



October 2, 2023

HMS Management Division
Office of Sustainable Fisheries
National Marine Fisheries Service
1315 East-West Highway, 13th Floor
Silver Spring, MD 20910

RE: Comments on NOAA-NMFS-2019-0035

Dear HMS Management Division:

On behalf of The Ocean Foundation, The Pew Charitable Trusts, Wild Oceans, Natural Resources Defense Council, and Earthjustice, we appreciate the opportunity to submit these comments on Draft Amendment 15 to the 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan (FMP) (NOAA-NMFS-2019-0035).

First, we would like to acknowledge the importance of the existing longline closures that are the subject of Amendment 15. Some of these closures have been in place for over 20 years and have contributed considerable conservation gains, including rebuilding of the North Atlantic swordfish population and ending of overfishing of white marlin. That said, we support NMFS's desire to evaluate their effectiveness for both their original intent (e.g., to reduce bycatch mortality of billfish, juvenile swordfish, sea turtles, and other marine biodiversity), as well as for new emerging threats. We also acknowledge the importance and deep complexity of adapting to rapid shifts in species distribution as a result of anthropogenic climate change.

With these considerations in mind, adjusting the spatiotemporal boundaries of these closures to optimize catches while minimizing bycatch and, importantly, adapting to climate change impacts, is a matter that requires carefully designed research into potential conservation and economic impacts. We appreciate Amendment 15's stated purpose to collect important data and think PRiSM has been a valuable peer-reviewed tool to help achieve this. We also commend NOAA's

investment in communicating this complex material effectively, especially through the online story board, an engaging tool that NMFS should continue to employ.

However, we do have concerns regarding some of the alternatives and note that whichever approach is ultimately selected, NMFS must implement the proper experimental design to robustly evaluate the impacts of the closures, including both spatial and temporal extent. Further, there must be backstops in place to expeditiously reverse course in the event that the project is not going as planned (e.g., bycatch rates are higher than expected).

With respect to the suite of measures under Alternative A (Area Modification), we are concerned over potential actions to shift the boundaries and timescales of these closures. Some of these changes may drastically decrease closed areas, which may undermine the progress that these closures have made for conserving marine resources to date. While the analysis to select the preferred alternatives is extensive, it does not account for all threats (e.g., undersized swordfish mortality) or other factors (e.g., effects from distribution of prey species), and failed to evaluate some listed species (e.g., giant manta rays, oceanic whitetip sharks). NMFS must fully evaluate all of these potential effects before moving ahead with any alternative and must ensure that it closely oversees the activities conducted pursuant to any alternatives it selects. We have particular concerns about the considerably reduced spatial coverage under the preferred alternatives for the Charleston Bump and East Florida Coast areas. The method by which the eastern boundaries of these areas were selected for the preferred alternatives is not sufficiently clear and may not be biologically based.

If any cuts in area or closure time are to occur per Alternative A, enhanced monitoring and data collection as part of Alternative B is highly important. B1, no action, would be unacceptable and B2 is still insufficient because it only requires monitoring within the closures. Should spatial closures be reduced, Alternative B3 for the monitoring area will be highly important for tracking and mitigating potential negative consequences. Alternatives B3d and B3e will be especially essential to provide comprehensive human and/or electronic monitoring to understand in real time the full effect of the changes within the closures, in previous closed areas, and in surrounding waters. If NMFS cannot guarantee secured funding for 100% observer coverage and electronic monitoring under Alternative B3d and B3e, then we support B4 as the Exempted Fishing Permits can be issued contingent on government or industry funded monitoring.

Alternatives B3a, B3b, and B3c are also important as safeguards for effort caps, bycatch caps, and trip level effort controls, respectively. As these Alternatives take effect, data collected by the enhanced monitoring must be closely scrutinized and evaluated, and measures must be in place to ensure quick action should bycatch be higher than anticipated. Further, the results of this monitoring should be shared publicly given the high degree of public interest in this action and its likely implications. Changes to the closure boundaries must be done in a precautionary manner to avoid any potential unintended consequences, and that should include providing 100% monitoring, particularly through Alternatives B3d and B3e. We understand that 100% monitoring coverage may be expensive, but industry should contribute to the costs of expanded monitoring as they are

simultaneously benefiting from enhanced access to public resources. Moreover, NMFS should ensure that 100% monitoring is provided regardless of funding source. Without comprehensive monitoring, the research value of NMFS's proposal would be lost while risking substantial harm to target and non-target stocks as well as protected species.

Per Alternative C (Evaluation and timing), we strongly support NMFS's preferred approach of Alternative C2 to evaluate once 3 years of data are available, combined with C4 to have additional evaluations triggered should special concerns arise such as unexpectedly high or low¹ bycatch, among others. Close attention should be paid to defining what those triggering circumstances are for C4, and the actions that will take place following those triggers. We urge that unexpectedly high levels of bycatch should be met with immediate closure of an area, followed by an evaluation before recommencing fishing.

We note that the quality and robustness of the background analyses may vary across the four closure sites. NMFS may want to consider that some of these areas may be better informed for action and refinements than others. In that case, a stepwise approach may be beneficial where changes are enacted on a closure-by-closure basis as they are ready for modification and evaluation.

Overall, NMFS must ensure that the measures it chooses comply with all applicable law. Under the Magnuson-Stevens Fishery Conservation and Management Act, NMFS is required to take steps to avoid and minimize bycatch and to ensure that measures protect the marine ecosystem. In addition, NMFS must ensure that all fishery management measures fully comply with other applicable law, including the Endangered Species Act (ESA), which applies to several species of potential bycatch in the subject area, and the Marine Mammal Protection Act. Appendix I presents further detail on the basic requirements NMFS must meet under these laws, including how these other measures emphasize the need for 100% monitoring.

We recognize NMFS's work to update and improve the 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan as the needs of fisheries change. In our support of well-designed, carefully monitored research to advance HMS management, we recommend that NMFS adopt the alternatives outlined above as improved by our recommendations. These measures include careful review of whether significant reductions in the area of longline closures are necessary, especially for the Charleston Bump and East Florida Coast areas. And it is imperative that any reductions in closure areas be met with 100% human and/or electronic observer coverage in monitoring areas to minimize the risk of negative consequences should bycatch be higher than expected, or other issues arise. We also support that industry, as planned beneficiaries of expanded access, contribute to the costs of monitoring requirements.

Thank you for your time and consideration.

¹ While lower bycatch is a positive outcome, unexpectedly low bycatch may indicate that monitoring efforts are not detecting bycatch accurately and effectively.

Sincerely,



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Appendix I. NMFS Must Ensure that Amendment 15 Fully Complies with All Applicable Legal Requirements

I. Magnuson-Stevens Fishery Conservation and Management Act

The Magnuson-Stevens Fishery Conservation and Management Act (“MSA”) requires that NMFS manage fish stocks in compliance with a number of national standards. The first of these standards requires NMFS to prevent overfishing—and end it where it is already occurring—and manage fish stocks to achieve optimum yield “on a continuing basis.” 16 U.S.C. § 1851(a)(1). The Act defines optimum yield as the amount of fish which provides the greatest benefit to the Nation, taking into account ecosystem protection, and, in the case of overfished species, “provides for rebuilding to a level consistent with producing the maximum sustainable yield in such fishery” (16 U.S.C., 1802(28)(A), (C)).

The MSA also requires NMFS to “avoid or minimize bycatch” and “minimize the mortality of bycatch which cannot be avoided.” 16 U.S.C. § 1853(a)(11). When determining whether a measure to minimize bycatch or bycatch mortality is “practicable,” NMFS considers a number of factors, including: effects of bycatch on the bycatch species, ecosystem effects, changes in bycatch of other species and resulting ecosystem effects, changes in fishing practices and behavior, changes in distribution of costs and benefits of fishing, changes in the economic, social, or cultural value of fishing activities and non-consumptive uses of fishery resources. 50 C.F.R. § 600.350(d)(3)(i). To the extent that there is uncertainty regarding any of these factors, fishery managers are expected to apply the precautionary approach, as defined by the Food and Agriculture Organization of the United Nations (“FAO”) Code of Conduct for Responsible Fisheries (Article 6.5). 50 C.F.R. § 600.350(d)(3)(ii). That Code dictates that “[t]he absence of adequate scientific information should not be used as a reason for postponing or failing to take measures to conserve target species, associated or dependent species and non-target species and their environment.” FAO Code of Conduct for Responsible Fisheries, Art. 6.5. Likewise, the absence of information on potential harmful impacts from fishing should not be assumed to indicate that those harmful impacts do not exist.

The MSA also requires that all “[c]onservation and management measures shall be based upon the best scientific information available.” 16 U.S.C. § 1851(a)(2).

Overall, the MSA directs NMFS to adopt conservation and management measures that promote long-term sustainability and protect marine ecosystems—not simply to maximize catch. 16 U.S.C. § 1802(5) (definition of conservation and management includes protection of marine ecosystem); 16 U.S.C. § 1851(a)(1) (measures must achieve optimum yield, not maximum yield); 16 U.S.C. § 1802(33) (definition of optimum yield, noting benefits to the Nation include marine ecosystem protection); *see also* Sustainable Fisheries Act Report of the Committee on Commerce, Science, and Transportation, Sen. Rep. 104-276 (May 23, 1996) at 32-33 (Sustainable Fisheries Act of 1996 changed the definition of “optimum” to clarify that ecological, economic, and social factors could only be used to set catch levels lower than

maximum sustainable yield, never higher). NMFS must manage fisheries to maintain long-term, sustainable populations and rebuild overfished stocks in the shortest time possible. 16 U.S.C. §§ 1851(a)(1), 1854(e)(3)-(4).

While the agency may consider economic factors, it may not trade the long-term sustainability of a fishery for short-term economic gain. In weighing measures to end overfishing against their economic consequences, NMFS must prioritize ending overfishing. *Natural Resources Defense Council v. Daley*, 209 F.3d 747, 753 (D.C. Cir. 2000) (“we reject the District Court's suggestion that there is a conflict between [the Magnuson Act's] expressed commitments to conservation and to mitigating adverse economic impacts. . . . [U]nder the [MSA], the Service must give priority to conservation measures.”); *see also* 16 U.S.C. § 1851(a)(8) (management measures must minimize economic impacts on fishing communities and provide for sustained participation in the fishery to the extent this is consistent with preventing overfishing and rebuilding overfished stocks).

Many of the stocks NMFS manages under the Atlantic HMS FMP are overfished and/or experiencing overfishing. The status of still more is simply unknown. NMFS must ensure that the changes it proposes in Amendment 15 will not impede already long rebuilding timelines for overfished species or contribute to overfishing. The Atlantic HMS fisheries catch and kill a substantial number of blue and white marlin, dusky sharks, scalloped hammerheads, and shortfin makos, all of which are overfished and/or experiencing overfishing. The rebuilding plans for these species assume that NMFS will continue to implement current time-area closures. For example, NMFS promulgated a revised rebuilding plan for dusky sharks (Amendment 5b to the HMS FMP), which assumed the continued operation of these time-area closures and assumed they would aid in rebuilding the population. Removing or decreasing the temporal or spatial extent of time-area closures that help reduce bycatch of dusky sharks, scalloped hammerheads, and shortfin makos would further undermine the validity of NMFS's rebuilding plans and require NMFS to re-evaluate their effectiveness.

II. Endangered Species Act

NMFS's management of the Atlantic HMS fisheries is also subject to the requirements of the Endangered Species Act (“ESA”). ESA Section 7(a)(1) requires that all federal agencies use their authorities in furtherance of conserving listed species. 16 U.S.C. § 1536(a)(1). ESA Section 7(a)(2) requires federal agencies to ensure that no action they authorize, fund, or carry out is likely to “jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical habitat].” *Id.* Therefore, NMFS must ensure that any management changes in Amendment 15 are not likely to pose jeopardy or adverse modification to species protected under the ESA.

Atlantic HMS fisheries incidentally injure and kill substantial numbers of threatened and endangered species, including loggerhead, leatherback, Kemp's ridley, olive ridley, green, and hawksbill sea turtles; oceanic whitetip sharks; scalloped hammerhead sharks; giant manta rays;

smalltooth sawfish; and sperm whales. The ESA requires NMFS to ensure that its actions, including Amendment 15, avoid the likelihood that these incidental takes will jeopardize the species and to actively promote their conservation and recovery to the point where listing is no longer necessary. The time-area closures that NMFS is considering revising in Amendment 15 likely contribute to reducing take of threatened and endangered species in this fishery, as well as protecting vulnerable species (particularly listed whales) from increased vessel traffic and noise. Any changes to these measures would require ESA consultation to ensure that they do not decrease the likelihood of survival or recovery of the many species affected by Atlantic HMS fisheries.

III. Marine Mammal Protection Act

NMFS must ensure that Amendment 15 complies with its duty to minimize incidental take of marine mammals under the Marine Mammal Protection Act (“MMPA”). The MMPA requires that fisheries “reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate” (“ZMRG”). 16 U.S.C. § 1387(b)(1). In pursuit of that goal, the MMPA requires that domestic fisheries be regulated, in part, based on the potential biological removal (“PBR”) of a particular marine mammal stock. PBR is defined as “the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population.” Id. § 1362(20). “Optimum sustainable population means, with respect to any population stock, the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element.” Id. § 1362(9). By regulation, NMFS has defined achieving ZMRG as reducing take to ten percent or less of PBR. 69 Fed. Reg. 43338 (July 20, 2004); 50 C.F.R. § 229.2.

For any domestic fishery that NMFS determines is not reducing marine mammal bycatch consistent with ZMRG, NMFS must develop and implement a take reduction plan “designed to assist in the recovery or prevent the depletion of each strategic stock which interacts with a commercial fishery listed under subsection (c)(1)(A)(i) or (ii) of this section....” Id. at § 1387(f)(1). In addition, NMFS may only authorize the incidental take of ESA-listed marine mammals by commercial fishing operations if it first finds, after public notice and comment, that the taking will have a “negligible impact” on the species or stock, a recovery plan has been or is being developed under the ESA, and, if required by Section 118, a monitoring plan and a take reduction plan are in place. Id. § 1371(a)(5)(E)(i).

The MMPA also underscores the importance of requiring 100% monitoring in any areas NMFS may open to fishing under Amendment 15, as considered under the suite of B alternatives. The MMPA requires NMFS to monitor the rate of marine mammal serious injury and mortality in commercial fisheries. 16 U.S.C. § 1387(d). This monitoring program must obtain “statistically reliable” data. 16 U.S.C. § 1387(d)(1)(A). The monitoring program must also

determine the reliability of self-reports from fishermen. 16 U.S.C. § 1387(d)(1)(B). To meet these requirements, the MMPA authorizes NMFS to require fishing vessels to carry observers. 16 U.S.C. § 1387(d)(2). Estimated levels of marine mammal mortality and serious injury, based on observer data, are essential for NMFS's ability to determine whether a fishery is having "negligible impact."