR 36392, July 24, 2009). The quotas established by the preferred alternative in Amendment 3 would, if selected, supersede the quotas established in this rule. The change for the 2010 porbeagle shark quota, which accounts for the additional overharvest experienced during the 2008 fishing season, would be 1.5 mt dw (3,307 lb dw).

As of December 31, 2008, the final reported landings of porbeagle sharks were 2.2 mt dw (4,471 lb dw) (127 percent of the 2008 1.7 mt dw (3,748 lb dw) annual base quota). In the final rule establishing the 2009 quotas (73 FR 79005, December 29, 2008), NMFS accounted for an overharvest of porbeagle sharks of 0.3 mt dw (601 lb dw). That final rule used data that was reported as of November 15, 2008. Between that date and December 31, 2008, an additional 0.2 mt dw was reported landed. As such, this additional overharvest of 0.2 mt dw (441 lb dw) is proposed to be deducted from the 2010 porbeagle shark quota. Per 50 CFR 635.27(b)(1)(vii)(A), if the available quota is exceeded in any fishing season, NMFS will deduct an amount equivalent to the overharvest(s) from the following fishing season or, depending on the level of overharvest(s), NMFS may deduct an amount equivalent to the overharvest(s) spread over a number of

subsequent fishing seasons to a maximum of five years. Given that the additional small overharvest of 0.2 mt dw (441 lb dw) was not accounted for in the 2009 quota (12 percent of the annual base porbeagle quota), NMFS will deduct the additional 2008 overharvest from the 2010 annual base commercial porbeagle quota. The 2010 adjusted annual commercial porbeagle quota would be 1.5 mt dw (3,307 lb dw) (1.7 mt dw annual base quota – 0.2 mt dw 2008 overage = 1.5 mt dw 2010 adjusted annual quota).

Fishing Season Notification for the 2010 Atlantic Commercial Shark Fishing Season

The 2010 Atlantic commercial shark fishing season for the shark research, blue sharks, porbeagle sharks, and pelagic sharks (other than porbeagle and blue sharks) in the northwestern Atlantic Ocean, including the Gulf of Mexico and the Caribbean Sea, will open on January 5, 2010. The non-sandbar LCS in the Gulf of Mexico region will open on February 4, 2010. NMFS will have different opening dates for the SCS and the Atlantic region non-sandbar LCS seasons. NMFS will keep the SCS fishery closed until the effective date of the final rule for Amendment 3. NMFS will open the non-sandbar LCS fishery in the Atlantic region on July 15, 2010.

All of the shark fisheries will remain open until December 31, 2010, unless NMFS determines that the fishing season landings for sandbar shark, non-sandbar LCS, blacknose, non-blacknose SCS, blue sharks, porbeagle sharks, or pelagic sharks (other than porbeagle or blue sharks) has reached, or is projected to reach, 80 percent of the available quota. At that time, consistent with 50

CFR 635.27(b)(1), NMFS will file for publication with the Office of the Federal Register a notice of closure for that shark species group and/or region that will be effective no fewer than 5 days from date of filing. From the effective date and time of the closure until NMFS announces, via a notice in the **Federal Register**, that additional quota, if any, is available, the fishery for the shark species group and, for non-sandbar LCS, region will remain closed, even across fishing years, consistent with 50 CFR 635.28(b)(2).

Classification

NMFS has determined that this action is consistent with the Magnuson-Stevens Act, including the national standards, and other applicable law.

Pursuant to 5 U.S.C. 553(d)(3), the Assistant Administrator for Fisheries has determined that good cause exists to waive the 30-day delay in effective date for the pelagic shark and shark research fisheries as such a delay would be contrary to the public interest. Providing a 30-day delay in effectiveness for the opening of the pelagic shark and shark research fisheries would be contrary to the public interest due to the negative economic impact on fishermen and on the fishery resource, and the diminished opportunity for collection of scientific data needed to manage the fisheries. In the case of the pelagic shark fishery (which includes blue, shortfin mako, porbeagle, common thresher, and oceanic whitetip sharks), this fishery is conducted as a bycatch fishery by those fishermen targeting other species such as swordfish, yellowfin tuna, and bigeye tuna. This incidental fishery continues throughout the year with no closure date anticipated in the FMP. Providing a 30-day delay in effectiveness would break the continuity of this fishery, forcing the fishermen to discard, dead or alive, any pelagic sharks that are caught. Such discards would not be counted against the commercial quota. Such a break in continuity occurred in 2009 when the shark fishery did not open until January 23 (73 FR 79005, December 24, 2008). In 2009, NMFS did not propose a good cause waiver and subsequently received concerns from pelagic fishermen, dealers, and other interested parties stating that the delay in the fishery caused economic loss and waste from the fish that were discarded dead rather than being landed.

For the 2010 fishing season, NMFS intended to complete this action in time for the fishery to open January 1, 2010, as appropriate, with no delay. However, due to the unexpectedly short LCS season in 2009 and the subsequent

public comments (particularly those received during the HMS Advisory Panel meeting in September 2009) that requested NMFS to address the issues with the LCS season, NMFS determined it was necessary to consider alternatives regarding the LCS season in this action. During that time, NMFS also determined it was necessary to consider alternatives regarding SCS and ACLs. The analyses required for those alternatives, the need to collect public comment on those alternatives, and consideration of the public comments caused a delay in implementation of this action.

Porbeagle sharks have a limited quota that is closely monitored to ensure it is not exceeded. Under the rebuilding plan for porbeagle sharks, NMFS established a total allowable catch (TAC) of 11.3 mt dw based on current commercial landings of 1.7 mt dw, current commercial discards of 9.5 mt dw, and current recreational landings of 0.1 mt dw. As described in previous documents, estimating dead discards accurately is more difficult than accounting for landings. Landing fish, rather than discarding them dead, helps NMFS monitor the TAC properly in order to rebuild the porbeagle shark. Opening the fishery would ensure that any mortality associated with landings would be counted against the quota. Additionally, blue sharks and the other pelagic sharks are not considered overfished and their quotas have never been reached. Closing these fisheries from January 1, 2010, until the effective date of this rule could be detrimental to our management of these species as many of these fish would be discarded dead. Such a delay and required discards would also result in economic harm to the fishermen who normally catch and land them. A delay would mean fishermen could not retain the sharks caught as bycatch or sell the shark on the market.

Regarding the shark research fishery, NMFS selects a small number of fishermen to participate in the shark research fishery each year for the purpose of providing NMFS biological and catch data to better manage the Atlantic shark fisheries. All the trips and catches in this fishery are monitored with 100 percent observer coverage. Specifically, the shark research fishery allows for the collection of fishery-dependent data for future stock assessments, including specific biological and other data that are priorities for improving future stock assessments, and allows NMFS and commercial fishermen to conduct cooperative research to meet the shark research objectives for NMFS. Some of

the shark research objectives include collecting reproductive and age data, monitoring size distribution, and tagging studies. The information collected in early January could be used in verifying data in the upcoming stock assessment for sandbar, dusky, and blacknose sharks in 2010, and will be used in other future stock assessments. While NMFS hopes to collect this data throughout the year, delaying the opening of the shark research fishery would not allow NMFS the ability to maintain the time-series of abundance for shark species or collect vital biological and regional data. Because of the biology and migratory patterns of sharks, for the data to be viable in future stock assessments and studies, it must be collected during the same time periods each year. Preventing NMFS from conducting any research trips deemed necessary could hinder the collection of scientific data and limit the ability of NMFS to manage the shark fisheries, which would be contrary to the public good.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

In compliance with section 603 of the Regulatory Flexibility Act (RFA), NMFS has prepared a Final Regulatory Flexibility Analysis (FRFA) for this final rule to analyze the impacts of delaying the 2010 SCS and Atlantic region non-sandbar LCS fishing seasons and adjustments to the non-sandbar LCS and porbeagle quotas based on overharvests from the previous fishing season. These actions have already been analyzed in Amendment 2 to the 2006 Consolidated HMS FMP. The FRFA analyzes the anticipated economic impacts of the final actions and any significant economic impacts on small entities. A summary of the FRFA is below. The full FRFA and analysis of social and economic impacts are available from NMFS (*see ADDRESSES*).

In compliance with section 604(a)(1) of the Regulatory Flexibility Act, the purpose of this final rulemaking is, consistent with the Magnuson-Stevens Act, to adjust the 2010 proposed quotas for non-sandbar LCS, sandbar sharks, SCS, blue sharks, porbeagle sharks, or pelagic sharks (other than porbeagle or blue sharks) based on overharvests from the previous fishing year. These adjustments are being implemented according to the regulations implemented in the final rule for Amendment 2 to the 2006 Consolidated HMS FMP. Thus, NMFS would expect few, if any, economic impacts to fishermen other than those already analyzed in Amendment 2 to the 2006 Consolidated HMS FMP based on the

quota adjustments. In addition, NMFS is delaying the 2010 non-sandbar LCS shark fishery season in the Atlantic regions to allow for a more equitable distribution of the available quotas among constituents as well as delay the opening of the 2010 SCS fishing season to allow for the implementation of Amendment 3, which could implement new blacknose and non-blacknose SCS quotas consistent with ACLs to rebuild the blacknose shark stock and end overfishing of this species. While there are direct negative economic impacts associated with the proposed measures, delaying the opening of the 2010 SCS, and non-sandbar LCS fishing seasons could ensure that North Atlantic fishermen have access to the 2010 quotas and will allow for more equitable access to the quotas by all fishery participants.

Section 604(a)(2) of the Regulatory Flexibility Act requires NMFS to summarize significant issues raised by the public in response to the Initial Regulatory Flexibility Analysis (IRFA), a summary of the NMFS's assessment of such issues, and a statement of any changes made as a result of the comments. The IRFA was done as part of the draft EA for the 2010 Atlantic Commercial Shark Season Specifications. NMFS did not receive any comments specific to the IRFA. However, NMFS did receive comments related to the overall economic impacts of the proposed rule. Those comments and NMFS's responses to them are mentioned above in the preamble for this rule. Almost all of the comments and responses relate to the economic issues in the fishery, particularly comments 1 through 6, 10, 11, and 12.

Section 604(a)(3) requires Federal agencies to provide an estimate of the number of small entities to which the rule would apply. NMFS considers all HMS permit holders to be small entities because they either had average annual receipts less than \$4.0 million for fish-harvesting, average annual receipts less than \$6.5 million for charter/party boats, 100 or fewer employees for wholesale dealers, or 500 or fewer employees for seafood processors. These are the Small Business Administration (SBA) size standards for defining a small versus large business entity in this industry.

The commercial shark fishery is comprised of fishermen who hold a shark directed or incidental limited access permits (LAP) and the related industries including processors, bait houses, and equipment suppliers, all of which NMFS considers to be small entities according to the size standards set by the SBA. The final rule would

apply to the approximately 223 directed commercial shark permit holders, 279 incidental commercial shark permit holders, and 100 commercial shark dealers as of March 18, 2009. Based on the 2008 ex-vessel price, the 2010 Atlantic shark commercial baseline quota could result in revenues of \$6,215,208. The adjustment due to the overharvests would result in a \$775 loss in revenues in the porbeagle fishery and a \$51,792 loss in revenue in the Atlantic non-sandbar LCS fishery. These revenues are similar to the gross revenues analyzed in Amendment 2 to the 2006 Consolidated HMS FMP.

Section 604(a)(4) of the Regulatory Flexibility Act requires NMFS to describe the projected reporting, recordkeeping, and other compliance requirements of the final rule, including an estimate of the classes of small entities which would be subject to the requirements of the report or record. None of the alternatives considered for this final rule would result in additional reporting, recordkeeping, and compliance requirements.

Section 604(a)(5) of the Regulatory Flexibility Act requires NMFS to describe the steps taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes. Additionally, the Regulatory Flexibility Act (5 U.S.C. 603(c)(1)–(4)) lists four general categories of “significant” alternatives that would assist an agency in the development of significant alternatives. These categories of alternatives are: (1) Establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) use of performance rather than design standards; and (4) exemptions from coverage of the rule for small entities.

In order to meet the objectives of this final rule, consistent with Magnuson-Stevens Act and the Endangered Species Act (ESA), NMFS cannot exempt small entities or change the reporting requirements only for small entities because all the entities affected are considered small entities. NMFS does not know of any performance or design standards that would satisfy the aforementioned objectives of this rulemaking while, concurrently, complying with the Magnuson-Stevens Act. As described in the proposed rule (74 FR 55526, October 28, 2009), NMFS analyzed several different alternatives in this rulemaking and provides the rationale for identifying the preferred

alternative to achieve the desired objective below.

The alternatives considered and analyzed have been grouped into two major categories. These categories include SCS and non-sandbar LCS. Under the SCS category, the alternatives include: (A1) Allow the 2010 SCS fishing season to open upon the effective date of the final rule for the 2010 Atlantic shark specifications; and, (A2) open the 2010 SCS fishing season on the effective date of the final rule for Amendment 3 to the Consolidated HMS FMP. Under the non-sandbar LCS category, the alternatives include: (B1) Allow the 2010 non-sandbar LCS fishery in the Atlantic and Gulf of Mexico regions to open upon the effective date of the final rule for the 2010 Atlantic shark specifications; (B2) open the 2010 non-sandbar LCS fishery in the Atlantic region on July 15, 2009 and open the 2010 non-sandbar LCS fishery in the Gulf of Mexico region upon the effective date of the final rule for the 2010 Atlantic shark specifications; and, (B3) Open the 2010 non-sandbar LCS fishery in the Atlantic and Gulf of Mexico regions on July 15, 2009.

The potential impacts these preferred alternatives may have on small entities have been analyzed and are discussed below. The preferred alternatives include A2 and B2. A summary of the analyses follows. The economic impacts that would occur under these preferred alternatives were compared with the other alternatives to determine if economic impacts to small entities could be minimized while still accomplishing the stated objectives of this rule.

The proposed changes to the opening dates for the SCS and non-sandbar LCS were analyzed. Under alternative A2, NMFS would delay the start of the 2010 SCS fishing season until implementation of the final rule for Amendment 3. There may be economic losses associated with the delay in the start of the fishing season, especially for fishermen in the southeast Atlantic and Gulf of Mexico that would have access to SCS at the beginning of 2010 and rely on SCS gross revenues at the beginning of the season. Depending on the quotas implemented under Amendment 3 for blacknose shark and non-blacknose SCS, the economic losses for SCS fishermen could range from \$126,174 to \$172,197 for blacknose sharks and \$502,145 to \$661,513 for non-blacknose SCS. In addition, depending on the final measures implemented under Amendment 3, gillnet fishermen could lose gross revenues from lost SCS fishing opportunities in 2010. Estimated losses for shark gillnet fishermen could

be between \$90,059 to \$90,501 for blacknose sharks and \$275,008 to \$287,427 for non-blacknose SCS. However, these losses are independent of this action and were fully analyzed in the DEIS for draft Amendment 3. In addition, shark dealers and other entities that deal with shark products could experience negative economic impacts as SCS products would not be available at the beginning of the season. This would be most prevalent in areas of the southeast Atlantic and Gulf of Mexico where SCS are available early in the fishing season.

The delay in the SCS fishing seasons could cause changes in ex-vessel prices. From 2004 through 2008, the average ex-vessel price of SCS meat in January was approximately \$0.58, whereas the average ex-vessel price in mid- to late-Spring was \$0.69. Fin prices are not reported by species. As such, the average ex-vessel price from 2004 through 2008 for shark fins is the same for LCS and SCS. The average price for fins in January is \$16.36 per lb. When the SCS fishery opens in mid- to late-Spring, the average price for fins has been \$7.35.

Delaying the 2010 SCS fishing season until the implementation of Amendment 3 would allow the blacknose shark stock to rebuild as quickly as possible, and would translate into higher SCS quotas with higher associated gross revenues in the shortest time period possible. In addition, since both blacknose sharks and non-blacknose SCS are present in waters off the North Atlantic later in the year, delaying the opening of the 2010 SCS fishing season could help ensure that North Atlantic fishermen have access to the non-blacknose SCS and blacknose shark quotas implemented under Amendment 3, allowing for more

equitable access to the quotas by all constituents. Thus, while there are some direct negative economic impacts associated with alternative A2, NMFS prefers this alternative at this time.

Under alternative B2, NMFS would delay the opening of the non-sandbar LCS fishery in the Atlantic region until July 15, 2010, and would open the non-sandbar LCS fishery in the Gulf of Mexico region upon the effective date of the final rule for the 2010 Atlantic shark specifications. Alternative B2 could result in additional negative economic impacts relative to those analyzed in Amendment 2 for fishermen in the southeast Atlantic, since these fishermen would not be able to land non-sandbar LCS when non-sandbar LCS would be present in their waters off the southeast Atlantic. In addition, alternative B2 could result in additional negative economic impacts relative to those analyzed in Amendment 2 for gillnet fishermen in the Atlantic region who would not be able to harvest non-sandbar LCS with gillnets during 2010, depending on final management measures implemented under Amendment 3. However, under alternative B2, fishermen in the North Atlantic would be able to have a fishing opportunity for non-sandbar LCS in 2010, as was the intent of Amendment 2. In the Atlantic region, the non-sandbar LCS quota and its associated gross revenues of an estimated \$485,509 based on 2008 ex-vessel prices would be more equitably distributed among different states of the Atlantic by delaying the opening of the non-sandbar LCS fishery until July 15, 2010, under alternative B2.

The economic impacts of alternative B2 in the Gulf of Mexico region would be the same as analyzed under Amendment 2. In addition, gillnet

fishermen in the Gulf of Mexico region could harvest non-sandbar LCS with gillnets prior to the implementation of Amendment 3, which may prohibit the landing of sharks with gillnet gear. State waters off Louisiana are closed to large coastal shark fishing from April 1 through June 30 of each year. During 2009, the non-sandbar LCS fishery closed on June 6, 2009. Thus, allowing the federal non-sandbar LCS fishery in the Gulf of Mexico to be open at the beginning of 2010 may result in negative economic impacts for Louisiana state fishermen if the non-sandbar LCS quota is harvested before the re-opening of Louisiana state waters in 2010. However, delaying the start of the shark fishing season in the Gulf of Mexico would be detrimental to the fishermen. Many fishermen in the Gulf of Mexico would not be able to fish for other species, since other Gulf of Mexico fisheries are closed in January. Also, shark dealers would need shark products in January to ship to other markets. Comments noted that if NMFS implemented alternative B3 and opened both the Gulf of Mexico and Atlantic regions in July, then a market glut of shark products would cause prices to fall. In addition, the state water closure in Louisiana did not affect the distribution of the non-sandbar LCS quota in the region. Louisiana reported significant landings for the 2009 non-sandbar LCS fishery from January until April. Therefore, NMFS prefers alternative B2 at this time.

Dated: December 29, 2009.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

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