

clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: April 21, 2010.

**Glenna Mickelson,**

*Management Analyst, Office of the Chief Information Officer.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648-XV13**

#### Atlantic Coastal Fisheries Cooperative Management Act Provisions; Atlantic Coastal Shark Fishery

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

**ACTION:** Notice of determination of non-compliance; Declaration of a moratorium.

**SUMMARY:** In accordance with the Atlantic Coastal Fisheries Cooperative Management Act (Act), NMFS, upon a delegation of authority from the Secretary of Commerce (Secretary), has determined that the State of New Jersey has failed to carry out its responsibilities under the Atlantic States Marine Fisheries Commission's (Commission) Interstate Fishery Management Plan for Atlantic Coastal Sharks (Plan) and that the measures New Jersey has failed to implement and enforce are necessary for the conservation of the shark resource. This determination is consistent with the findings of the Commission on February 4, 2010. Pursuant to the Act, a Federal moratorium on fishing, possession, and landing of all shark species identified in the Commission Plan is hereby declared and will be effective on July 30, 2010. The moratorium will not be withdrawn by NMFS until New Jersey is found to have come back into compliance with the Commission's Interstate Fisheries Management Plan for Atlantic Coastal Sharks.

**DATES:** Effective July 30, 2010.

**ADDRESSES:** Emily Menashes, Acting Director, Office of Sustainable Fisheries, NMFS, 1315 East-West Highway, Room 13362, Silver Spring, MD 20910.

**FOR FURTHER INFORMATION CONTACT:** Brian Hooker, Fishery Management Specialist, NMFS Office of Sustainable Fisheries, (301) 713-2334.

#### **SUPPLEMENTARY INFORMATION:**

##### **Non-Compliance Statutory Background**

The Atlantic Coastal Act, 16 U.S.C. 5101 *et seq.*, sets forth a non-compliance review and determination process that is triggered when the Commission finds that a state has not implemented measures specified in the Plan and refers that determination to the Secretary for review and potential concurrence. The Secretary delegated all decision-making under this process to NMFS, although NMFS is required to notify the Secretary before any final action is taken.

The Atlantic Coastal Act's non-compliance process involves two stages of decision-making. In the first stage, the Secretary (delegated to NMFS) must make two findings: 1) whether the state in question has failed to carry out its responsibility under the Commission's Interstate Fishery Management Plan; and if so, 2) whether the measures that the state failed to implement and enforce are necessary for the conservation of the fishery in question. These initial findings must be made within 30 days after receipt of the Commission's non-compliance referral and consequently, this first stage of decision-making is referred to as the "30-Day Determination." A positive 30-Day Determination triggers a mandatory moratorium on fishing within state waters for the fishery in question. This moratorium may begin immediately or at any time within six months of the 30-Day Determination.

##### **Commission Referral of Non-Compliance**

On February 4, 2010, the Commission found that the State of New Jersey is out of compliance with the Commission Plan. Specifically, the Commission found that New Jersey has not implemented regulations that are necessary to rebuild depleted shark stocks, ensure sustainable harvest of others, and provide protection for sharks in nursing and pupping grounds found within State waters.

The Commission Plan requires all member States to implement the Plan's shark regulations by January 1, 2010. As of January 2010, all member States except New Jersey had implemented some of the plan and/or had tentative

dates for implementation of the plan or conservation equivalency measures. According to New Jersey's Division of Fish and Wildlife, conforming shark regulations have been drafted. These draft regulations were submitted to the Governor's office for approval, publication, and public comment in the fall of 2009. However, a change of State administration and other ministerial delays prevented the regulations from being implemented. During both the Commission's February 2, 2010, Coastal Shark Management Board meeting and its February 4, 2010, Policy and Business Board meetings, New Jersey did not protest the Boards' determinations that they were not in compliance with the Plan.

##### **Agency Action In Response to Commission Non-Compliance Referral**

The Commission forwarded the findings of their vote on February 4, 2010, in a formal non-compliance referral letter that was received on February 8, 2010. In response, NMFS began the Atlantic Coastal Act's 30-Day Determination clock. Immediately thereafter, NMFS sent letters to the State of New Jersey, the Mid-Atlantic and New England Fishery Management Councils, and to the Commission, advising them of the Atlantic Coastal Act's non-compliance process, inviting them to provide commentary on the issue, and in the case of New Jersey, inviting the State to meet with NMFS to present its position in person or provide written comments on the Commission's findings.

New Jersey elected to meet with NMFS staff on March 2, 2010, via conference call and submitted a written statement outlining their timetable for implementing the regulations for the Atlantic Coastal Shark Plan. Specifically, staff of New Jersey's Department of Environmental Protection (NJDEP) outlined their intention to publish the proposed rule, solicit and respond to public comment, and have a rule in place by mid-July that would be compliant with the Commission's Plan. The Commission also responded on February 25, 2010, re-emphasizing the importance of the seasonal closure to protect pupping sandbar sharks from May 15 July 15. No comments have yet been received from the New England Fishery Management Council or the Mid-Atlantic Fishery Management Council.

##### **Agency's Findings**

New Jersey did not fulfill its responsibilities under the Commission's Atlantic Coastal Shark Plan

New Jersey does not dispute that it has not implemented the management measures for the Commission's Atlantic Coastal Shark Plan. In fact, New Jersey has already taken several steps to implement the Plan and has been in communication with NMFS regarding its timetable for implementing the Plan. NMFS determined the measures that New Jersey failed to implement are necessary for the conservation of the fishery.

The Atlantic shark species groups included in the Commission's Plan are smooth dogfish species (smooth dogfish), small coastal sharks species (Atlantic sharpnose, finetooth, blacknose, and bonnethead sharks), non-sandbar large coastal sharks species (silky, tiger, blacktip, spinner, bull, lemon, nurse, scalloped hammerhead, great hammerhead, and smooth hammerhead sharks), pelagic species (shortfin mako, porbeagle, common thresher, oceanic whitetip, and blue sharks), prohibited species (sandtiger, bigeye sandtiger, whale, basking, white, dusky, bignose, Galapagos, night, reef, narrowtooth, Caribbean sharpnose, smalltail, Atlantic angel, longfin mako, bigeye thresher, sharpnose sevengill, bluntnose sixgill, and bigeye sixgill sharks), and research species (sandbar sharks).

As a whole, the measures in the Commission's Plan are necessary for the conservation of Atlantic coastal sharks. Relative to other fish species, all shark species have a very low reproductive potential due to a slow growth rate, late sexual maturity, one to two-year reproductive cycles, a small number of young per brood, and specific requirements for nursery areas. Additionally, simple biological information on many species such as reproductive cycles, nursery and mating areas, number of young per brood, and age at maturity is unknown. A number of shark species, such as sandbar, dusky, blacknose, and porbeagle sharks, are overfished with lengthy rebuilding time periods ranging from 19 years to approximately 400 years. Other species, such as shortfin mako sharks, are not overfished but are experiencing overfishing. Many species, such as white, basking, whale, sand tiger, and bigeye sand tiger sharks, have an unknown status but are prohibited in Federal waters and in the Commission's Plan due to concerns that fishing pressure could lead to overfishing given those species' life history and very low reproductive capacity. While all known shark species can be identified to species by shark experts, identification of certain species of sharks can be easily confused by recreational and

commercial fishers. Incorrect identification could lead to additional mortality on stocks that cannot handle such mortality. As such, many of the shark management measures, both Federal regulations and those in the Commission Plan, are designed to provide conservation to some species by extending those regulations to all species. This approach is made to address any mis-identification issues for species that look alike to the average person. These types of regulations include but are not limited to placing species into species groups based on the gear the species is usually caught on, setting the recreational trip and size limits to apply to all species, requiring all state dealers to obtain a Federal dealer permit (which requires a shark identification course), and establishing the seasonal closure for many species from May 15 to July 15.

Current New Jersey regulations require commercial fishermen to obtain a Federal commercial shark permit. Thus, New Jersey commercial shark fishermen must comply with the Shark Plan by virtue of their Federal permit, even in the absence of state shark regulations. Many of the Federal commercial regulations overlap with the Commission's Plan. However, current New Jersey recreational regulations, such as the 48 inch total length minimum size and 2 fish per vessel (or 2 per person if shore fishing) are less restrictive than either the Federal or Commission Plan regulations. Additionally, New Jersey does not prohibit landing of all the Plan's prohibited and research species. Because of these less restrictive measures, New Jersey fishermen could land more sharks, and smaller sharks including some species, such as sandbar, dusky, and porbeagle sharks, which have rebuilding time periods of at least 70 years. The Commission has noted that the seasonal closure of the pupping and nursing grounds in Delaware Bay and the prohibition on landing of sandbar and other coastal shark species is necessary to rebuild shark stocks. The Commission's Technical Committee has identified Delaware Bay as one of the most important nursing grounds for depleted sandbar sharks on the Atlantic Coast. This area and other areas in New Jersey state waters is immediately adjacent to Federal determinations of essential fish habitat for one or more life stage (neonates, juveniles, or adults) for many species of sharks, including basking, great hammerhead, scalloped hammerhead, white, dusky, tiger, sand tiger, angel, Atlantic sharpnose, shortfin

mako, blue, and common thresher sharks. Since the State of New Jersey occupies a significant portion of the Delaware Bay shoreline and also is adjacent to the essential fish habitat for many shark species, the State's implementation of measures consistent with the Commission Plan is crucial. Accordingly, the State of New Jersey's failure to implement conservation measures under the Plan could jeopardize both Commission and Federal rebuilding efforts.

The Moratorium shall be implemented on July 30, 2010.

Pursuant to the Atlantic Coastal Act, NMFS must implement a moratorium within 180 days of the positive 30-Day Determination that is being made in this matter. On March 16, 2010, NMFS notified the State of New Jersey and the Commission of its determination that New Jersey failed to carry out its responsibilities under the Commission's Plan and that the measures New Jersey has failed to implement and enforce are necessary for the conservation of the shark resource. In this determination and notification NMFS detailed the actions necessary to avoid the implementation of a Federal moratorium for sharks in New Jersey waters. In the initial determination NMFS would have implemented a moratorium that would have prohibited, in State waters, the possession of the Commission's non-sandbar large coastal shark species, the Commission prohibited species, and the Commission research species (sandbar sharks) starting May 15, 2010, followed by the full moratorium prohibiting, in State waters, the possession of all shark species listed in the Commission Plan starting July 30, 2010. The initial May 15 date for a moratorium was necessary to provide substantial conservation benefit to those Commission shark species that utilize the pupping areas located in New Jersey state waters early in the year. However, on March 25, 2010 New Jersey effected a Notice of Administrative Change (N.J.A.C. 7:25-18.1) closing the shark fishing season in State waters from May 15 July 15. Although the State's closure does not explicitly prohibit possession of all the prohibited species in the Commission's Plan it has been determined that the closure protects shark pupping grounds in New Jersey waters and meets the conservation objectives of a Federal moratorium on the possession of the Commission's non-sandbar large coastal shark species, the Commission's prohibited species, and the Commission's research species (sandbar sharks) beginning May 15, 2010. The species not included in the State's

closure are: longfin mako, bigeye thresher, sevengill, sixgill, bigeye sixgill, Caribbean sharpnose, smalltail, and Atlantic angel sharks. These species, however, are not likely to be impacted in the short term, prior to July 30, 2010, as their distribution is either offshore in federally-regulated waters, or rarely encountered in New Jersey inshore waters. Accordingly, New Jersey's new regulations have mooted the conservation need for a May 15, 2010, Federal moratorium and as such, a May 15th Federal moratorium for these species would achieve no conservation objective. Since New Jersey has yet to adopt all of the provisions of the Commission's shark plan, NMFS has determined that a moratorium effective July 30, 2010, would provide conservation benefit for all shark species, including the Commission's prohibited shark species and pelagic shark species that are observed off the coast of New Jersey later in the year, by preventing shark fishing during a time period when substantial shark fishing is still occurring.

NMFS staff analyzed several moratorium dates prior to deciding upon the dates specified above. In short, there were three categories of timing alternatives for Atlantic Coastal Act moratoria: (1) implement a full moratorium on all shark species starting May 15 (the day the Commission's seasonal shark closure begins); (2) implement a full moratorium on the last possible date (roughly Day 180 of the statutory six-month timeframe); and (3) implement a moratorium for some shark species on May 15 to be consistent with the Commission Plan's seasonal shark closure that would expand to a full moratorium for all Commission shark species on July 30. In this circumstance, the chosen third alternative provided significant Atlantic coastal shark biological/conservation benefits, implemented a seasonal closure similar to that of the Commission Plan, and satisfied the need for public notice of the moratorium and interagency logistical coordination. In March and April, commercial New Jersey fishermen land approximately 5-percent and recreational New Jersey fishermen land less than one percent of the yearly average shark landings. As such, an immediate closure would not offer much more conservation value over a May 15 closure. The May 15th and July 30th dates provided more conservation than the end of the six-month moratorium window, which would be September 6. By September, the fishery is beginning to wind down with

approximately 65 and 75 percent of the average yearly commercial and recreational shark catch already landed, respectively. This is due to lower water temperatures and the resulting southerly migration of many shark species away from New Jersey. For this reason, a closure near the end of the six-month moratorium window would have had minimal conservation benefit.

As previously mentioned, New Jersey has already effected an administrative change implementing a seasonal closure protecting shark nursery grounds from May 15 to July 15. NMFS has determined that this action negates the need to implement a Federal moratorium for select shark species beginning May 15, 2010 as outlined in the preferred third alternative described in the previous paragraph. The Commission emphasized, and NMFS concurs, that the state seasonal closure is of particular importance in the protection of certain shark stocks as it will close important pupping and nursing grounds in Delaware Bay and other State waters. New Jersey's action satisfied that conservation need.

Staff from NJDEP have also indicated that management measures fully implementing the Commission's Plan are expected to be in place by July 19, 2010. These measures in the Plan are needed given the biology and stock status of many species of sharks. As such, the State's cooperation with the Commission's Plan is crucial. Accordingly, its failure to implement conservation measures under the Commission's Plan will most certainly jeopardize any rebuilding efforts.

#### **Moratorium Prohibitions**

There will be a prohibition on the possession of all Commission shark species, a group that includes non-sandbar large coastal shark species, the Commission's prohibited species, the Commission's research species (sandbar sharks), small coastal species, pelagic species, and smooth dogfish species, beginning July 30, 2010. Once the moratorium takes effect, proscribed conduct shall reflect the prohibited acts mandated by the Atlantic Coastal Act as set forth as 16 U.S.C. 5106(e). Accordingly, as of Friday, July 30, 2010, it shall be unlawful for any person to do the following:

1. Engage in fishing for the following species within New Jersey waters - 0 to 3 nautical miles (0 to 5.5 kilometers) from shore: Commission large coastal sharks (silky, tiger, blacktip, spinner, bull, lemon, nurse, scalloped hammerhead, great hammerhead, smooth hammerhead), the Commission's prohibited species

(whale, basking, sand tiger, bigeye sand tiger, white, dusky, night, bignose, Galapagos, Caribbean reef, narrowtooth, longfin mako, bigeye thresher, sevengill, sixgill, bigeye sixgill, Caribbean sharpnose, smalltail, and Atlantic angel sharks), the Commission's research species (sandbar sharks), the Commission's small coastal sharks (Atlantic sharpnose, blacknose, finetooth, and bonnethead sharks), the Commission's pelagic sharks (shortfin mako, thresher, oceanic whitetip, porbeagle, and blue sharks), and smooth dogfish.

2. Land, attempt to land, or possess any of the shark species identified in paragraph 1 (above) in the State of New Jersey.

3. Fail to return to the water immediately, with a minimum of injury, any Commission shark species identified in paragraph 1 (above) that are taken incidental to fishing for any other fish species (i.e., as bycatch);

4. Refuse to permit any officer authorized to enforce the provisions of this moratorium to board a fishing vessel subject to such person's control for purposes of conducting any search or inspection in connection with the enforcement of this moratorium;

5. Forcibly assault, resist, oppose, impede, intimidate, or interfere with any such authorized officer in the conduct of any search or inspection under this moratorium;

6. Resist a lawful arrest for any act prohibited by this moratorium;

7. Ship, transport, offer for sale, sell, purchase, import, or have custody, control, or possession of, any shark taken or retained in violation of this moratorium; or

8. Interfere with, delay, or prevent, by any means, the apprehension or arrest of another person, knowing that such other person has committed any act prohibited by this moratorium.

#### **Classification**

This declaration of a moratorium is consistent with the Atlantic Coastal Act at 16 U.S.C. 5106 insofar as New Jersey has been found to have failed to carry out its responsibilities under the Commission's Atlantic Coastal Shark Plan and the measures that New Jersey has failed to implement and enforce are necessary for the conservation of the shark fishery. Further, the moratorium prohibits fishing for Atlantic coastal sharks within New Jersey state waters and/or possessing or landing Atlantic coastal sharks and is being implemented within six months of the agency findings.

The declaration of moratorium is consistent with the Administrative

Procedures Act at 5 U.S.C. 555 insofar as New Jersey was promptly notified of the Commission's non-compliance referral and given an opportunity to meet with the agency and provide comments on the matter. New Jersey has also been promptly notified of the agency's determination in this matter. Additionally, NMFS provided notice to the public of this compliance action in a notice published in the **Federal Register** (75 FR 9158, March 1, 2010). NMFS received one comment in response to that notice. The comment supported closing all shark fishing indefinitely off the coast of New Jersey. In response NMFS finds that the comment goes beyond the scope of shark conservation management measures as detailed in the Commission's Plan, and although we concur that a full moratorium on the possession of sharks in the State's waters is necessary for shark conservation beginning July 30, 2010, it will only be in place so long as the State of New Jersey remains out of compliance with the Commission's Plan. Action beyond that is not warranted in this action.

The Assistant Administrator for Fisheries, NOAA (AA), finds that providing additional prior public notice and opportunity for comment is impracticable and unnecessary. Providing additional notice and opportunity for comment would be impracticable, because it would prevent the agency from executing its functions under the Act in a timely manner. The Act contemplates quick action on the declaration of a moratorium that would not be possible if additional notice and an opportunity for comment are provided. Furthermore, providing additional notice and opportunity for comment would be unnecessary because it would serve no purpose. The nature of a moratorium is described in the Act and, therefore, cannot be modified in response to public comments.

The declaration of moratorium does not trigger the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* because prior notice and opportunity for public comment are not required for this determination by the Administrative Procedures Act or any other law.

The declaration of a moratorium does not fall under review under Executive Order 12866 insofar as the moratorium is not a regulatory action of the agency but is an action mandated by Congress upon the findings of certain conditions precedent set forth in the Atlantic Coastal Act, which also prescribes the nature and extent of the moratorium. Although the recreational and

commercial shark fisheries in New Jersey are of importance to the State, the moratorium as proposed is not expected to materially or adversely affect the economy or have an impact of over \$100 million. New Jersey has expressed the desire to come into compliance with the Commission's Plan within this calendar year, so although the state has not yet completed an affirmative and observable regulatory action, NMFS fully expects New Jersey to come into compliance with the Plan by the end of the calendar year. The matter creates no serious inconsistency with actions by other agencies and it is not expected to have material budgetary impacts. The declaration of moratorium is not significant within the meaning of the Executive Order.

The declaration of moratorium is not the result of a policy formulated or implemented by the agency, but is instead the result of the application of found facts to the Congressional standards set forth in the Atlantic Coastal Act and as such, the declaration does not implicate federalism in the manner contemplated by Executive Order 13132. Further, the agency has consulted with New Jersey to the maximum extent practicable in this matter given the truncated timeframe set forth in the Atlantic Coastal Act. Rather, the Act provides clear evidence that Congress intended the Secretary to have the authority to preempt state law. That authority has been delegated from the Secretary to NMFS. The scope of the moratorium reflects the standards set forth in the Atlantic Coastal Act, and as such restricts state law to the minimum level necessary to further the objectives of the statute.

**Authority:** 16 U.S.C. 5101 *et seq.*

Dated: April 22, 2010.

**Samuel D. Rauch III,**

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

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648-XW06**

### Endangered Species; File No. 14510

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

**ACTION:** Issuance of permit.

**SUMMARY:** Notice is hereby given that NMFS Southwest Fisheries Science Center, 3333 North Torrey Pines Court, La Jolla, CA 92037-1023, has been issued a permit to take green (*Chelonia mydas*), loggerhead (*Caretta caretta*), olive ridley (*Lepidochelys olivacea*), and leatherback (*Dermochelys coriacea*) sea turtles for purposes of scientific research.

**ADDRESSES:** The permit and related documents are available for review upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713-2289; fax (301)713-0376; and Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213; phone (562)980-4001; fax (562)980-4018.

**FOR FURTHER INFORMATION CONTACT:** Kate Swails or Amy Hapeman (301)713-2289.

**SUPPLEMENTARY INFORMATION:** On November 18, 2009, notice was published in the **Federal Register** (74 FR 59525) that a request for a scientific research permit to take had been submitted by the above-named applicant. The requested permit has been issued under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222-226).

The purpose of the proposed research project is to initiate a baseline study of the status of sea turtles in the San Gabriel River and Alamitos Bay in Long Beach, California. Researchers would also opportunistically take samples and potentially track sea turtles incidentally taken in coastal power plants off California and that strand live in the marine environment. Researchers may annually capture, measure, weigh, photograph/video, flipper tag, passive integrated transponder tag (PIT), tissue biopsy, blood sample, scute scrape, lavage, ultrasound, oral swab, cloacal swab, inject tetracycline, and release up to: ten green, one olive ridley, and three loggerhead sea turtles taken in power plant entrainments; four green, one olive ridley, one loggerhead, and two leatherback sea turtles that strand in the marine environment; and 35 green, six loggerhead, and six olive ridley sea turtles during captures as part of the San Gabriel and Los Alamitos Bay California project. Some turtles may have satellite transmitters, sonic tags, or camera attached. Researchers would also have