

Analysis of Petition and Decision

NMFS carefully considered the information contained in the petition and supporting documents, and made the final determinations for each portion of the petition as follows.

Petition Component (1): Conduct In-water Population Level Assessments

The petition fails to provide any new information that justifies the need for regulations that would change the agency's general pattern or practice regarding data collection and analytical methodologies. NMFS is aware of the TEWG's assessments of the current datasets and is already working to improve the empirical data that define where, how many, and at what life stage and condition sea turtles may be encountered. NMFS is also conducting and supporting in-water research in many Atlantic states, as well as conducting aerial surveys in the mid-Atlantic to better assess sea turtle distribution and abundance. NMFS has built upon the TEWG recommendations by developing a requirements plan (NOAA 2004) to improve our understanding of the status of U.S. sea turtle populations. The requirements plan reviews the current sea turtle population assessment program in terms of present research capability and capacity, and delineates the resources necessary to acquire reliable assessment information to fully address identified data requirements. NMFS has addressed, and will continue to address, both the substance of this petitioned action and the TEWG recommendations through existing research planning documents and programs. Improvement of NMFS' research program is a matter left to the agency's discretion; it is not a specific and discrete action that is properly within the scope of a petition for rulemaking pursuant to APA 5 U.S.C. 553(e). Accordingly, NMFS denies this component of the petition.

Petition Component (2): Increase Observer Coverage to Obtain Accurate Information on the Number of Sea Turtles Caught in All Fisheries

Oceana has previously petitioned NMFS to develop and implement a workplan for placing observers on enough fishing trips to provide statistically reliable bycatch estimates in all fisheries (67 FR 19154; April 18, 2002). In its response to that petition, NMFS explained that even though observers are effective in many fisheries, they may not be appropriate for all fisheries (68 FR 11501, March 11, 2003). NMFS is continuing to expand and modernize observer programs for Federal commercial fisheries. NMFS recognizes that improving monitoring

programs should increase our understanding of sea turtle interactions, but constraints on agency resources and logistical difficulties (e.g., small boats) make it difficult to monitor the extent of sea turtle interactions in state-managed and recreational fisheries. NMFS is exploring various observer options that could allow for more comprehensive, longer term monitoring of sea turtle-fishery interactions across fishing sectors and jurisdictional boundaries, but this on going effort is still in its early stages. Options may include placing observers in fisheries of concern pursuant to authority under the Endangered Species Act (ESA). In light of NMFS' previous denial of a substantially similar petitioned action and the agency's ongoing efforts to improve observer coverage, granting this petitioned action is unwarranted at this time.

Petition Component (3): Establish a New, Uniform Quantitative Method for Determining Take Limits for Biological Opinions

NMFS is interested in maintaining consist ESA section 7 jeopardy analyses in its biological opinions, while taking into account the wide variability in listed species' biology, as well as the wide variability in available information on them. To this end, NMFS convened a workshop in August 2004 as a first step in vetting the ESA section 7 biological opinion assessment framework. NMFS is still in the process of adding features such as identifying a suite of quantitative and qualitative methods for use in both data-sparse and data-rich situations, as well as testing and refining the applicability of the methods using information typical to section 7 consultations.

Any structured decision approach adopted by NMFS must, in the overall jeopardy evaluation, weigh such qualitative factors as severity of injury, significance of behavioral responses, and extent and severity of habitat disturbance. Approaches for evaluating take levels for biological opinions should contain options suitable to the varied species, available data sets, and actions under consideration. Use of any particular quantitative model such as PBR for every evaluation is inappropriate. Moreover, section 7 of the ESA and its implementing regulations do not require NMFS to estimate incidental take quantitatively. When promulgating the section 7 regulations in 1986, NMFS and the U.S. Fish and Wildlife Service explicitly declined to endorse the use of numerical estimates of incidental take in all cases. In many biological opinions, a description of the extent of

take is used because the loss of habitat resulting in death or injury of individuals may have more significant adverse consequences than the direct loss of a certain number of individuals (51 FR 19953, June 3, 1986). Where Federal actions 'take' threatened or endangered species by altering the species' habitat, it is often impossible to translate the habitat lost into numerical estimates of the number of individuals taken. Consequently, numerical estimates are not appropriate to every consultation, and requiring them through rulemaking could reduce the protections listed species currently receive.

The analytical framework for evaluating take levels in biological opinions is not yet completed and has not been fully tested. NMFS has determined that it is premature to consider rulemaking to adopt the framework, or any other uniform decision approach, at this time. Thus, NMFS denies this component of the petition.

References Cited

Turtle Expert Working Group. 2000. Assessment update for the Kemp's ridley and loggerhead sea turtle populations in the western North Atlantic. U.S. Dep. Commer. NOAA Tech. Mem. NMFS-SEFSC-444, 115 pp.
NOAA Fisheries National Task Force for Improving Marine Mammal and Turtles Stock Assessment. September 2004. A Requirements Plan for Improving Understanding of the Status of U.S. Protected Species.

Authority: 16 U.S.C. 1531 *et seq.*

Dated: November 28, 2005.

Donna Wieting,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.
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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 051104291-5291-01; I.D. 100405F]

50 CFR Part 648

RIN 0648-AT29

Fisheries of the Northeastern United States; Spiny Dogfish; Framework Adjustment 1

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

ACTION: Proposed rule; establishing a multiple-year specifications process.

SUMMARY: NMFS proposes measures contained in Framework Adjustment 1 (Framework 1) to the Spiny Dogfish Fishery Management Plan (FMP) that would allow the specification of commercial quotas and other management measures for up to 5 years. The intent is to provide flexibility and efficiency to the management of the species.

DATES: Comments must be received on or before December 16, 2005.

ADDRESSES: Copies of Framework 1, the Regulatory Impact Review (RIR), Initial Regulatory Flexibility Analysis (IRFA), and other supporting documents are available from Daniel Furlong, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115, Federal Building, 300 South Street, Dover, DE 19901-6790. The RIR/IRFA is also accessible via the Internet at <http://www.nero.nmfs.gov>.

Written comments on the proposed rule may be sent by any of the following methods:

- Mail to the following address: Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, One Blackburn Drive, Gloucester, MA 01930. Mark the outside of the envelope "Comments on Framework 1 - Dogfish";
- Fax to Patricia A. Kurkul at the following number: (978) 281-9135;
- E-mail to the following address: DogFrame1@noaa.gov. Include in the subject line of the e-mail comment the following document identifier: "Comments on Framework 1";
- Electronically through the Federal e-Rulemaking portal: <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Eric Jay Dolin, Fishery Policy Analyst, (978) 281-9259, fax (978) 281-9135.

SUPPLEMENTARY INFORMATION:

Background

This framework adjustment to the FMP is intended to improve management of the Northeast Atlantic stock of spiny dogfish (*Squalus acanthias*), pursuant to the Magnuson-Stevens Fishery Conservation and Management Act of 1976, as amended (Magnuson-Stevens Act). Under the existing FMP, spiny dogfish are jointly managed by both the Mid-Atlantic and the New England Fishery Management Councils (Councils). The Councils recommend annual commercial quotas and other management measures (e.g., minimum or maximum fish sizes, seasons, mesh size restrictions, trip

limits, or other gear restrictions), as needed, in order to ensure that the target F of 0.08 will not be exceeded.

Implementing regulations for these fisheries are found at 50 CFR part 648, subpart L. Under the current FMP, the commercial quota and trip limits are specified annually and apply only to the following fishing year.

The Councils developed Framework 1, pursuant to § 648.237, in order to streamline the administrative and regulatory processes involved in specifying the fishing measures for spiny dogfish, while, at the same time, maintaining consistency with the Magnuson-Stevens Act. The proposed action would modify the FMP so that, within a given year, the Councils could specify commercial quotas and other management measures necessary to ensure that the target F of 0.08 will not be exceeded in each of the following 1 to 5 years. Implementation of Framework 1 will provide the option, not the requirement, for Councils to specify multi-year management measures. All of the environmental and regulatory review procedures currently required under the Magnuson-Stevens Act and the National Environmental Policy Act will be conducted and documented during the year in which specifications are set. These analyses will consider impacts throughout the time span for which specifications are to be set (1 to 5 years). Multi-year quotas and other management measures would not have to be constant from year to year, but would instead be based upon expectations of future stock conditions as indicated by the best scientific information available at the time the multi-year specifications are set. Updated information on the resource and the fishery would be reviewed at least every 5 years by the Mid-Atlantic Fishery Management Council's (MAFMC) Spiny Dogfish Monitoring Committee, the Joint Spiny Dogfish Committee and the Councils. Adjustments to the management measures, once implemented, would not be expected to occur during the period of multi-year specifications. Nevertheless, if new information indicated that modification to the multi-year management measures is necessary to ensure that the target F of 0.08 is not exceeded, the Councils would initiate the process for setting specifications in order to make such modifications. Given the elimination of the annual review/management measure adjustment process under this proposed action, environmental impact evaluation in the specification setting year would have to thoroughly consider the uncertainty

associated with projected estimates of stock size in the 1 to 5 year time horizon. Accordingly, Council recommendations for multi-year management measures would have to be adequately conservative to accommodate this uncertainty under the proposed action.

During the development of Framework 1, the Councils considered and analyzed the following three alternatives for a multi-year specifications process: A no-action alternative, which would continue the requirement to establish spiny dogfish specifications on an annual basis; the proposed alternative; and an alternative that would require the Councils to conduct an annual review of the previously established multi-year specifications. The Councils selected the proposed action because it provided the most straightforward and efficient administrative process for establishing multi-year specifications, and because it is expected to provide greater predictability to the commercial fishing sector.

Classification

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

An IRFA was prepared that describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the reasons why this action is being considered, and the objectives of and legal basis for this action is contained in the preamble of this proposed rule. The preamble also includes complete descriptions of the proposed, no action, and the other alternative discussed here. Under the current management system, the Councils annually submit a specifications document to NMFS for review. Under the other two alternatives, the Councils would submit a specifications document only in the first year of the multi-year specifications period, if applicable. This would reduce substantially the administrative burden on both the Councils and NMFS. Additionally, longer term specifications should provide greater predictability to the commercial fishing sector. Under the proposed alternative, an annual review of updated information on the fisheries by the MAFMC's Spiny Dogfish Monitoring Committee, the Joint Spiny Dogfish Committee, and the Councils would not be required during the period of multi-year specifications because the analysis of multi-year measures would have evaluated the impacts of the measures for years 2 through 5, as appropriate, in the specifications process. The Councils

concluded that the provision for an annual review would not be necessary and would reduce administrative efficiency. However, the Councils contemplate that a review would be initiated when new information indicated that modifications could be required to ensure that the target F of 0.08 is not exceeded.

There are no relevant Federal rules that duplicate, overlap, or conflict with this rule. This rule does not contain any new, nor does it revise any existing reporting, recordkeeping, and other compliance requirements. Framework 1 deals only with the administrative periodicity of specifications process, and therefore would have minimal direct effect on entities participating in these fisheries.

List of Subjects in 50 CFR Part 648

Fishing, Fisheries, Reporting and recordkeeping requirements.

Dated: November 25, 2005.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For the reasons stated in the preamble, 50 CFR part 648 is proposed to be amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. Section 648.230 is revised to read as follows:

§ 648.230 Catch quotas and other restrictions.

(a) *Process for setting specifications.* The Spiny Dogfish Monitoring Committee will review the following data at least every five years, subject to availability, to determine the total allowable level of landings (TAL) and other restrictions necessary to assure that a target fishing mortality rate (F) of 0.08 will not be exceeded: Commercial

and recreational catch data; current estimates of F; stock status; recent estimates of recruitment; virtual population analysis results; levels of noncompliance by fishermen or individual states; impact of size/mesh regulations; sea sampling data; impact of gear other than otter trawls and gill nets on the mortality of spiny dogfish; and any other relevant information.

(b) *Recommended measures.* Based on this review, the Spiny Dogfish Monitoring Committee shall recommend to the Joint Spiny Dogfish Committee a commercial quota and any other measures including those in paragraphs (b)(1)-(b)(5) of this section that are necessary to assure that the F specified in paragraph (a) of this section will not be exceeded in any fishing year (May 1 - April 30), for a period of 1–5 fishing years. The quota may be set within the range of zero to the maximum allowed. The measures that may be recommended include, but are not limited to:

- (1) Minimum or maximum fish sizes;
- (2) Seasons;
- (3) Mesh size restrictions;
- (4) Trip limits; or
- (5) Other gear restrictions.

(c) *Joint Spiny Dogfish Committee recommendation.* The Councils' Joint Spiny Dogfish Committee shall review the recommendations of the Spiny Dogfish Monitoring Committee. Based on these recommendations and any public comments, the Joint Spiny Dogfish Committee shall recommend to the Councils a commercial quota and, possibly, other measures, including those specified in paragraph (b) of this section, necessary to assure that the F specified in paragraph (a) of this section will not be exceeded in any fishing year (May 1 – April 30), for a period of 1–5 fishing years. The commercial quota may be set within the range of zero to the maximum allowed.

(d) *Council recommendations.* The Councils shall review these recommendations and, based on the recommendations and any public comments, recommend to the Regional

Administrator a commercial quota and other measures necessary to assure that the F specified in paragraph (a) of this section will not be exceeded in any fishing year (May 1 - April 30), for a period of 1–5 fishing years. The Councils' recommendations must include supporting documentation, as appropriate, concerning the environmental, economic, and other impacts of the recommendations. The Regional Administrator shall initiate a review of these recommendations and may modify the recommended quota and other management measures to assure that the target F specified in paragraph (a) of this section will not be exceeded in any fishing year (May 1 - April 30), for a period of 1–5 fishing years. The Regional Administrator may modify the Councils' recommendations using any of the measures that were not rejected by both Councils. After such review, NMFS shall publish a proposed rule in the **Federal Register** specifying a coastwide commercial quota and other measures necessary to assure that the F specified in paragraph (a) of this section will not be exceeded in any fishing year (May 1 - April 30), for a period of 1–5 fishing years. After considering public comments, NMFS shall publish a final rule in the **Federal Register** to implement such a quota and other measures.

(e) *Annual quota.* [Reserved]

(f) *Distribution of annual quota.* (1) The annual quota specified according to the process outlined in paragraph (a) of this section shall be allocated between two semi-annual quota periods as follows: May 1 through October 31 (57.9 percent) and November 1 through April 30 (42.1 percent).

(2) All spiny dogfish landed for a commercial purpose in the states from Maine through Florida shall be applied against the applicable semi-annual commercial quota, regardless of where the spiny dogfish were harvested.

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