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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XD990

Atlantic Highly Migratory Species; Essential Fish Habitat

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

ACTION: Notice of availability of Draft Environmental Assessment; request for comments.

SUMMARY: NMFS announces the availability of a Draft Environmental Assessment for Amendment 10 to the 2006 Consolidated Atlantic Highly Migratory Species (HMS) Fishery Management Plan (FMP).

NMFS finalized the most recent Atlantic HMS Essential Fish Habitat (EFH) 5-Year Review on July 1, 2015 and determined that updates to Atlantic HMS EFH were warranted. NMFS also determined that modifications to current Habitat Areas of Particular Concern (HAPCs) for bluefin tuna (*Thunnus thynnus*) and sandbar shark (*Carcharhinus plumbeus*) and the consideration of new HAPCs for lemon sharks (*Negaprion brevirostris*) and sand tiger sharks (*Carcharias taurus*) may be warranted.

The purpose of this Draft Amendment is to update Atlantic HMS EFH with recent information following the EFH

delineation methodology established in Amendment 1 to the 2006 Consolidated Atlantic HMS FMP (Amendment 1); update and consider new HAPCs for Atlantic HMS based on recent information, as warranted; minimize to the extent practicable the adverse effects of fishing and non-fishing activities on EFH, and identify other actions to encourage the conservation and enhancement of EFH.

DATES: Written comments must be received by December 22, 2016.

ADDRESSES: Electronic copies of Draft Amendment 10 to the 2006 Consolidated HMS FMP may also be obtained on the internet at:

<http://www.nmfs.noaa.gov/sfa/hms/documents/fmp/am10/index.html>

You may submit comments on this document, identified by NOAA-NMFS-2016-0117, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to www.regulations.gov, enter NOAA-NMFS-2016-0117 into the search box, click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Jennifer Cudney, National Marine Fisheries Service, Highly Migratory

Species Management Division, 263 13th Ave, Saint Petersburg, FL 33701.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Jennifer Cudney or Randy Blankinship by phone at (727) 824-5399.

SUPPLEMENTARY INFORMATION:

Background

The Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act") includes provisions concerning the identification and conservation of EFH (16 U.S.C. 1801 *et seq.*). EFH is defined in 50 CFR 600.10 as "those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity." NMFS must

identify and describe EFH, minimize to the extent practicable the adverse effects of fishing on EFH, and identify other actions to encourage the conservation and enhancement of EFH (§ 600.815(a)). Federal agencies that authorize, fund, or undertake actions that may adversely affect EFH must consult with NMFS, and NMFS must provide conservation recommendations to Federal and state agencies regarding any such actions. § 600.815(a)(9). Specifically, a consultation is required if a Federal agency has authorized, funded, or undertaken part or all of a proposed activity. For example, if a project proposed by a Federal or state agency or an individual requires a Federal permit, then the Federal agency authorizing the project through the issuance of a permit must consult with NMFS. A consultation is required if the action will "adversely" affect EFH. An adverse effect is defined as any impact that reduces quality and/or quantity of EFH. This includes direct or indirect physical, chemical, or biological alterations of the waters or substrate and loss of, or injury to species and their habitat, and other ecosystem components, or reduction of the quality and/or quantity of EFH. Adverse effects may result from actions occurring within EFH or outside of EFH. If a federal agency determines that an action will not adversely affect EFH, no

consultation is required. Private landowners and state agencies are not required to consult with NMFS.

In addition to identifying and describing EFH for managed fish species, a review of EFH must be completed every 5 years, and EFH provisions must be revised or amended, as warranted, based on the best available scientific information. NMFS announced the initiation of this review and solicited information for this review from the public in a **Federal Register** notice on March 24, 2014 (79 FR 15959). The initial public review/submission period ended on May 23, 2014. The Draft Atlantic HMS EFH 5-Year Review was made available on March 5, 2015 (80 FR 11981), and the public comment period ended on April 6, 2015. NMFS analyzed the information gathered through the EFH review process, and the Notice of Availability for the Final Atlantic HMS EFH 5-Year Review was published on July 1, 2015 (80 FR 37598) ("5-Year Review").

The 5-Year Review considered data regarding Atlantic HMS and their habitats that have become available since 2009 that were not included in EFH updates finalized in Amendment 1 (June 1, 2010, 75 FR 30484); Final Environmental Impact Statement for Amendment 3 to the 2006 Consolidated HMS FMP (Amendment 3) (June 1, 2010, 75 FR 30484); and the interpretive rule that described EFH for

roundscale spearfish (September 22, 2010, 75 FR 57698). NMFS also determined in the 5-Year Review that the methodology used in Amendment 1 to delineate Atlantic HMS EFH was still the best approach to update EFH delineations in Amendment 10 because it infers habitat use and EFH from available point data, allows for the incorporation of multiple complex datasets into the analysis, is transparent, and is easily reproducible.

As a result of this review, NMFS determined that a revision of HMS EFH was warranted, and that an amendment to the 2006 Consolidated Atlantic HMS FMP would be developed as Amendment 10. In addition to the literature informing the 5-year Review and the subsequent proposed amendment, NMFS indicated that it would also incorporate all newly available data collected prior to January 1, 2015, to ensure that the best available data would be analyzed for Draft Amendment 10, and EFH geographic boundaries would be re-evaluated, even for species where there were limited or no new EFH data found in the literature review.

Consultation with the Atlantic HMS Advisory Panel and the public did not yield additional suggestions for NMFS to consider on EFH delineation methods for Atlantic HMS during the EFH 5-Year Review process. Therefore, NMFS determined

that the current HMS EFH delineation methodology could be used for the analyses in Draft Amendment 10.

Where appropriate, NMFS may designate HAPCs, which are intended to focus conservation efforts on localized areas within EFH that are vulnerable to degradation or are especially important ecologically for managed species. EFH regulatory guidelines encourage the Regional Fishery Management Councils and NMFS to identify HAPCs based on one or more of the following considerations (§ 600.815(a)(8)):

- the importance of the ecological function provided by the habitat;
- the extent to which the habitat is sensitive to human-induced environmental degradation;
- whether, and to what extent, development activities are, or will be, stressing the habitat type; and/or,
- the rarity of the habitat type.

After reviewing the new information that has become available for Atlantic HMS since the last updates to EFH were completed, and based on analyses of new data, NMFS is considering modifications to current HAPCs for bluefin tuna and sandbar sharks, and the creation of new HAPCs for lemon sharks and sand tiger sharks.

The purpose of the amendment would be to update EFH for Atlantic HMS with recent information following the EFH delineation methodology established in Amendment 1; minimize to the extent practicable the adverse effects of fishing and non-fishing activities on EFH; and identify other actions to encourage the conservation and enhancement of EFH. Specific actions would include the update and revision of existing HMS EFH, as necessary; modification of existing HAPCs or designation of new HAPCs for bluefin tuna, and sandbar, lemon, and sand tiger sharks, as necessary; and analysis of fishing and non-fishing impacts on EFH by considering environmental and management changes and new information since 2009.

Essential Fish Habitat Updates

Preferred Alternative 2 would update all Atlantic HMS EFH designations with new data collected since 2009, using the methodology established under Amendment 1. The incorporation of new information and data into EFH analyses, and subsequent adjustment of Atlantic HMS EFH, is expected to result in neutral cumulative and direct and indirect, short-term ecological, social, and economic impacts on the natural and human environment. This alternative is also expected to result in neutral long-term direct ecological, social, and economic impacts on the

natural and human environment. The primary effect of updating Atlantic HMS EFH would be a change in the areas that are subject to consultation with NMFS under the EFH regulations. Updating Atlantic HMS EFH ensures that any management consultations subsequently completed by the NMFS Office of Habitat Conservation, and resulting conservation recommendations, are based on the best available scientific information considering EFH designation. These future consultations through the Habitat Consultation process could, among other things, focus conservation efforts and avoid potential adverse impacts from Federal actions in areas designated as EFH. Thus, NMFS expects that long-term cumulative and indirect impacts of Alternative 2 would be minor and beneficial, as the consultation process and resulting conservation recommendations could reduce any potential adverse impacts to EFH from future federal actions. This could result in an overall positive conservation benefit.

Habitat Areas of Particular Concern (HAPCs)

The preferred alternatives concerning HAPCs would modify or create new HAPCs for several HMS.

Preferred alternative 3b would modify the current HAPC for the spawning, eggs, and larvae life stages for bluefin tuna. Specifically, NMFS would change the boundary of the

existing bluefin tuna HAPC to encompass a larger area within the Gulf of Mexico. Recent literature suggests the potential for spawning bluefin tuna, eggs, and larvae to be concentrated in areas of the eastern Gulf of Mexico not encompassed by the current HAPC in response to variability in oceanographic conditions associated with the Loop Current, which moves through regions that are to the east of the current HAPC. NMFS would extend the HAPC in the Gulf of Mexico from its current extent eastward to the 82° West longitude line. The seaward boundary of the HAPC would continue to be the U.S. EEZ, while the shoreward extent of the HAPC would be restricted at the 100m bathymetric line per recommendations from the NMFS scientists.

Preferred alternative 4b would modify the current HAPC for sandbar shark along the Atlantic coast (specifically off the coast of the Outer Banks (NC), in Chesapeake Bay (VA), Delaware Bay (DE) and in the Mullica River-Great Bay system (NJ)). Modification would include changing the boundary of the existing HAPC to encompass different areas, consistent with the updated Atlantic HMS EFH designations. The current sandbar shark HAPC does not overlap with the currently -designated sandbar shark EFH as required by the Magnuson-Stevens Act implementing regulations, which

specify FMPs “identify specific types or areas of habitat *within* EFH as habitat areas of particular concern” (emphasis added) (§ 600.815(a)(8)). Thus, NMFS is proposing to adjust the boundaries of the HAPC so that it is contained within the updated sandbar shark EFH. These changes include incorporation of additional area in Delaware Bay and Chesapeake Bay to reflect updated EFH designations, and adjustment of the HAPC around the Outer Banks of North Carolina. The updated areas identified as HAPCs are still considered to be important pupping and nursery grounds for sandbar shark. Delaware Bay and Chesapeake Bay are the largest nursery grounds for sandbar shark in the mid-Atlantic, and there is evidence of high inter-annual site fidelity for up to five years following birth to these nursery grounds.

Preferred Alternative 5b would designate a new HAPC for lemon sharks between Jupiter Inlet, FL, and Cape Canaveral, FL. Information analyzed in the 5-year review suggests that areas off south central and south eastern Florida may provide important nursery grounds and aggregation sites for multiple life stages. Aggregations of juvenile lemon sharks have appeared annually since 2003 within sheltered alongshore troughs and shallow open surf zones adjacent to Cape Canaveral from November through

February. Adult lemon sharks have also been observed to annually form large aggregations off Jupiter Inlet between December and April. Geophysical and oceanographic conditions in the Cape Canaveral and Jupiter inlet regions may generate a climatic transition zone that may create a temperature barrier to northward and southward migration. A new HAPC would be created to encompass both areas and presumed migratory corridors between them and extend from shore to 12 km from the beach. These habitats occur near a heavily populated area of southeastern Florida, are subjected to military use and/or are easily accessible to the public, and both appear to be discrete aggregation areas for lemon sharks.

Preferred Alternative 6b would designate two new HAPCs for sand tiger sharks in Delaware Bay and in coastal Massachusetts. Recently, new research and information has become available which suggests that Delaware Bay might provide important seasonal (summertime) habitat for all life stages of sand tiger shark. The first HAPC would reflect the distribution of known data points in Delaware Bay. The second HAPC would be established in the Plymouth, Kingston, Duxbury (PKD) Bay system in coastal Massachusetts for juveniles and neonate sand tiger in the Cape Cod region. Tagging data suggest that tagged neonates and

juveniles are seasonally distributed within the estuary (June through October); consistently used habitats for extended periods of time; and exhibited inter-annual site fidelity for the PKD Bay system.

NMFS expects that the short-term direct and indirect ecological, social and economic effects of revising current HAPCs for bluefin tuna spawning, eggs, and larvae in the Gulf of Mexico and for sandbar shark in the Mid-Atlantic, and creating new HAPCs for lemon sharks off southeastern Florida and for sand tiger sharks in Delaware Bay and in the PKD Bay system of Massachusetts would be neutral, as this process only designates habitat and there are no additional associated management measures under evaluation in Draft Amendment 10 for these HAPCs. Similarly, NMFS expects that the long-term direct ecological, social and economic effects of modifying and creating these HAPCs would be neutral. However, NMFS expects that the long-term indirect ecological, social, and economic effects of Alternatives 3b, 4b, 5b, and 6b would be minor and beneficial as a result of any future consultations as the Habitat Consultation process and resulting conservation recommendations could reduce any potential adverse impacts to HAPCs from future federal actions. This could result in an overall positive conservation benefit. These preferred

alternatives would permit the incorporation and consideration of the best available scientific information in considering an HAPC designation for, among other things, purposes of focusing conservation efforts and avoiding adverse impacts through the Habitat Consultation process, inform the public of areas that could receive additional scrutiny from NMFS with regards to EFH impacts, and/or promote additional area-based research, as necessary.

Fishing and Non-Fishing Impacts and Conservation

Recommendations

As analyzed in Amendment 1, since nearly all HMS EFH is comprised of open water habitat, all HMS fishing gears but bottom longline and shrimp trawl do not have an effect on EFH. For some shark species, EFH includes benthic habitat types such as mud or sandy bottom that might be affected by fishing gears. NMFS has determined that bottom tending gears such as bottom longline and shrimp trawls, which are the two gears most likely to impact EFH, have a minimal and only temporary effect on EFH. There is no new information that has become available since Amendment 1 to the 2006 Consolidated HMS FMP that would alter this conclusion. As a result, NMFS is not proposing any measures or alternatives to minimize fishing impacts on these habitats.

However, although adverse effects are not anticipated, NMFS has provided an example list of conservation recommendations in Chapter 5 of Draft Amendment 10 that could address shark bottom longline fishing impacts; these recommendations could apply to all areas designated as either EFH or HAPCs. This section is included to satisfy the EFH provisions concerning mandatory contents of FMPs, specifically the Conservation and Enhancement requirements at § 600.815(a)(6). This amendment similarly evaluates the potential adverse effects of fishing with all HMS gear types on designated and proposed EFH and HAPCs in Chapter 5 and provides conservation recommendations, as necessary.

Opportunities for Public Comment

NMFS will conduct public hearing conference calls and webinars to allow for opportunities for interested members of the public from all geographic areas to submit verbal comments on Draft Amendment 10. These will be announced at a later date and in the **Federal Register**. NMFS has also requested time on the meeting agendas of the relevant Regional Fishery Management Councils (i.e., the Caribbean, Gulf of Mexico, South Atlantic, Mid-Atlantic, and New England Fishery Management Councils) to present information on Draft Amendment 10. Information on the date and time of

those presentations will be provided on the appropriate council agendas.

The webinar presentation and conference call transcripts will be made available at this website:

<http://www.nmfs.noaa.gov/sfa/hms/documents/fmp/am10/index.html>. Transcripts from Council meetings may be provided by the Councils on respective websites.

Public Hearing Code of Conduct

The public is reminded that NMFS expects participants at public hearings and council meetings to conduct themselves appropriately. At the beginning of each meeting, a representative of NMFS will explain the ground rules (e.g., all comments are to be directed to the agency on the proposed action; attendees will be called to give their comments in the order in which they registered to speak; each attendee will have an equal amount of time to speak; attendees may not interrupt one another; etc.). NMFS representative(s) will structure the meeting so that all attending members of the public will be able to comment, if they so choose, regardless of the controversial nature of the subject(s). Attendees are expected to respect the ground rules, and those that do not may be asked to leave the meeting.

Authority: 16 U.S.C. 971 *et seq.*, and 1801 *et seq.*

Dated: September 2, 2016

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