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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 160801681-6999-02]

RIN 0648-BG22

**International Fisheries; Tuna and Tuna-like Species in the Eastern Pacific Ocean;
Silky Shark Fishing Restrictions and Fish Aggregating Device Data Collection and
Identification**

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

ACTION: Final rule.

SUMMARY: NMFS is issuing regulations under the Tuna Conventions Act to implement certain provisions of two Resolutions adopted by the Inter-American Tropical Tuna Commission (IATTC) in 2016: Resolution C-16-01 (*Collection and Analyses of Data On Fish-Aggregating Devices*) and Resolution C-16-06 (*Conservation Measures for Shark Species, with Special Emphasis on the Silky Shark (Carcharhinus Falciformis) for the Years 2017, 2018, and 2019*). Per Resolution C-16-01, these regulations require the owner or operator of a U.S. purse seine vessel to ensure characters of a unique code be marked indelibly on each fish aggregating device (FAD) deployed or modified on or after January 1, 2017, in the IATTC Convention Area. The vessel owner or operator must record and submit information about the FAD, as described in Annex I of Resolution C-16-01. Per Resolution C-16-06, these regulations prohibit the owner or operator of a U.S.

purse seine vessel from retaining on board, transshipping, landing, or storing, in part or whole, carcasses of silky sharks caught by purse-seine vessels in the IATTC Convention Area. These regulations also provide limits on the retained catch of silky sharks caught in the IATTC Convention Area. This rule is necessary for the United States to satisfy its obligations as a member of the IATTC.

DATES: This rule is effective January 1, 2017.

ADDRESSES: Copies of the Regulatory Impact Review and other supporting documents are available via the Federal eRulemaking Portal: <http://www.regulations.gov>, docket NOAA-NMFS-2016-0106 or by contacting the Regional Administrator, Barry A. Thom, NMFS West Coast Region, 1201 N.E. Lloyd Boulevard, Suite 1100, Portland Oregon, 97232-1274, or *RegionalAdministrator.WCRHMS@noaa.gov*.

FOR FURTHER INFORMATION CONTACT: Rachael Wadsworth, NMFS, West Coast Region, 562-980-4036.

SUPPLEMENTARY INFORMATION: On October 11, 2016, NMFS published a proposed rule in the **Federal Register** (81 FR 70080) to implement certain provisions of Resolutions C-16-01 and C-16-06 adopted by the IATTC in 2016. The proposed rule contained additional background information, including information on the IATTC, the international obligations of the United States as an IATTC member, and the need for regulations. The 30-day public comment period for the proposed rule closed on November 10, 2016.

The final rule is implemented under the Tuna Conventions Act (16 U.S.C. 951 *et seq.*), as amended on November 5, 2015, by title II of Public Law 114-81. The recent amendments direct the Secretary of Commerce, in consultation with the Secretary of

State, and, with respect to enforcement measures, the U.S. Coast Guard, to promulgate such regulations as may be necessary to carry out the United States' obligations under the Antigua Convention, including recommendations and decisions adopted by the IATTC. The authority of the Secretary of Commerce to promulgate such regulations has been delegated to NMFS. This rule implements certain provisions of Resolutions C-16-01 and C-16-06 for U.S. commercial fishing vessels that fish for tuna or tuna-like species in the IATTC Convention Area. The preamble of the proposed rule included a detailed description of the elements of this rule.

This rule includes four elements: two elements regarding FADs and two elements regarding silky sharks. The first element requires the owner or operator of a U.S. purse seine vessel to ensure characters of a unique code be marked indelibly on each fish aggregating device (FAD) deployed or modified on or after January 1, 2017. The vessel owner or operator must select one of the following two options for the unique code for each FAD: (1) obtain a unique code from NMFS West Coast Region that NMFS has obtained from the IATTC Secretariat, as specified in Annex I of Resolution C-16-01 or (2) use an existing unique identifier associated with the FAD (*e.g.*, the manufacturer identification code for the attached buoy).

The vessel owner or operator is required to ensure the characters for the unique code be at least five centimeters in height on the upper portion of the attached radio or satellite buoy in a location that does not cover the solar cells used to power the equipment. For FADs without attached radio or satellite buoys, the characters are required to be marked indelibly on the uppermost or emergent top portion of the FAD. In other words, the vessel owner or operator is required to ensure the marking is durable and

will not fade or be erased (*e.g.*, marked using an epoxy-based paint or an equivalent in terms of lasting ability) and visible at all times during daylight. In circumstances where the observer is unable to view the unique code, the captain or crew is required to assist the observer (*e.g.*, by providing the unique code of the FAD to the observer).

The second element requires the owner or operator of a vessel to record and submit information about the FAD to the address specified by the Highly Migratory Species (HMS) Branch, Sustainable Fisheries Division, NMFS West Coast Region (Suite 4200, 501 W. Ocean Blvd., Long Beach, CA 90802). Owners and operators of a FAD are required to record this information on the standard form developed by the IATTC Secretariat and provided to the owners and operators by the HMS Branch.

The third element prohibits the crew, operator, and owner of a commercial purse seine fishing vessel of the United States used to fish for tuna or tuna-like species from retaining on board, transshipping, storing, or landing any part or whole carcass of a silky shark that is caught in the Convention Area. U.S. purse seiners do not target silky sharks, yet they are caught incidentally and are primarily discarded as discussed in the

Classification Section.

The fourth element requires the crew, operator, and owner of a U.S. longline fishing vessel to limit the retention of silky sharks caught in the IATTC Convention Area to a maximum of 20 percent by weight of the total catch of fish during any fishing trip that occurred in whole or in part in the IATTC Convention Area. U.S. longline vessels fishing in the IATTC Convention Area do not target, and infrequently catch, silky sharks. Data from 2008 to 2015 show that any incidentally caught silky sharks are released, and

almost all are released alive. Silky sharks are commonly released by cutting the line or dehooking the shark before it is brought onboard the vessel.

Public Comments and Responses

NMFS received one comment letter during the 30-day public comment period that closed on November 10, 2016. The comment letter was from a representative of Tri-Marine Management Company, LLC (Tri-Marine). Three distinct comments are expressed in the letter, which NMFS responds to below.

Comment 1: Unfortunately, scientific data shows total mortality of silky sharks on purse seiners still exceeds 84 percent (http://www.intres.com/articles/meps_oa/m521p143.pdf).

The conservation gain of this measure will be very limited given the poor survivability of released sharks.

Response: NMFS agrees that the anticipated conservation benefit for the U.S. purse seine fleet in the eastern Pacific Ocean (EPO) following these regulations is likely minimal. As noted in the preamble of the proposed rule, silky sharks are not targeted by U.S. purse seine vessels in the EPO and they are infrequently caught. However, this is not the case in other IATTC nations, where silky sharks are retained and consumed. The IATTC scientific staff has specifically recommended prohibiting retention in purse seine fisheries, similar to the measures adopted for oceanic whitetip sharks Resolution C-11-10 (*Resolution on the Conservation of Oceanic Whitetip Sharks Caught in Association with Fisheries in the Antigua Convention Area*).

Although studies in the Pacific Ocean have shown that a large percentage of silky sharks do not survive after undergoing the brailing process, restrictions on retention can

remove the incentive for purse seine vessels to target silky sharks. Therefore, much of the conservation benefit from this Resolution is expected from implementing this restriction by IATTC nations with vessels that target silky sharks. NMFS is implementing this provision of the Resolution to comply with U.S. obligations as a member of the IATTC.

Comment 2: While we understand and respect the conservation aim of this proposed rule, the operational implications of demonstrating full compliance were not adequately accounted for by the IATTC and should be considered by NMFS in the development and enforcement of this rule. Silky sharks are often caught unintentionally in purse seine sets on schools of tuna that are associated with FADs, and also in unassociated sets. When tuna and other non-target species are caught in purse seine sets, the net is brought alongside the vessel and everything (including silky sharks) is scooped onto the deck using a brailer. Brails are screened for non-target species like sharks when they are brought onboard. When silky sharks are seen, the crew carefully releases them overboard using best practices, which they are trained on (<http://www.issfguidebooks.org/purseseine-3-14/>).

Brails are large, each containing as much as seven metric tons (mt) of fish, which are conveyed quickly from the brail to the fish wells to preserve the quality of the catch. While crew, officers, and onboard observers are diligent in identifying, releasing, and logging the catch of silky sharks, there are still instances where sharks are inadvertently loaded into fish wells, especially very small sharks. In order to demonstrate full compliance with this rule, each brail would need to be examined in its entirety (*e.g.*, dumped out on deck before being loaded into fish wells). For many vessels this is not

feasible without greatly slowing operations to a point where fish quality may not meet acceptable standards.

The negative economic impacts due to slowed operations and fish waste because of poor quality would be significant. Therefore, if this proposed rule is adopted, we urge you to consider guidelines for implementation and enforcement that prohibit the *intended* retention of silky sharks, but do not penalize purse seine vessel operators in the rare event that silky sharks are identified at the point of offload.

Response: NMFS recognizes that methodically checking for and discarding silky sharks on the deck takes more time and effort than dropping the catch into wells without searching for sharks. However, the language in Resolution C-16-06 is not flexible enough to prohibit only the *intended retention* of silky sharks. The United States must implement Resolution C-16-06 to satisfy obligations as a member of the IATTC.

In addition, regulations to prohibit the retention onboard, transshipping, landing, or storing of sharks is not without precedent for purse seine vessels fishing for tuna in the Pacific Ocean. Many of the large U.S. purse seine vessels that could catch silky sharks also fish in the western and central Pacific Ocean and are subject to NMFS regulations at 50 CFR 300.226 that prohibit the retention of silky sharks in those waters (without an exception for unintentional retention). Therefore, the practice is feasible. U.S. purse seine vessels in the EPO are also subject to regulations at 50 CFR 300.27, which already prohibit retention of oceanic whitetip shark (without an exception for unintentional retention), which presumably present the same feasibility issues.

Comment 3: We encourage NMFS to promote more effective conservation measures for silky sharks at the IATTC, such as a measure that would require the fins of

any sharks landed in any fishery in the Convention Area to be naturally attached rather than applying a fins-to-carcass ratio. In addition, we recognize that the catch of silky sharks is higher in FAD sets than in unassociated sets, and are highly supportive of scientifically based, equitably applied, FAD management.

Response: NMFS agrees with the commenter’s suggestion to pursue shark measures in the IATTC that would prohibit landing with fins-attached. Such proposals have been tabled for consideration by the IATTC since 2012, and the United States has strongly supported these proposals.

Changes from the Proposed Rule

With the exception of a non-substantive adjustment to the wording of the new definition “HMS Branch” in 50 CFR 300.21, there are no changes to the regulatory text in the final rule from the proposed rule.

Classification

The NMFS Assistant Administrator has determined that this proposed rule is consistent with the Tuna Conventions Act and other applicable laws.

This action is categorically excluded from the requirement to prepare an Environmental Assessment in accordance with NOAA Administrative Order (NAO) 216-6. A memorandum for the file has been prepared that sets forth the decision to use a categorical exclusion, and a copy is available from NMFS (see **ADDRESSES**).

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

This rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) and which has been approved by OMB Control Number

0648-0148. NMFS amended an existing supporting statement for the Pacific Tuna Fisheries Logbook to include the data collection requirements for FADs, as described in this rule. Public reporting burden for the additional collection of information is estimated to average ten minutes per form, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (see ADDRESSES) and by e-mail to *OIRA_Submission@omb.eop.gov*, or fax to (202) 395-5806.

Regarding the elements of the rule pertaining to silky sharks; there are no new collection-of-information requirements associated with this action that are subject to the PRA, and existing collection-of-information requirements still apply under the following Control Numbers: 0648-0593 and 0648-0214.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number. All currently approved NOAA collections of information may be viewed at:

http://www.cio.noaa.gov/services_programs/prasubs.html.

The Chief Counsel for Regulation, Office of the General Counsel, Department of Commerce, determined that this rule would not have a significant economic impact on a substantial number of small entities. Although an Initial Regulatory Flexibility Analysis (IRFA) was published to aid the public in commenting upon the small business impact of

the proposed regulations, that analysis concluded that the action will not have a significant adverse economic impact on a substantial number of small entities. Public comment was solicited on the IRFA and proposed rule, and no challenges to the conclusions or other substantive issues in the IRFA were received through public comment. Accordingly, a Final Regulatory Flexibility Analysis was not prepared. Because the actions contained in this final rule are not expected to have a significant economic impact on a substantial number of small entities, the Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule will not have a significant adverse impact on a substantial number of small entities. The factual basis for this determination is described below.

As described in the **SUPPLEMENTARY INFORMATION** section, the regulations require FAD identification and data reporting as well as fishing restrictions on silky sharks. The entities directly affected by the actions of this final rule are (1) U.S. purse seine vessels that use FADs to fish for tuna or tuna-like species in the IATTC Convention Area, and (2) U.S. purse seine and longline vessels that catch silky sharks.

The United States Small Business Administration (SBA) defines a “small business” (or “small entities”) as one with annual revenue that meets or is below an established size standard. On December 29, 2015, NMFS issued a final rule establishing a small business size standard of \$11 million in annual gross receipts for all businesses primarily engaged in the commercial fishing industry (NAICS 11411) for Regulatory Flexibility Act (RFA) compliance purposes only (80 FR 81194; December 29, 2015). The \$11 million standard became effective on July 1, 2016, and is to be used in place of the

U.S. SBA current standards of \$20.5 million, \$5.5 million, and \$7.5 million for the finfish (NAICS 114111), shellfish (NAICS 114112), and other marine fishing (NAICS 114119) sectors of the U.S. commercial fishing industry in all NMFS rules subject to the RFA after July 1, 2016. *Id.* at 81194. The new standard results in fewer commercial finfish businesses being considered small.

NMFS prepared analyses for this regulatory action in light of the new size standard. All of the entities directly regulated by this regulatory action are commercial finfish fishing businesses. Under the new size standards, the entities for which the action on FADs applies are considered large and small business, and the longline vessels for which the action on silky sharks applies to be small business.

As of July 2016, there are 15 large purse seine vessels (with at least 363 mt of fish hold volume) listed on the IATTC Regional Vessel Register. The number of U.S. large purse seine vessels on the IATTC Regional Vessel Register has increased substantially in the past two years due to negotiations regarding the South Pacific Tuna Treaty (SPTT) and the interest expressed by vessel owners that typically fish in the western and central Pacific Ocean (WCPO) in relocating to the EPO. Neither gross receipts nor ex-vessel price information specific to individual fishing vessels are available to NMFS, so NMFS applied indicative regional cannery prices—as approximations of ex-vessel prices—to annual catches of individual vessels to estimate their annual receipts. Indicative regional cannery prices are available through 2014 (developed by the Pacific Islands Forum Fisheries Agency; available at <https://www.ffa.int/node/425>). NMFS estimated vessels' annual receipts during 2012-2014. Using this approach, NMFS estimates that among the affected vessels, the range in annual average receipts in 2012-2014 was \$3 million to \$20

million and the median was about \$13 million. Thus, NMFS estimates that slightly more than half of the affected large purse seine vessels are small entities.

Because only the large purse seine vessels fish with FADs and incidentally catch silky sharks in the EPO, the action is not expected to impact the coastal purse seine vessels. U.S. purse seiners do not target silky sharks in the EPO. Since 2005, the best available data from observers show that the incidental catches of silky sharks are primarily discarded. However, a small percentage has been landed in the past ten years. For example, in 2015, a year in which more than three large purse seine vessels fished in the EPO, about 3 percent of the total catches of silky sharks were landed and the rest were discarded either dead or alive. Since at least 2005, the observer coverage rate on class size 6 vessels in the EPO has been 100 percent.

As of August 2016, the IATTC Regional Vessel Register lists 158 U.S. longline vessels that have the option to fish in the IATTC Convention Area. The majority of these longline vessels possess Hawaii Longline Limited Access Permits (issued under 50 CFR 665.13). In addition, there are U.S. longline vessels based on the U.S. West Coast, some of which operate solely under the Pacific HMS permit. U.S. West Coast-based longline vessels operating under the Pacific HMS permit fish primarily in the EPO and are currently restricted to fishing with deep-set longline gear outside of the U.S. West Coast exclusive economic zone (EEZ).

There have been less than three West Coast-based vessels operating under the HMS permit since 2005. Therefore, landings and ex-vessel revenue are confidential. However, the number of Hawaii-permitted longline vessels that have landed in West Coast ports has increased from 1 vessel in 2006 to 14 vessels in 2014. In 2014, 621 mt of

highly migratory species were landed by Hawaii permitted longline vessels with an average ex-vessel revenue of approximately \$247,857 per vessel. For the longline fishery, the ex-vessel value of catches by the Hawaii longline fleet in 2012 was about \$87 million. With 129 active vessels in that year, per-vessel average revenues were about \$0.7 million, well below the \$11 million threshold for finfish harvesting businesses. NMFS considers all longline vessels, for which data is non-confidential, that catch silky sharks in the IATTC Convention Area to be small entities for the purposes of the RFA.

U.S. longline vessels fishing in the IATTC Convention Area, whether under the Hawaii Longline Limited Access Permit or the Pacific HMS permit, do not target silky sharks and all those caught incidentally are released. An evaluation of total catch per longline trip where silky sharks have been caught and released shows that, if the average weights of silky sharks are approximated, the amount of silky sharks caught by U.S. longline vessels fishing in the EPO do not come close to 20 percent by weight of the total catch of fish during a fishing trip.

An IRFA was prepared for the proposed rule, and the analysis concluded that the action will not have a significant adverse economic impact on a substantial number of small entities. Under the new size standards, the entities impacted by the action on FADs are considered large and small business. However, a disproportional economic effect between small and large businesses is not expected. There will be only a minimal additional time burden for owners and operators of large purse seine vessels to ensure characters of a unique code be marked indelibly on their FADs and to record data for FAD activities. And while the large purse seine vessels impacted by the actions with respect to treatment of silky sharks would be required to release all silky sharks, U.S.

purse seine vessels do not target silky sharks, and primarily release those caught incidentally. However, there may be some modifications to the fishing practices of these large and small entities to release all catch of silky sharks. NMFS considers the longline vessels for which the action on silky sharks applies to be small entities. U.S. longline vessels fishing in the EPO do not target silky sharks and release all those incidentally caught. U.S. longline vessels only occasionally catch a small amount of silky sharks on fishing trips in the EPO. Therefore, this action is not expected to impact the fishing practices of these longline vessels.

Thus, these actions are not expected to substantially change the typical fishing practices of affected vessels. In addition, any impact to the income of U.S. vessels would be minor. Therefore, NMFS has determined that the action is not expected to have a significant economic impact on a substantial number of small entities. The action will also not have a disproportional economic impact on small business entities.

List of Subjects in 50 CFR Part 300

Fish, Fisheries, Fishing, Fishing vessels, International organizations, Marine resources, Reporting and recordkeeping requirements, Treaties.

Dated: November 28, 2016.

Samuel D. Rauch III,
Deputy Assistant Administrator for Regulatory Programs,
National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 300 is amended as follows:

PART 300—INTERNATIONAL FISHERIES REGULATIONS

Subpart C—Eastern Pacific Tuna Fisheries

1. The authority citation for part 300, subpart C, continues to read as follows:

Authority: 16 U.S.C. 951 *et seq.*

2. In § 300.21, add a definition for “Highly Migratory Species (HMS) Branch” in alphabetical order to read as follows:

§ 300.21 Definitions.

* * * * *

Highly Migratory Species (HMS) Branch means the Chief of the HMS Branch of the Sustainable Fisheries Division, National Marine Fisheries Service West Coast Region, Suite 4200, 501 W. Ocean Blvd., Long Beach, CA 90802.

* * * * *

3. In § 300.24, add paragraphs (ee) through (hh) to read as follows:

§ 300.24 Prohibitions.

* * * * *

(ee) Fail to ensure characters of a unique code are marked indelibly on a FAD deployed or modified on or after January 1, 2017, in accordance with § 300.25(h).

(ff) Fail to record and report data on interactions or activities on FADs as required in § 300.25(i).

(gg) Use a commercial purse seine fishing vessel of the United States to retain on board, transship, store, or land any part or whole carcass of a silky shark (*Carcharhinus falciformis*) in contravention of § 300.27(e).

(hh) Use a U.S. longline vessel to catch silky shark in contravention of § 300.27(f).

4. In § 300.25:

a. In paragraph (g)(4), remove “(h)(1) and (2)” and “(h)(5)” and add in their place “(g)(1) and (2)” and “(g)(5)”;

b. In paragraph (g)(5), remove “(h)(4)” and add in its place “(g)(4)”;

c. Add paragraphs (h) and (i).

The additions read as follows:

§ 300.25 Eastern Pacific fisheries management.

* * * * *

(h) *FAD identification requirements for purse seine vessels.* (1) For each FAD deployed or modified on or after January 1, 2017, in the IATTC Convention Area, the vessel owner or operator must either: obtain a unique code from HMS Branch; or use an existing unique identifier associated with the FAD (*e.g.*, the manufacturer identification code for the attached buoy).

(2) U.S. purse seine vessel owners and operators shall ensure the characters of the unique code or unique identifier be marked indelibly at least five centimeters in height on the upper portion of the attached radio or satellite buoy in a location that does not cover the solar cells used to power the equipment. For FADs without attached radio or satellite buoys, the characters shall be on the uppermost or emergent top portion of the FAD. The vessel owner or operator shall ensure the marking is visible at all times during daylight. In circumstances where the on-board observer is unable to view the code, the captain or

crew shall assist the observer (*e.g.*, by providing the FAD identification code to the observer).

(i) *FAD data reporting for purse seine vessels.* U.S. vessel owners and operators must ensure that any interaction or activity with a FAD is reported using a standard format provided by the HMS Branch. The owner and operator shall ensure that the form is submitted to the address specified by the HMS Branch.

5. In § 300.27, redesignate paragraphs (e) through (h) as paragraph (g) through (j) and add paragraphs (e) and (f) to read as follows:

§ 300.27 Incidental catch and tuna retention requirements.

* * * * *

(e) *Silky shark restrictions for purse seine vessels.* The crew, operator, and owner of a commercial purse seine fishing vessel of the United States used to fish for tuna or tuna-like species is prohibited from retaining on board, transshipping, storing, or landing any part or whole carcass of a silky shark (*Carcharhinus falciformis*) that is caught in the Convention Area.

(f) *Silky shark restrictions for longline vessels.* The crew, operator, and owner of a longline vessel of the United States used to fish for tuna or tuna-like species must limit the retained catch of silky sharks caught in the IATTC Convention Area to a maximum of 20 percent in weight of the total catch during each fishing trip that occurs in whole or in part in the IATTC Convention Area.

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