



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 223

[Docket No. 240508-0132]

RIN 0648-BM49

Endangered and Threatened Wildlife and Plants; Protective Regulations for the Oceanic Whitetip Shark (*Carcharhinus longimanus*)

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

ACTION: Proposed rule; request for comments; notice of availability of a draft
environmental assessment.

SUMMARY: We, NMFS, are proposing to issue protective regulations under section
4(d) of the Endangered Species Act (ESA) for the conservation of the threatened oceanic
whitetip shark (*Carcharhinus longimanus*). The proposed regulations would apply all of
the prohibitions listed under ESA sections 9(a)(1)(A) through 9(a)(1)(G) for the species,
with limited exceptions for scientific research and law enforcement activities that
contribute to the conservation of the species. In addition, we are announcing the
availability of a draft environmental assessment (EA) that analyzes the environmental
impacts of promulgating these regulations. Finally, we solicit comments from the public
and all interested parties regarding this proposed rule and the draft EA.

DATES: Comments on this proposed rule must be received by [*insert date 60 days after
publication in the **FEDERAL REGISTER***].

ADDRESSES: A plain language summary of this proposed rule is available at
<https://www.regulations.gov/docket/NOAA-NMFS-2023-0117>. You may submit

comments on the proposed rule, identified by NOAA-NMFS-2023-0117 by the following method:

- *Electronic Submissions:* Submit all electronic comments via the Federal e-Rulemaking Portal. Go to <https://www.regulations.gov> and enter NOAA-NMFS-2023-0117 in the Search box. Click on the “Comment” icon, complete the required fields, and enter or attach your comments.

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 <https://www.regulations.gov> without change. All personal identifying information (*e.g.*, name and address), 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).

The proposed rule and other reference materials regarding this determination are available electronically at <https://www.fisheries.noaa.gov/species/oceanic-whitetip-shark#conservation-management>.

FOR FURTHER INFORMATION CONTACT: Adrienne Lohe, NMFS Office of Protected Resources, 301-427-8442.

SUPPLEMENTARY INFORMATION:

Background

The prohibitions listed under section 9(a)(1) of the ESA automatically apply when a species is listed as endangered, but not when a species is listed as threatened. In the case of a species listed as threatened, the Secretary of Commerce (Secretary) shall issue such regulations as deemed necessary and advisable to provide for the conservation of the species (16 U.S.C. 1533(d)). The Secretary may by regulation prohibit with respect to

any threatened species any or all acts prohibited under section 9(a)(1). Section 9(a)(1) of the ESA prohibits any person subject to the jurisdiction of the United States from: (a) importing any such species into, or exporting any such species from the United States; (b) taking any such species within the United States or the territorial sea of the United States; (c) taking any such species upon the high seas; (d) possessing, selling, delivering, carrying, transporting, or shipping, by any means whatsoever, any such species that was illegally taken; (e) delivering, receiving, carrying, transporting, or shipping in interstate or foreign commerce, by any means whatsoever and in the course of commercial activity, any such species; (f) selling or offering for sale in interstate or foreign commerce any such species; or (g) violating any regulation pertaining to such species or to any threatened species of fish or wildlife (16 U.S.C. 1538(a)(1)). The ESA defines “take” as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct (16 U.S.C. 1532(19)). The term “harm” is defined in our regulations as any act which kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation that results in death or injury of wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding, or sheltering (50 CFR 222.102). The term “harm” is used in this proposed rule as defined in the regulations.

The final rule to list the oceanic whitetip shark (*Carcharhinus longimanus*) as a threatened species under the ESA was published on January 30, 2018, and became effective March 1, 2018 (83 FR 4153). The proposed and final rules to list the species as threatened (81 FR 96304, December 29, 2016; 83 FR 4153, January 30, 2018), the Oceanic Whitetip Status Review Report (Young *et al.* 2017), and the Draft Recovery Status Review (NMFS 2023) provide extensive information on the status of the oceanic whitetip shark and the threats facing this species. We relied heavily on these documents

while developing this proposed rule, and provide a brief summary of the species' status and threats below.

The oceanic whitetip shark is a highly migratory, pelagic species distributed in tropical and subtropical waters globally. The species is relatively long-lived, and has low to moderate productivity relative to other shark species. Although the oceanic whitetip shark is currently thought to consist of a single population, some population structuring (*i.e.*, genetic differentiation between population segments) is evident, particularly between the Atlantic and Indo-Pacific (Ruck 2016; Camargo *et al.* 2016). Historical fisheries data and observations suggest that the species was once among the most common and ubiquitous shark species in tropical waters around the world (NMFS 2023). More recently, however, numerous lines of evidence from all three major ocean basins (Atlantic, Pacific, and Indian Oceans) suggest that the oceanic whitetip shark has experienced significant historical declines of varying magnitudes over the past several decades, and that these declines are likely ongoing (NMFS 2023). Rigby *et al.* (2019) estimated a median global population reduction at 98-100 percent over three generation lengths (61.2 years). This is the only global trend estimate available for the oceanic whitetip shark. The following threats have been identified as contributing to the threatened status of the species: incidental bycatch in commercial fisheries (particularly pelagic longlines (PLL), purse seines, and gillnets), international trade of oceanic whitetip shark fins, and inadequate regulatory mechanisms (management) to address these threats. There are several other stressors that are of lesser concern but that may work synergistically to negatively affect the population viability of oceanic whitetip sharks (*e.g.*, effects of climate change, pollutants, recreational fisheries).

In our listing determination for the species we concluded that, within the jurisdiction of the United States, regulations to control for overutilization of oceanic whitetip sharks in U.S. waters, including fisheries management plans with quotas and trip

limits, species-specific retention prohibitions in PLL gear, and finning regulations, were not in and of themselves inadequate such that they were contributing to the global extinction risk of the species (81 FR 96304, December 29, 2016). Further, NMFS has recently added the oceanic whitetip shark to the prohibited retention list for all U.S. Atlantic shark fisheries (89 FR 278, January 3, 2024). However, retention of oceanic whitetip sharks is not prohibited in all gear types or fisheries, and other forms of take beyond retention are not prohibited.

Application of Section 9 Prohibitions to the Oceanic Whitetip Shark

Based on the preceding information, we are proposing to apply all of the prohibitions listed under ESA sections 9(a)(1)(A) through (G) to the species, with limited exceptions. This will contribute to the conservation of the species by ensuring that the United States is not impeding the recovery of the species. We are proposing limited exceptions to the prohibitions on import, export, and take; these limited exceptions are more fully described in the next section.

Section 9(a)(1)(A) prohibits the import and export of endangered species to or from the United States. The international shark fin trade was identified as a significant threat to the oceanic whitetip shark in both the final listing of the species (83 FR 4153, January 30, 2018) and the Draft Recovery Status Review (NMFS 2023). Although the oceanic whitetip shark is not generally targeted in fisheries, the high value of oceanic whitetip shark fins creates an incentive for opportunistic retention and finning of oceanic whitetip sharks when caught, and is the main economic driver of mortality of this species in commercial fisheries throughout its global range. The United States makes up a small proportion of the global shark fin trade (Ferretti *et al.* 2020), and shark finning has been illegal in U.S. waters for many years. Additionally, the Shark Fin Sales Elimination Act, enacted as section 5946 of the National Defense Authorization Act for Fiscal Year 2023 (117 H.R. 7776, Pub. L. 117-263, Dec. 23, 2022), recently prohibited the possessing,

acquiring, receiving, transporting, offering for sale, selling, or purchasing a shark fin or a product containing a shark fin in the United States, with limited exceptions. However, prohibition of the import and export of oceanic whitetip sharks to or from the United States through this rule, if finalized, would serve to further deter illegal trade and transshipment activity within and through the United States.

Section 9(a)(1)(B) of the ESA prohibits the take of endangered species within the United States or the territorial seas of the United States, and section 9(a)(1)(C) prohibits the take of endangered species upon the high seas by any person subject to the jurisdiction of the United States. As stated previously, “take” under the ESA means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Take of oceanic whitetip sharks may be intentional or incidental, may occur during the course of commercial or recreational activities, and may result in direct and indirect impacts to an individual shark. Because much of the range of the oceanic whitetip shark occurs outside U.S. jurisdiction, it is important that protective regulations also prohibit take on the high seas by any person subject to U.S. jurisdiction. Protecting oceanic whitetip sharks from take, whether intentional or incidental, would help preserve the species’ populations occurring in U.S. waters as well as on the high seas, and slow the rate of population decline.

Sections 9(a)(1)(D), (E), and (F) of the ESA prohibit, among other things, the possession, sale, and transport of endangered species that are taken illegally or that are entered into interstate or foreign commerce. The extension of these prohibitions to the oceanic whitetip shark would serve as a further deterrent to illegal trade in its fins or other parts.

Lastly, we are proposing to extend the section 9(a)(1)(G) prohibition against violating this and any other regulations we promulgate pertaining to the oceanic whitetip shark.

Summary of Exceptions to Section 9 Prohibitions

The ESA allows for specific exceptions to the section 9 prohibitions through interagency consultations as prescribed by ESA section 7 or permits issued pursuant to ESA section 10. If this proposed rule becomes final and the section 9 prohibitions are extended to the threatened oceanic whitetip shark, the following exceptions would also apply.

Section 7 of the ESA requires all Federal agencies to consult with us on actions they fund, authorize, or carry out that may affect species listed under the ESA (16 U.S.C. 1536(a)(2)). NMFS consults on a range of activities conducted, funded, or authorized by Federal agencies, including but not limited to fishery regulations and scientific research activities. Incidental take of the oceanic whitetip shark that results from federally conducted, funded, or authorized activities for which section 7 consultations are completed would not constitute violations of section 9 prohibitions against take, provided the activities are conducted in accordance with all reasonable and prudent measures (RPMs) and terms and conditions contained in any biological opinion issued by NMFS.

Sections 10(a)(1)(A) and (B) of the ESA provide us with the authority to grant exceptions to the ESA's prohibitions for certain activities. Section 10(a)(1)(A) allows NMFS to permit any action otherwise prohibited by section 9 for scientific purposes or to enhance the propagation or survival of the affected species. We issue scientific research and enhancement permits to Federal and non-Federal entities conducting research or conservation activities that involve take of a listed species, in exception to any section 9 prohibitions. Section 10(a)(1)(B) allows NMFS to issue incidental take permits to non-Federal entities performing activities that may incidentally take a listed species in the course of an otherwise lawful activity; these permits provide an exception to the section 9(a)(1)(B) prohibitions.

We have decided to propose exceptions to the ESA section 9(a)(1)(A), (B), and (C) prohibitions for the oceanic whitetip shark, to apply in certain circumstances described below. We are proposing exceptions to these prohibitions for two classes of activities that provide for the conservation of the species. Specifically, and under specified conditions described below, we propose to except: (1) scientific research activities from the section 9(a)(1)(A), (B), and (C) prohibitions; and (2) law enforcement activities from the section 9(a)(1)(B) take prohibitions. These exceptions are described in detail in the following sections.

Exception to Prohibitions for Scientific Research Activities

Currently, there are many data gaps related to the biology, life history, ecology, movement patterns, habitat use, and population structure of the oceanic whitetip shark. Scientific research to fill these data gaps is critical for improving our understanding of the species' conservation status and threats facing the species, assessing the effectiveness of current and future management measures, measuring recovery progress, and ultimately conserving the species. The species' life history parameters and population structure may be investigated through the collection and analysis of tissue samples (*e.g.*, fin clip, tissue plug, blood) from live animals. Determination of life history parameters may also be accomplished through the collection and analysis of biological samples (*e.g.*, vertebrae, reproductive organs, blood, and other internal organs) from animals that previously suffered mortality unrelated to the need to obtain biological samples (*i.e.*, sample collection from salvaged carcasses, or samples taken by fisheries observers or scientists from oceanic whitetip sharks dead at haulback). Reproductive information may be gleaned using ultrasonography techniques on live female sharks that may or may not be pregnant. Data on movements and habitat use may be obtained through application of video cameras/Crittercams, as well as tagging (*e.g.*, conventional, acoustic, satellite, biologgers, physiological), release, and recapture of live animals. Some of these research

activities require targeted and/or incidental capture or handling of individual sharks during fishing activities in order to take biological samples, apply various tracking tags, and/or conduct other research activities. Therefore, these and other types of research activities that will contribute to the species' conservation would require conditional exceptions from the take prohibitions. We propose an exception from the section 9(a)(1)(B) and (C) prohibitions for scientific research activities when the following conditions are met: 1) the scientific research activities are carried out by or in collaboration with a research institution; state, tribal, or federal agency; or other scientific organization in a good faith effort to advance the conservation and/or recovery of the species; 2) the scientific research activities are intended to involve only non-lethal take, *i.e.*, no individuals may be intentionally killed for the purposes of scientific research under this exception; and 3) the scientific research activities are carried out in accordance with all other applicable laws and regulations. If these conditions are met, scientific research activities resulting in take would not constitute a violation of the prohibitions, and an ESA section 10(a)(1)(A) permit would not be required.

We also propose an exception from the section 9(a)(1)(A) prohibitions on import and/or export when the following conditions are met: 1) the import or export is accompanied by proper permits issued under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) indicating that the trade is for the purposes of scientific research; and 2) the import or export is carried out in accordance with all other applicable laws and regulations. If these conditions are met, import and/or export for the purposes of scientific research would not constitute a violation of the section 9(a)(1)(A) prohibitions, and an ESA section 10(a)(1)(A) permit would not be required.

Exception to Prohibitions for Law Enforcement Activities

There may be instances in which law enforcement officials or management authorities, including any employee or designee of NMFS or of any other governmental entity that has co-management authority for the oceanic whitetip shark, may need to take an oceanic whitetip shark when acting in the course of their official duties. We propose that the employee or designee, when acting in the course of official duties, be authorized to take an oceanic whitetip shark without an ESA section 10(a)(1)(A) permit if such action is necessary in the following circumstances: to aid a sick, injured, entangled, or stranded oceanic whitetip shark, to dispose of a dead oceanic whitetip shark, or to salvage a dead oceanic whitetip shark (or parts or samples thereof) that may be useful for scientific study.

Identification of Those Activities That Would Constitute a Violation of Section 9 of the ESA

On July 1, 1994, NMFS and the U.S. Fish and Wildlife Service (FWS) published a policy (59 FR 34272) that requires us to identify, to the extent known at the time a species is listed, those activities that would or would not be considered likely to result in a violation of section 9 of the ESA. The intent of this policy is to increase public awareness of the effect of a listing on proposed and ongoing activities within a species' range. Because we did not apply any of the section 9 prohibitions to the oceanic whitetip shark at the time of listing, we will now identify the activities that are likely to result in a violation of the proposed prohibitions in this proposed rule. Based on the best scientific and commercial data available, we conclude that the following categories of activities are those likely to result in a violation of the ESA section 9 prohibitions. Whether a violation results from a particular activity, however, is entirely dependent upon the facts and circumstances of each incident. The mere fact that an activity may fall within one of these categories does not mean that the specific activity will result in a violation; due to such factors as location and scope, specific actions may not result in direct or indirect adverse

effects on the species. Further, an activity not listed here may result in a violation.

However, the following types of activities are those that are likely to violate the prohibitions in section 9 that we propose to extend to the oceanic whitetip shark through this action:

1. Fishing activity that results in take of oceanic whitetip sharks, unless authorized by an incidental take statement issued through a biological opinion pursuant to section 7 of the ESA or permitted through section 10 of the ESA.

2. Interstate or foreign commerce in oceanic whitetip sharks or parts or products thereof.

3. Import or export of oceanic whitetip sharks, or parts or products thereof, unless under an ESA section 10 permit or subject to the scientific research activity exception in this proposed rule.

This non-exhaustive list provides examples of the types of activities that are likely to violate this proposed rule, if finalized. Identification of these activities is intended to help people identify actions with a high risk of violating the ESA, such that they can be avoided, and to encourage efforts to recover the oceanic whitetip shark. Persons or entities concluding that their activity is likely to violate the ESA are encouraged to immediately adjust or terminate that activity to avoid violations and to seek authorization under: (a) an ESA section 10 incidental take permit; (b) an ESA section 10 research and enhancement permit; or (c) an ESA section 7 consultation. The public is encouraged to contact us (see **FOR FURTHER INFORMATION CONTACT**) for assistance in determining whether circumstances at a particular location, involving these or any other activities, might constitute a violation of this proposed rule, if finalized.

We find that, based on the best available information, the following actions will not result in a violation of the section 9 prohibitions that we propose to extend to the species through this action:

1. Activities that result in incidental take authorized by an incidental take statement issued through a biological opinion pursuant to section 7 of the ESA or permitted through section 10 of the ESA.

2. Collection, handling, and possession of oceanic whitetip sharks and specimens thereof that are acquired lawfully in accordance with an ESA section 10 permit or through one of the exceptions in this proposed rule.

3. Import or export of oceanic whitetip shark, or parts or products thereof, under an ESA section 10 permit or through the scientific research activity exception in this proposed rule.

Public Comments Solicited

We are soliciting comments, information, and/or recommendations on any aspect of this proposed rule from all concerned parties (see **DATES** and **ADDRESSES**). We will consider all relevant information, comments, and recommendations received before reaching a final decision on ESA section 4(d) regulations for the oceanic whitetip shark. We may add or remove prohibitions or exceptions on the basis of public comment and in light of the biological status, conservation needs, and threats to the species.

Public Hearing

The ESA provides for a public hearing on this proposal, if requested. Requests must be filed by the date specified in the **DATES** section above.

Peer Review

In December 2004, the Office of Management and Budget issued a Final Information Quality Bulletin for Peer Review (Peer Review Bulletin), establishing minimum peer review standards, a transparent process for public disclosure, and opportunities for public input. The Peer Review Bulletin, implemented under the Information Quality Act (Pub. L. 106-554), is intended to provide public oversight on the quality of agency information, analyses, and regulatory activities. The text of the Peer

Review Bulletin was published in the **Federal Register** on January 14, 2005 (70 FR 2664). The Peer Review Bulletin requires Federal agencies to subject “influential” scientific information to peer review prior to public dissemination. Influential scientific information is defined as “information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions,” and the Peer Review Bulletin provides agencies broad discretion in determining the appropriate process and level of peer review. The Peer Review Bulletin establishes stricter standards for the peer review of “highly influential” scientific assessments, defined as information whose “dissemination could have a potential impact of more than \$500 million in any one year on either the public or private sector or that the dissemination is novel, controversial, or precedent-setting, or has significant interagency interest.” As stated previously, in developing this rule, we relied on previous NMFS reviews of this species, and thus we do not consider the scientific information underlying the proposed protective regulations to constitute newly compiled or disseminated influential scientific information requiring peer review per the Peer Review Bulletin.

References

A complete list of the references used in this proposed rule is available online (see **ADDRESSES**) and upon request (see **FOR FURTHER INFORMATION CONTACT**).

Classification

National Environmental Policy Act (NEPA)

In the case of a species listed as threatened, section 4(d) of the ESA directs that the Secretary of Commerce (Secretary) shall issue such regulations as the Secretary deems necessary and advisable to provide for the conservation of the species. The Secretary may, by regulation, prohibit, with respect to any threatened species of fish or wildlife, any or all acts prohibited under section 9(a)(1). Accordingly, the promulgation

of ESA section 4(d) protective regulations is subject to the requirements of NEPA, and we have prepared a draft EA analyzing the proposed 4(d) regulations and alternatives. We are seeking comment on the draft EA, which is available on the Federal eRulemaking Portal website (<https://www.regulations.gov>) or upon request (see **DATES** and **ADDRESSES**, above).

Executive Order (E.O.) 12866 and 14094 - Regulatory Planning and Review

This proposed rule has been determined to be not significant for the purposes of E.O. 12866, as amended by E.O. 14094.

Regulatory Flexibility Act

We prepared an initial regulatory impact analysis (IRFA) in accordance with section 603 of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601, *et seq.*). The IRFA analyzes the impacts to small entities that may be affected by the proposed rule. To review the IRFA, see the **ADDRESSES** section above. We welcome comments on this IRFA, which is summarized below.

The IRFA first identified the types and approximate number of small entities that would be subject to regulation under the proposed rule. It then evaluated the potential for the proposed rule to incrementally impact small entities, *i.e.*, result in impacts to small entities beyond those that would be incurred due to existing regulations but absent the proposed rule. The IRFA anticipates that regulations under the proposed rule would apply to thousands of small entities, but that only a small subset of these small entities would be impacted and impacts would be negligible. It is unlikely that the proposed rule would affect any small governmental jurisdictions. The small entities potentially impacted by the proposed rule are comprised of small businesses participating in numerous fisheries in the Atlantic Ocean, Eastern Pacific Ocean (EPO), and Western and Central Pacific Ocean (WCPO) management units, as well as small businesses involved in the commercial trade or transport of oceanic whitetip sharks or their derivative products. Any additional costs

associated with enforcement of the rule would be incurred by government agencies that do not qualify as small entities.

The proposed rule would prohibit the take, whether intentional or incidental, of oceanic whitetip sharks within waters of the United States or the territorial seas of the United States, as well as upon the high seas, by any person subject to the jurisdiction of the United States. Hundreds of small entities participating in commercial and recreational fisheries in the Atlantic Ocean, EPO, and WCPO Management Units (MUs) would be subject to prohibitions under the proposed regulations. These entities are categorized under North American Industry Classification System (NAICS) codes 114111 (commercial finfish fishing) and 487210 (scenic and sightseeing transportation (water)). For purposes of compliance with the RFA, NMFS has established a small business size standard of \$11 million in annual gross receipts for all businesses in the commercial fishing industry.

Oceanic whitetip sharks in international waters of the Atlantic Ocean, EPO, and WCPO MUs are managed by the International Commission for the Conservation of Atlantic Tunas, the Inter-American Tropical Tuna Commission, and the Western and Central Pacific Fisheries Commission. There are approximately 2,100 U.S.-flagged vessels participating in international fisheries under the management of these Regional Fishery Management Organizations (RFMOs). Binding measures of each of the three RFMOs prohibit the retention, transshipping, landing, storing, selling, or offering for sale any part or whole carcass of oceanic whitetip sharks in any fishery by Contracting Parties, including U.S.-flagged vessels and persons subject to the jurisdiction of the United States. In addition, the Atlantic Highly Migratory Species (HMS) Pelagic Longline Fishery and Hawaii Pelagic Shallow Set Longline Fishery already undergo section 7 consultation on effects of the fisheries' actions on oceanic whitetip sharks in waters of the U.S. Exclusive Economic Zone and on the high seas. Despite the current

lack of a 4(d) prohibition on take, NMFS included in biological opinions on each of the fisheries incidental take statements (ITSS) and RPMs intended to improve release conditions and post-release survival, as well as monitoring/reporting requirements for oceanic whitetip sharks. Given these baseline measures, the proposed rule is unlikely to impose additional reporting requirements on these fisheries for incidental take of oceanic whitetip sharks or result in any measurable incremental impacts to small entities due to their participation in international fisheries.

Impacts of the proposed rule on U.S. federally and state-managed fisheries would be minor. Oceanic whitetip sharks are not a targeted species in U.S. fisheries due to a combination of factors, and historical landings of the sharks in state and federal waters have been very low. Possession and landing of sharks is prohibited in multiple fisheries, as well as in state waters of several coastal and island states and U.S. territories. Oceanic whitetip sharks are generally found outside state water boundaries, making catch of the sharks in state waters rare even if landing is not prohibited. Since 2000, the highest reported single-year total for combined commercial and recreational landings of oceanic whitetip sharks in all state and federal waters was 26 pounds in 2002. NOAA Fisheries' annual landings statistics indicate that there were no commercial or recreational landings of oceanic whitetip sharks in U.S. state or federal waters from 2015 to 2020, and there have been no commercial landings in U.S. territorial waters since 2016.

Federally managed fisheries in the Atlantic most likely to interact with oceanic whitetip sharks and, therefore, most likely to be impacted by the proposed rule, include the Atlantic HMS fisheries and NMFS' Southeast Region's Coastal Migratory Pelagic (CMP) and Caribbean Reef Fish Fisheries. NMFS considers all HMS, CMP, and Caribbean Reef Fish fishery permit holders to be small entities because they had average annual receipts of less than \$11 million for commercial fishing in 2021 and the proposed rule would apply to all permit holders in these fisheries. However, this proposed rule is

not expected to incrementally impact permit holders in these fisheries in cases in which retention of oceanic whitetip sharks is already prohibited.

Recent Atlantic HMS fishery management measures prohibit the retention of oceanic whitetip sharks in all commercial and recreational HMS fisheries (89 FR 278, January 3, 2024). As of October 2022, approximately 206 Shark Directed Limited Access and 241 Shark Incidental Limited Access permits were issued. From 2017 through 2021, no oceanic whitetip sharks were landed in HMS commercial fisheries in U.S. waters of the Atlantic Ocean, including the Gulf of Mexico and Caribbean Sea. During that same time period, two oceanic whitetip sharks were harvested in the recreational sector. Thus, while this proposed rule could directly impact small entities with HMS Shark Directed Limited Access permits and Shark Incidental Limited Access permits, these impacts are expected to be none to negligible as these permit holders cannot retain any oceanic whitetip sharks under the current regulations. Similarly, any impacts of this proposed rule on small entities sponsoring HMS tournaments in which recreational permit holders participate and on HMS charter/headboat operators are also expected to be none to negligible, given the prohibition on retention that is currently in place.

The CMP Fishery, as managed by the Fishery Management Plan for CMP Resources in the Gulf of Mexico and Atlantic Region, has been identified as a fishery likely to interact with oceanic whitetip sharks. Oceanic whitetip sharks are not targeted and are only caught as bycatch. The Caribbean Reef Fish Fisheries are managed by the island-based fishery management plans (St. Croix, Puerto Rico, and St. Thomas/St. John). These island-based fisheries do not target oceanic whitetip sharks, although interactions can occur as bycatch. Based on historical data, the number of interactions in the CMP Fishery and the Caribbean Reef Fish Fisheries is expected to be small and, thus, any economic impacts resulting from the proposed rule would be minimal.

In the EPO, oceanic whitetip sharks are not a managed species under the Pacific Fishery Management Council or the North Pacific Fishery Management Council, nor are they an expressly prohibited species given their low frequency of occurrence in the regions. Encounters with oceanic whitetip sharks are extremely rare in EPO federally managed waters, and NMFS does not anticipate any impacts to small entities participating in EPO federally managed fisheries from the proposed rule.

In the WCPO, NMFS has completed section 7 consultations on all of its federally managed fisheries that are likely to incidentally capture oceanic whitetip sharks. This proposed rule would apply to participants in these WCPO fisheries, which include the Hawaii Deep-set Longline Fishery; the Hawaii Shallow-set Longline Fishery, the Hawaii, Guam, and CNMI Bottomfish Fisheries; and the United States WCPO Purse Seine Fishery. NMFS considers all participants in these fisheries to be small entities because they had average annual receipts of less than \$11 million for commercial fishing in 2021. Despite the lack of a prohibition on take at the time, in each of the biological opinions on these fisheries, NMFS included ITSs and RPMs requiring monitoring/reporting of oceanic whitetip sharks as well as measures to minimize captures and improve release conditions and post-release survival. NMFS does not foresee any additional impacts to small entities participating in WCPO federally managed fisheries, and therefore does not foresee the need for additional consultation from the proposed rule.

This proposed rule would directly regulate small entities engaged in the import and export of oceanic whitetip sharks (or their derivative products) to or from the United States; the possession, transport, and sale of sharks that were illegally taken; and the possession, transport, and sale of oceanic whitetip sharks through both interstate and foreign commerce. Small entities subject to these prohibitions are largely categorized under NAICS codes 424460 (Fish and Seafood Merchant Wholesalers), 484 (Truck Transportation subsector), and 481112 (Scheduled Freight Air Transportation).

According to data gathered from the Dun & Bradstreet Hoovers Database, there are more than 8,000 U.S. small businesses with primary NAICS code 424460, approximately 500,000 U.S. small businesses with a primary NAICS code within the 484 subsector, and approximately 900 U.S. small businesses with primary NAICS code 481112. Despite the large number of small entities to which these prohibitions would apply, incremental impacts of this proposed rule on these small entities would likely be negligible. A query of the CITES trade database revealed a single import of oceanic whitetip shark fins into the United States between 2013 and 2021, and this import, which occurred in 2019, was seized or confiscated. The CITES data further indicate that no commercial exports of oceanic whitetip shark fins or specimens from the United States occurred between 2013 and 2021, and that the last export of oceanic whitetip sharks or derivative products for non-commercial purposes occurred in 2019. Import and export of oceanic whitetip sharks for scientific research purposes would not be impacted due to the proposed exception from the section 9(a)(1)(A) prohibitions on import and/or export when specific conditions are met. As noted above, existing regulations limit opportunities for legal harvest of oceanic whitetip sharks in U.S. fisheries, and very little such harvest has occurred in recent years. Thus, this proposed rule would have little or no incremental impact on legal U.S. trade of oceanic whitetip sharks, their fins, and other derivative products. Specifically, the proposed rule would have negligible impacts on U.S. small entities engaged in the import, export, wholesale, retail sale, or transport of fish and seafood products. This includes small entities with fishery-specific dealer permits for sharks.

Potential impacts of this proposed rule on small entities beyond those related to fisheries and trade are anticipated to be minor. Under the exception to the section 9(a)(1)(A), (B), and (C) prohibitions for scientific research activities that meet certain conditions, entities conducting qualifying scientific research and/or enhancement activities would not need to obtain a section 10(a)(1)(A) scientific enhancement permit.

Small entities conducting aquaculture activities resulting in incidental take of oceanic whitetip sharks could be required to obtain a section 10(a)(1)(B) incidental take permit. However, there is no foreseeable instance of this occurring, and it is possible that section 7 consultation on effects of the aquaculture operations on oceanic whitetip sharks would already address incidental take of the species if that did occur. Section 10 incidental take permits could also be required for entities conducting derelict gear or trash removal activities on the high seas or for those working to disentangle marine mammals from fishing gear/lines. However, these activities are typically carried out by federal and state agencies, which do not qualify as small entities.

It has been determined that this proposed action would not duplicate or conflict with any federal rules. We note that fishermen, dealers, and managers in the fisheries to which this proposed rule would apply already must comply with domestic laws that implement a number of existing international agreements and other fishery management, environmental, and administrative measures. These include, but are not limited to, the Magnuson-Stevens Fishery and Conservation Management Act, the High Seas Fishing Compliance Act, the Marine Mammal Protection Act, the ESA, the National Environmental Policy Act, the Paperwork Reduction Act, the Coastal Zone Management Act, and the Shark Fin Sales Elimination Act.

The RFA requires consideration of any significant alternatives to the proposed rule that would accomplish the stated objectives of the applicable statutes and would minimize significant economic impacts to small entities. We considered the following alternatives when developing this proposed rule.

Alternative 1: No-action Alternative. Under the No-action Alternative, NMFS would not establish an ESA 4(d) rule (*i.e.*, no change from current management policies). The No-action Alternative represents the regulatory status quo. Under the No-action Alternative, none of the prohibitions under section 9(a)(1) of the ESA would be extended

to provide for the conservation of the oceanic whitetip shark. Current programs would continue to guide management of the species. ESA section 7 consultations on federal agency actions would only address whether an action jeopardizes the continued existence of the oceanic whitetip shark. Reasonable and prudent alternatives would only be imposed if federal agency actions that take oceanic whitetip sharks are likely to jeopardize the continued existence of the species. ESA section 10 permits would not be required for non-federal actions that take the species because take would not be prohibited.

Currently, a suite of region-specific rules and best practices (described above and detailed in the Draft Recovery Status Review (NMFS 2023)) regulate the harvest of oceanic shark species, including the oceanic whitetip shark, both in U.S. and international waters. NMFS concluded in its final listing determinations that existing regulations have not totally abated the impact of stressors on the threatened oceanic whitetip shark (83 FR 4153, January 30, 2018). In the Draft Recovery Status Review, NMFS finds that efforts to address overutilization of the species through regulatory measures appear largely inadequate (NMFS 2023). Under the No-action Alternative, oceanic whitetip sharks would remain vulnerable to stressors that would continue to affect population status of the species. Thus, the No-action Alternative is not necessarily a “no cost” alternative.

Alternative 2: Application of All ESA Section 9(a) Prohibitions with Exceptions (Proposed Alternative). Under the Proposed Alternative, ESA section 9(a)(1) prohibitions would apply to thousands of small entities engaged in commercial and recreational fishing; import, export, and wholesale of seafood products; and air and truck freight transport. However, as discussed above, both direct and indirect impacts to all potentially affected industries and entities would likely be minor. Import and export of oceanic whitetip sharks for qualifying scientific research purposes would not be impacted due to the proposed exception to the section 9(a)(1)(A) prohibition under this alternative.

Alternative 2 was selected as the Proposed Alternative because it would promote the survival and recovery of the oceanic whitetip shark, and because this alternative would reduce the economic impacts on entities as compared to the economic impacts of Alternative 3.

Alternative 3: Application of ESA Section 9(a)(1) Prohibitions (Full Action Alternative). Alternative 3 would apply all Section 9(a)(1) prohibitions of the ESA to the oceanic whitetip shark, without exception. Potential impacts on small entities under this alternative would be equivalent to those generated under the Proposed Alternative, with a few notable exceptions. Under this alternative, an entity carrying out scientific research activities that would qualify for the exception to section 9(a)(1)(A) and (B) prohibitions under the Proposed Alternative would be required to obtain a section 10(a)(1)(A) permit for such activities. An entity that would qualify under the Proposed Alternative for the exception from the section 9(a)(1)(A) prohibitions on import and/or export of oceanic whitetip sharks or their parts would also be required to obtain a section 10(a)(1)(A) permit. Finally, under this alternative, a law enforcement official or management authority whose take of an oceanic whitetip shark would qualify under the Proposed Alternative for the exception from the prohibition on take would be required to obtain a section 10(a)(1)(A) permit. The administrative effort and associated cost of obtaining a section 10(a)(1)(A) permit that would not be required under the Proposed Action constitutes an incremental impact of Alternative 3, relative to impacts resulting from the Proposed Action. While activities that are known to contribute to the extinction risk of the species (*e.g.*, take) would be prohibited under this alternative, activities that contribute to the conservation and recovery of the species would likely be deterred or delayed.

E.O. 12988 - Civil Justice Reform

We have determined that this proposed rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of E.O. 12988. We are proposing protective regulations pursuant to provisions in the ESA using an existing approach that improves the clarity of the regulations and minimizes the regulatory burden of managing ESA listings while retaining the necessary and advisable protections to provide for the conservation of threatened species.

E.O. 13175 - Consultation and Coordination with Indian Tribal Governments

The longstanding and distinctive relationship between the Federal and tribal governments is defined by treaties, statutes, executive orders, judicial decisions, and agreements, which differentiate tribal governments from the other entities that deal with, or are affected by, the Federal Government. This relationship has given rise to a special Federal trust responsibility involving the legal responsibilities and obligations of the United States toward Indian Tribes and with respect to Indian lands, tribal trust resources, and the exercise of tribal rights. Pursuant to these authorities, lands have been retained by Indian Tribes or have been set aside for tribal use. These lands are managed by Indian Tribes in accordance with tribal goals and objectives within the framework of applicable treaties and laws. E.O. 13175 outlines the responsibilities of the Federal Government in matters affecting tribal interests.

E.O. 13175 requires that if NMFS issues a regulation that has substantial direct effects on the communities of Indian tribal governments and imposes substantial direct compliance costs on those communities, NMFS must consult with those governments, or the Federal Government must provide the funds necessary to pay the direct compliance costs incurred by the tribal governments. In developing this proposed rule, we found that the proposed 4(d) rule will not impose substantial direct compliance costs on the communities of Indian tribal governments and does not have tribal implications.

E.O. 13132 - Federalism

E.O. 13132 requires agencies to take into account any federalism impacts of regulations under development. It includes specific consultation directives for situations where a regulation will preempt state law or impose substantial direct compliance costs on state and local governments (unless required by statute). Neither of those circumstances is applicable to this proposed rule.

Paperwork Reduction Act (PRA)

This proposed rule does not contain any new or revised collection of information requirements. This rule, if adopted, would not impose recordkeeping or reporting requirements on state or local governments, individuals, businesses, or organizations.

E.O. 13211 - Energy Supply, Distribution, or Use

E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking “significant energy actions.” According to E.O. 13211, “significant energy action” means any action by an agency that promulgates or is expected to lead to the promulgation of a final rule or regulation that is a significant regulatory action under E.O. 12866 and is likely to have a significant adverse effect on the supply, distribution, or use of energy. NMFS has determined that no Statement of Energy Effects is required because this proposed rule is not significant under E.O. 12866.

E.O. 12898 - Environmental Justice

E.O. 12898 requires that Federal actions address environmental justice in the decision-making process. In particular, the adverse human health or environmental effects of the actions should not have a disproportionately high effect on minority and low-income communities. The proposed protective regulations are not expected to have a disproportionately high effect on minority populations or low-income populations.

Authority: The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: May 8, 2024.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS proposes to amend 50 CFR part 223 as follows:

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

1. The authority citation for part 223 continues to read as follows:

Authority: 16 U.S.C. 1531–1543; subpart B, § 223.201–202 also issued under 16 U.S.C. 1361 *et seq.*; 16 U.S.C. 5503(d) for § 223.206(d)(9).

2. Add § 223.216 to subpart B to read as follows:

§ 223.216 Oceanic whitetip shark.

(a) *Prohibitions.* The prohibitions of section 9(a)(1) of the ESA (16 U.S.C. 1538(a)(1)) relating to endangered species apply to the threatened oceanic whitetip shark listed in § 223.102(e), except as provided in paragraph (b) of this section.

(b) *Exceptions.* Exceptions to the prohibitions applied in paragraph (a) of this section to the threatened oceanic whitetip shark listed in § 223.102(e) are described in paragraphs (b)(1) through (b)(3) of this section.

(1) *Scientific research import/export exception.* The prohibitions of section 9(a)(1)(A) of the ESA, as applied in paragraph (a) of this section, relating to the threatened oceanic whitetip shark listed in § 223.102(e) do not apply when the following conditions are met: 1) the import or export is accompanied by proper permits issued under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) indicating that the trade is for the purposes of scientific research; and 2) the import or export is carried out in accordance with all other applicable laws and regulations. If these conditions are met, import and/or export for the purposes of

scientific research would not constitute a violation of the section 9(a)(1)(A) prohibitions, and an ESA section 10(a)(1)(A) permit would not be required.

(2) *Scientific research take exception.* The take prohibitions of sections 9(a)(1)(B) and (C) of the ESA, as applied in paragraph (a) of this section, relating to the threatened oceanic whitetip shark listed in § 223.102(e) do not apply to ongoing or future scientific research when the following conditions are met: (1) the scientific research activities are carried out by or in collaboration with a research institution; state, tribal, or federal agency; or other scientific organization in a good faith effort to advance the conservation and/or recovery of the species; (2) the scientific research activities are intended to involve only non-lethal take, *i.e.*, no individuals may be intentionally killed for the purposes of scientific research under this exception; and (3) the scientific research activities are carried out in accordance with all other applicable laws and regulations. If these conditions are met, scientific research activities resulting in take would not constitute a violation of the prohibitions, and an ESA section 10(a)(1)(A) permit would not be required.

(3) *Law enforcement take exception.* The take prohibitions of section 9(a)(1)(B) of the ESA, as applied in paragraph (a) of this section, relating to the threatened oceanic whitetip shark listed in § 223.102(e) do not apply to law enforcement officials or management authorities, including any employee or designee of NMFS or of any other governmental entity that has co-management authority for the oceanic whitetip shark if, when acting in the course of their official duties, it is necessary to take an oceanic whitetip shark to: aid a sick, injured, entangled, or stranded oceanic whitetip shark, dispose of a dead oceanic whitetip shark, or salvage a dead oceanic whitetip shark (or parts or samples thereof) which may be useful for scientific study.