

**Proposed Rulemaking to Establish Protective Regulations under Section  
4(d) of the Endangered Species Act for the Threatened Oceanic Whitetip  
Shark**

**Initial Regulatory Flexibility Analysis**

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## Contents

Introduction	3
Why Action by the Agency Is Being Considered	4
Objectives of and Legal Basis for the Proposed Rule	4
Description and Estimate of the Number of Small Entities to which the Proposed Rule Will Apply	5
Definition of a Small Entity	5
Description and Estimate of the Number of Small Entities Subject to Regulations under the Proposed Rule	6
Description of Reporting and Recordkeeping Efforts	11
Identification of Relevant Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule	11
Description of Alternatives to the Proposed Rule Which Accomplish the Objectives and Which Minimize Impacts on Small Entities	12
ALTERNATIVE 1: NO ACTION ALTERNATIVE	12
ALTERNATIVE 2: Application of All ESA sec. 9(a) Prohibitions with Exceptions (PROPOSED ALTERNATIVE)	12
ALTERNATIVE 3: Application of ESA sec. 9(a)(1) Prohibitions (FULL ACTION)	14
References	14

## Introduction

This analysis considers the extent to which impacts resulting from the Proposed Rulemaking to Establish Protective Regulations under Section 4(d) of the Endangered Species Act for the threatened oceanic whitetip shark could be borne by small businesses. The analysis presented is conducted pursuant to the Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996. Information for this analysis was gathered from the Small Business Administration (SBA), Dun and Bradstreet, Inc., and discussions with NMFS Southeast Regional Office and Pacific Islands Regional Office personnel.

First enacted in 1980, the RFA was designed to ensure that the government considers the potential for its regulations to unduly inhibit the ability of small entities to compete. The goals of the RFA include increasing the government's awareness of the impact of regulations on small entities and encouraging agencies to exercise flexibility to provide regulatory relief to small entities. When a proposed regulation is published for public comment in the *Federal Register*, the RFA requires the agency to prepare and make available for public comment an analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). For this proposed rulemaking, this analysis takes the form of an initial regulatory flexibility analysis (IRFA). As described in 5 U.S. Code § 603, each IRFA is required to contain:

1. "a description of the reasons why action by the agency is being considered;
2. a succinct statement of the objectives of, and legal basis for, the proposed rule;
3. a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;
4. a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
5. an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule." (5 USC § 603(b))

Additionally, each IRFA is required to contain "a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities." (Id. § 603(c))

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<sup>1</sup> Estimated annual revenues for this company were obtained from the Dun & Bradstreet Hoovers database.

## Why Action by the Agency Is Being Considered

NOAA's National Marine Fisheries Service (NMFS) listed the oceanic whitetip shark as a threatened species under the ESA on January 30, 2018 (83 FR 4153; January 30, 2018). The oceanic whitetip shark is a highly migratory, pelagic species distributed in tropical and subtropical waters globally. Its range includes waters of the Atlantic Ocean, Eastern Pacific, Western and Central Pacific, and Indian Ocean, each of which is designated as a management unit (MU) in NMFS' Draft Recovery Plan for the oceanic whitetip shark (NMFS 2023a). Among the primary threats to the shark's survival are 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. Unless these threats are addressed, the oceanic whitetip shark may face further declines in population and increased risk of extinction. Please see the Proposed Rule for a full description of why this action is being considered.

## Objectives of and Legal Basis for the Proposed Rule

The ESA provides several means for the protection of threatened or endangered species. Section 7 of the ESA requires Federal agencies to consult with NMFS to ensure that any activity they authorize, fund, or carry out (called the "agency action") does not jeopardize the continued existence of an endangered or threatened species, or destroy or adversely modify its critical habitat. The protections under ESA section 7 are automatically adopted when a species is listed as endangered or threatened. Section 9 of the ESA prohibits any person subject to the jurisdiction of the United States from the following activities, with respect to endangered species:

1. Import any such species into, or export any such species from the U.S.;
2. Take any such species within the U.S. or the U.S. territorial sea;
3. Take any such species upon the high seas;
4. Possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of (2) and (3) above;
5. Deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of commercial activity, any such species;
6. Sell or offer for sale in interstate or foreign commerce any such species; or
7. Violate any regulation pertaining to such species or to any threatened species of fish or wildlife.

All of the ESA section 9 prohibitions automatically apply when a species is listed as endangered but not when it is listed as threatened. For threatened species, Section 4(d) of the ESA authorizes the Secretary to promulgate protective regulations the Secretary determines are necessary and advisable for the conservation of the threatened species. The Secretary may by regulation apply any of the prohibitions listed under Section 9(a)(1) of the ESA to the threatened species. NMFS determines what regulations to apply based on the biological status, conservation needs, and potential threats to the threatened species. The objective of the proposed rule is to reduce take of oceanic whitetip sharks in Federal, non-Federal, and recreational fisheries, which will contribute to the conservation of the species by ensuring that the United States is not impeding its recovery. Please see the Proposed Rule for a full description of the objectives of, and legal basis for, this action.

## Description and Estimate of the Number of Small Entities to which the Proposed Rule Will Apply

### Definition of a Small Entity

The RFA defines three types of small entities:

- **Small Business.** Section 601(3) of the RFA defines a small business according to the definition of a small business concern provided in section 3 of the Small Business Act (SBA). The SBA broadly defines a small business concern as a business which is “independently owned and operated and which is not dominant in its field of operation.” (15 USC § 632) The SBA provides industry-specific criteria based on either revenues or number of employees that delineate which businesses meet this definition.
- **Small Organization.** Section 601(4) of the RFA defines a small organization as a not-for-profit enterprise that is independently owned and operated and not dominant in its field.
- **Small Governmental Jurisdiction.** Section 601(5) of the RFA defines a small government jurisdiction as a government of a county, city, town, township, village, school district, or special district, with a population less than 50,000.

The RFA requires consideration of direct impacts to small entities that may result from the proposed rule. This 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. Potential incremental impacts of the proposed rule were estimated based on:

- Assessment of the extent to which existing regulations prohibit the types of activities that would be prohibited under the proposed rule;
- Review of the scope of and trends in historical activities prohibited under the proposed rule; and
- Projection over the foreseeable future of activities subject to prohibitions under the proposed rule.

This 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. NMFS has determined that the proposed rule would not likely affect any small governmental jurisdictions. The small entities subject to, and potentially impacted by, the proposed rule comprise 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 remainder of this section describes, and estimates the number of, small entities to which the proposed rule would apply. It further presents rationale for this IRFA's conclusion that the proposed rule would likely result in negligible incremental impacts to small entities.

## **Description and Estimate of the Number of Small Entities Subject to Regulations under the Proposed Rule**

### ***Fisheries***

The application of section 9(a)(1)(B) would prohibit the take of oceanic whitetip sharks within the United States or the territorial seas of the United States, and the application of section 9(a)(1)(C) would prohibit the take of the sharks upon the high seas by any person subject to the jurisdiction of the United States. Under the ESA, "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct (16 U.S.C. § 1532(19)). Under the proposed rule, the take prohibitions would apply to both intentional and incidental take. Hundreds of small entities participating in commercial fisheries in the Atlantic Ocean, East Pacific, and Western and Central Pacific Management Units 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)). Exhibit 2 lists potentially affected industries by NAICS code and SBA size standard. Provision is made under SBA's regulations for an agency to develop its own industry-specific size standards after consultation with the SBA Office of Advocacy and an opportunity for public comment (see 13 CFR 121.903(c)). Under this provision, NOAA Fisheries may establish size standards that differ from those established by the SBA Office of Size Standards, but only for use by NOAA Fisheries and only for the purpose of conducting an analysis of economic effects in fulfillment of the agency's obligations under the RFA. To utilize this provision, NOAA Fisheries must publish such size standards in the Federal Register, which NOAA Fisheries did on December 29, 2015 (80 FR 81194). In that final rule, effective on July 1, 2016, NOAA Fisheries established a small business size standard of \$11 million in annual gross receipts for all businesses in the commercial fishing industry (NAICS 11411) for RFA compliance purposes. This standard differs from the SBA's published size standard of \$25 million in annual gross receipts for businesses in the commercial fishing industry. Potential impacts on small entities participating in fisheries in the Atlantic Ocean, EPO, and WCPO are described below.

### **International Fisheries**

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 (ICCAT), Inter-American Tropical Tuna Commission (IATTC), and Western and Central Pacific Fisheries Commission (WCPFC). Binding measures of each of these three Regional Fishery Management Organizations (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 (ICCAT 2010; IATTC 2011; WCPFC 2012). 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 lack of a 4(d) prohibition on take, NMFS included in biological opinions on each of the fisheries incidental take statements (ITSS) and reasonable and prudent measures (RPMs) intended to improve release conditions and post-release survival, as well as monitoring/reporting requirements for oceanic whitetip sharks (NMFS 2019; NMFS 2020). Thus, the proposed rule likely would impose no additional reporting requirements on these fisheries for incidental take of oceanic whitetip sharks. Given these baseline regulations, the proposed rule is unlikely to result in any measurable incremental impacts to small entities due to their participation in international fisheries. According to vessel registration data published by the three RFMOs, there are 450 U.S.-flagged vessels participating in ICCAT fisheries, 1,471 U.S.-flagged vessels participating in IATTC fisheries, and 193 U.S.-flagged vessels participating in WCPFC fisheries.

### **Domestic 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. 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, including (but not limited to) Georgia, Texas, Hawaii, CNMI, Guam, and American Samoa. In state fisheries where harvest of oceanic whitetip sharks is permitted, landings have been negligible. In Florida waters, for example, there are only two records of oceanic whitetip shark landings from 1986 to present (K. Richmond, personal communication, 26 September 2023). Oceanic whitetip sharks are generally found outside state water boundaries, making catch of the sharks rare even if landing is not prohibited. In general, historical landings of the sharks in state and federal waters have been very low. 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 (NOAA Fisheries 2023).

Federally managed fisheries in the Atlantic most likely to interact with oceanic whitetip sharks and, therefore, 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 (NMFS 2023b), and the proposed rule would apply to all permit holders in these fisheries. However, the 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). 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 the proposed rule could directly impact small entities with HMS Shark Directed

Limited Access 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 as a result of this proposed rule on small entities sponsoring HMS tournaments in which recreational permit holders participate and 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 (FMP) 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 in hook and line gear. 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 in hook and line gears. Based on historical data, the number of interactions in the CMP Fishery and Caribbean Reef Fish Fisheries is expected to be small and, thus, any economic impacts resulting from the 4(d) rule would be minimal.

In the EPO, oceanic whitetip sharks are not a “managed species” under the Pacific Fishery Management Council or 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 (D. Lowry, personal communication, 30 August 2023), and NMFS does not anticipate any impacts to small entities participating in EPO federally managed fisheries from the proposed rule. If it is determined that take of oceanic whitetip sharks is occurring in federally managed waters off of the U.S. Pacific coast, NMFS would already be required to initiate section 7 consultation, which could include issuance of a biological opinion on the effects of federal fisheries on the species.

In the WCPO, PIRO has completed section 7 consultations on all of its federally managed fisheries that are likely to incidentally capture oceanic whitetip sharks. The proposed rule would apply to participants in these fisheries, which include the Hawaii Deep-set Longline Fishery; Hawaii Shallow-set Longline Fishery; Hawaii, Guam, and CNMI Bottomfish Fisheries; and U.S. WCPO Purse Seine Fishery (NOAA Fisheries 2023). 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 (80 FR 81194; NOAA Fisheries 2022). Despite the lack of a 4(d) prohibition on take, NMFS PIRO included in each of the biological opinions on these fisheries ITSs and RPMs requiring minimizing captures, improving release conditions and post-release survival, and monitoring/reporting for oceanic whitetip sharks. Inclusion of the ITSs is intended to ensure monitoring of the level and nature of any incidental take and to serve as a check on the biological opinions’ no-jeopardy conclusions by providing a reinitiation trigger if the level of take analyzed in a biological opinion is exceeded. Therefore, NMFS does not foresee any additional impacts to small entities participating in WCPO federally managed fisheries or the need for additional consultation from the proposed rule (C. Young, personal communication, 6 September 2023).

### ***Interstate and Foreign Commerce***

Prohibitions under sections 9(a)(1)(A), (D), (E), and (F) would entail, among other things, the direct regulation of 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 section 9(a)(1)(A), (D), (E), and (F) prohibitions would apply, incremental impacts of the proposed rule on these small entities would likely be negligible. A query of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) trade database revealed a single commercial import of oceanic whitetip shark fins into the U.S. between 2013 to 2021 and that this import, in 2019, was seized or confiscated.<sup>1</sup> The CITES data further indicate that there were no commercial exports of oceanic whitetip shark fins or specimens from the U.S. between 2013 and 2021 and that the last export of oceanic whitetip sharks or derivative products for non-commercial purposes occurred in 2019 (CITES 2023). 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 (see the Proposed Rule for a description of these conditions). 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, the 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.

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<sup>1</sup> The deadline for submission of the previous year's trade data to CITES is October 31 of each year. As such, CITES trade data may be incomplete for 2022 and have not yet been published for 2023.

**EXHIBIT 2 . INDUSTRIES MOST AFFECTED BY THE PROPOSED RULE AND A DESCRIPTION OF THE INDUSTRY SECTORS ENGAGED IN THOSE ACTIVITIES**

Relevant Activity	NAICS Code	NAICS Industry Description	Description	SBA Size Standard
Commercial Fisheries	114111	Finfish Fishing	This U.S. industry comprises establishments primarily engaged in the commercial catching or taking of finfish (e.g., bluefish, salmon, trout, tuna) from their natural habitat.	\$11,000,000
Charter Fishing Boat Operation (Recreational Fisheries)	487210	Scenic and Sightseeing Transportation, Water	This industry comprises establishments primarily engaged in providing scenic and sightseeing transportation on water. The services provided are usually local and involve same-day return to place of origin.	\$14,000,000
Interstate and Foreign Commerce	424460	Fish and Seafood Merchant Wholesalers	This industry comprises establishments primarily engaged in the merchant wholesale distribution of fish and seafood (except canned or packaged frozen).	100 Employees
Transport	484	General and Specialized Local and Long-Distance Trucking	Industries in the Truck Transportation subsector provide over-the-road transportation of cargo using motor vehicles, such as trucks and tractor trailers.	\$34,000,000
	481112	Scheduled Freight Air Transportation	This U.S. industry comprises establishments primarily engaged in providing air transportation of cargo without transporting passengers over regular routes and on regular schedules.	1,500 Employees
Source: U.S. Small Business Administration 2023.				

***Other Activities***

Potential impacts of the proposed rule on small entities beyond those related to fisheries and trade are anticipated to be minor. The proposed rule includes an exception from section 9(a)(1)(A), (B), and (C) prohibitions for scientific research activities that meet certain conditions. Under this exception, 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. Section 10 incidental take permits could also be required for entities conducting derelict gear or trash removal activities

on the high seas or 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.

## **Description of Reporting and Recordkeeping Efforts**

Section 603(b)(4) of the RFA requires agencies to describe any new reporting, record-keeping, and other compliance requirements. 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.

## **Identification of Relevant Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule**

Under section 603(b)(5) of the RFA, agencies must identify, to the extent practicable, relevant federal rules which duplicate, overlap, or conflict with the proposed action. Fishermen, dealers, and managers in the fisheries to which the proposed rule would apply must comply with a number of international agreements, domestic laws, and other fishery management measures. These include, but are not limited to, the Magnuson-Stevens Act, the High Seas Fishing Compliance Act, Marine Mammal Protection Act, ESA, National Environmental Policy Act, the Paperwork Reduction Act, and the Coastal Zone Management Act. This proposed action has been determined not to duplicate or conflict with any federal rules. However, the proposed action could overlap with existing regulations designed to control for overutilization of oceanic whitetip sharks in U.S. waters. These regulations, which are described above, include, but are not limited to, the following:

- Binding measures of the ICCAT, IATTC, and WCPFC 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 (ICCAT 2010; IATTC 2011; WCPFC 2012).
- In January 2024, NMFS published a final rule prohibiting the retention of oceanic whitetip sharks in all commercial and recreational HMS fisheries (89 FR 278).
- The Atlantic 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 lack of a 4(d) prohibition on take, NMFS' biological opinions on these fisheries include ITs and RPMs intended to improve release conditions and post-release survival, as well as monitoring/reporting requirements for oceanic whitetip sharks (NMFS 2019; NMFS 2020).
- In the WCPO, PIRO already conducts section 7 consultation on all of its federally managed fisheries that are likely to incidentally capture oceanic whitetip sharks, including the Hawaii Deep-set Longline Fishery; Hawaii Shallow-set Longline Fishery; Hawaii, Guam, and CNMI Bottomfish Fisheries; and U.S. WCPO Purse Seine Fishery.
- The Shark Fin Sales Elimination Act, enacted as section 5946 of the National Defense Authorization Act for Fiscal Year 2023 (117 H.R. 7776, P.L. 117-263; Dec. 23, 2022), prohibits 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.

## Description of Alternatives to the Proposed Rule Which Accomplish the Objectives and Which Minimize Impacts on Small Entities

The RFA requires consideration of alternative rules that would minimize impacts to small entities. Alternatives were evaluated based on alignment with the following objectives:

1. To conserve oceanic whitetip sharks.
2. To comply with the mandates of the ESA.
3. To regulate activities to avoid or minimize take of oceanic whitetip sharks.
4. To avoid or minimize import and export of oceanic whitetip sharks and parts and products thereof.
5. To allow ongoing and future scientific research to advance the conservation and recovery of the oceanic whitetip shark.
6. To comply with all other federal laws and regulations.

We considered the following alternatives when developing the 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.

NMFS does not consider the No-action Alternative to be a reasonable alternative because it would not satisfy the objectives listed above. 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 regulate the harvest of oceanic shark species, including the oceanic whitetip shark, both in U.S. and international waters (Young et al. 2017; Young and Carlson 2020). Without regulations established in an ESA 4(d) rule, 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 sec. 9(a) Prohibitions with Exceptions (PROPOSED ALTERNATIVE)**

Under Alternative 2, NMFS would promulgate a 4(d) rule that extends all of the prohibitions enumerated in section 9(a)(1) of the ESA to the oceanic whitetip shark, with limited exceptions for specified categories of activities that contribute to the conservation of the species.

The ESA section 9(a)(1) prohibitions make it unlawful, with regard to endangered species, for any person subject to the jurisdiction of the United States to:

- A. Import any such species into, or export any such species from the United States;
- B. Take any such species within the United States or the territorial sea of the United States;
- C. Take any such species upon the high seas;
- D. Possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);
- E. Deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;
- F. Sell or offer for sale in interstate or foreign commerce any such species; or
- G. Violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

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, both direct and indirect impacts would likely be minor to all potentially affected industries and entities. 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, which is described below.

There are two specific exceptions to the section 9(a)(1) prohibitions included in the Proposed Alternative.

- Take resulting from scientific research activities that advance the conservation and/or recovery of the species, as well as import and export of scientific samples and specimens.
- Take resulting from certain emergency response and salvage activities carried out by authorized law enforcement officials or management authorities.

Scientific research to fill data gaps related to the biology, life history, ecology, movement patterns, habitat use, and population structure of the oceanic whitetip shark is critical to conserve the species. Some of these research activities may require targeted and/or incidental capture of individual sharks in order to take biological samples, apply various tracking tags, and/or conduct other research activities. Therefore, such activities require conditional exceptions from the take prohibitions both in U.S. waters and on the high seas. If conditions described in the protective regulation are met, an ESA section 10(a)(1)(A) permit will not be required for researchers that conduct take in the course of such scientific research.

Scientific research activities are excepted from the ESA section 9(a)(1)(A) prohibition on import and export because a researcher may need to import samples collected in a foreign country for analysis within the U.S. Similarly, a researcher may export samples collected in the U.S. to a colleague in a foreign country. Including this exception in the preferred alternative relieves researchers of the requirement to obtain an ESA 10(a)(1)(A) permit for import or export of oceanic whitetip shark samples or specimens, as long as the samples or specimens are accompanied by the proper permits or certificates issued under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

In certain circumstances, law enforcement officials may need to take an oceanic whitetip shark when acting in the course of their official duties. Circumstances in which such action may be necessary

include aiding a sick, injured, entangled, or stranded oceanic whitetip shark, or disposing of a dead oceanic whitetip shark. There may also be opportunities for collection of scientifically valuable data or samples from oceanic whitetip sharks that may arise in a location, or at a time, when specialists who work with the species are not present. In these situations, the proposed exemption would allow authorized representatives of natural resources agencies to coordinate with NMFS to secure such data/material.

In addition to the proposed exceptions described above, the ESA provides specific procedures for obtaining authorization for prohibited take through either interagency consultation as prescribed by ESA section 7 or a permit as prescribed by ESA section 10. All other activities that result in take of the oceanic whitetip shark may be punishable by civil or criminal penalties and fines as stipulated by section 11 of the ESA.

The exceptions included in this alternative contribute to the conservation of the oceanic whitetip shark because these activities are beneficial to the species. Scientific research activities improve our understanding of the status of and risks facing the oceanic whitetip shark, and provide critical information for assessing the effectiveness of current and future management practices. Law enforcement activities such as aiding entangled oceanic whitetip sharks or salvaging dead oceanic whitetip sharks for further scientific study, as necessary, may reduce instances of mortality and support scientific research efforts.

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 sec. 9(a)(1) Prohibitions (FULL ACTION)**

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 Alternative 3 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 9(a)(1)(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 Alternative constitutes an incremental impact of Alternative 3, relative to impacts resulting from the Proposed Alternative. While additional 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, as described under Alternative 2 above, would likely be deterred or delayed.

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