

NOTICE OF OFFICE OF MANAGEMENT AND BUDGET ACTION

Date 08/19/2009

Department of Commerce
National Oceanic and Atmospheric Administration
FOR CERTIFYING OFFICIAL: Suzanne Hilding
FOR CLEARANCE OFFICER: Diana Hynek

In accordance with the Paperwork Reduction Act, OMB has taken action on your request received 03/25/2009

ACTION REQUESTED: Extension without change of a currently approved collection
TYPE OF REVIEW REQUESTED: Regular
ICR REFERENCE NUMBER: 200903-0648-008
AGENCY ICR TRACKING NUMBER:
TITLE: Reporting of Sea Turtle Incidental Takes in Virginia Chesapeake Bay Pound Net Operations
LIST OF INFORMATION COLLECTIONS: See next page

OMB ACTION: Approved without change
OMB CONTROL NUMBER: 0648-0470
The agency is required to display the OMB Control Number and inform respondents of its legal significance in accordance with 5 CFR 1320.5(b).

EXPIRATION DATE: 08/31/2012 DISCONTINUE DATE:

BURDEN:	RESPONSES	HOURS	COSTS
Previous	609	102	2,000
New	609	102	1,827
Difference			
Change due to New Statute	0	0	0
Change due to Agency Discretion	0	0	0
Change due to Agency Adjustment	0	0	-173
Change Due to Potential Violation of the PRA	0	0	0

TERMS OF CLEARANCE: This request is approved. Prior to resubmission of this Information Collection for renewal, the Agency should reassess estimates of burden taking into account recent experience with this program.

OMB Authorizing Official: Kevin F. Neyland
Deputy Administrator,
Office Of Information And Regulatory Affairs

List of ICs

IC Title	Form No.	Form Name	CFR Citation
Reporting of Sea Turtle Incidental Takes in Virginia Chesapeake Bay Pound Net Operations			50 CFR 222.102, 223.205,223.206

PAPERWORK REDUCTION ACT SUBMISSION

Please read the instructions before completing this form. For additional forms or assistance in completing this form, contact your agency's Paperwork Clearance Officer. Send two copies of this form, the collection instrument to be reviewed, the supporting statement, and any additional documentation to: Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW, Washington, DC 20503.

1. Agency/Subagency originating request	2. OMB control number b. <input type="checkbox"/> None a. _____ - _____
3. Type of information collection (<i>check one</i>) a. <input type="checkbox"/> New Collection b. <input type="checkbox"/> Revision of a currently approved collection c. <input type="checkbox"/> Extension of a currently approved collection d. <input type="checkbox"/> Reinstatement, without change, of a previously approved collection for which approval has expired e. <input type="checkbox"/> Reinstatement, with change, of a previously approved collection for which approval has expired f. <input type="checkbox"/> Existing collection in use without an OMB control number For b-f, note Item A2 of Supporting Statement instructions	4. Type of review requested (<i>check one</i>) a. <input type="checkbox"/> Regular submission b. <input type="checkbox"/> Emergency - Approval requested by _____ / _____ / _____ c. <input type="checkbox"/> Delegated
7. Title	5. Small entities Will this information collection have a significant economic impact on a substantial number of small entities? <input type="checkbox"/> Yes <input type="checkbox"/> No
8. Agency form number(s) (<i>if applicable</i>)	6. Requested expiration date a. <input type="checkbox"/> Three years from approval date b. <input type="checkbox"/> Other Specify: _____ / _____
9. Keywords	10. Abstract
11. Affected public (<i>Mark primary with "P" and all others that apply with "x"</i>) a. ___ Individuals or households d. ___ Farms b. ___ Business or other for-profit e. ___ Federal Government c. ___ Not-for-profit institutions f. ___ State, Local or Tribal Government	12. Obligation to respond (<i>check one</i>) a. <input type="checkbox"/> Voluntary b. <input type="checkbox"/> Required to obtain or retain benefits c. <input type="checkbox"/> Mandatory
13. Annual recordkeeping and reporting burden a. Number of respondents _____ b. Total annual responses _____ 1. Percentage of these responses collected electronically _____ % c. Total annual hours requested _____ d. Current OMB inventory _____ e. Difference _____ f. Explanation of difference 1. Program change _____ 2. Adjustment _____	14. Annual reporting and recordkeeping cost burden (<i>in thousands of dollars</i>) a. Total annualized capital/startup costs _____ b. Total annual costs (O&M) _____ c. Total annualized cost requested _____ d. Current OMB inventory _____ e. Difference _____ f. Explanation of difference 1. Program change _____ 2. Adjustment _____
15. Purpose of information collection (<i>Mark primary with "P" and all others that apply with "X"</i>) a. ___ Application for benefits e. ___ Program planning or management b. ___ Program evaluation f. ___ Research c. ___ General purpose statistics g. ___ Regulatory or compliance d. ___ Audit	16. Frequency of recordkeeping or reporting (<i>check all that apply</i>) a. <input type="checkbox"/> Recordkeeping b. <input type="checkbox"/> Third party disclosure c. <input type="checkbox"/> Reporting 1. <input type="checkbox"/> On occasion 2. <input type="checkbox"/> Weekly 3. <input type="checkbox"/> Monthly 4. <input type="checkbox"/> Quarterly 5. <input type="checkbox"/> Semi-annually 6. <input type="checkbox"/> Annually 7. <input type="checkbox"/> Biennially 8. <input type="checkbox"/> Other (describe) _____
17. Statistical methods Does this information collection employ statistical methods <input type="checkbox"/> Yes <input type="checkbox"/> No	18. Agency Contact (person who can best answer questions regarding the content of this submission) Name: _____ Phone: _____

19. Certification for Paperwork Reduction Act Submissions

On behalf of this Federal Agency, I certify that the collection of information encompassed by this request complies with 5 CFR 1320.9

NOTE: The text of 5 CFR 1320.9, and the related provisions of 5 CFR 1320.8(b)(3), appear at the end of the instructions. *The certification is to be made with reference to those regulatory provisions as set forth in the instructions.*

The following is a summary of the topics, regarding the proposed collection of information, that the certification covers:

- (a) It is necessary for the proper performance of agency functions;
- (b) It avoids unnecessary duplication;
- (c) It reduces burden on small entities;
- (d) It used plain, coherent, and unambiguous terminology that is understandable to respondents;
- (e) Its implementation will be consistent and compatible with current reporting and recordkeeping practices;
- (f) It indicates the retention period for recordkeeping requirements;
- (g) It informs respondents of the information called for under 5 CFR 1320.8(b)(3):
 - (i) Why the information is being collected;
 - (ii) Use of information;
 - (iii) Burden estimate;
 - (iv) Nature of response (voluntary, required for a benefit, mandatory);
 - (v) Nature and extent of confidentiality; and
 - (vi) Need to display currently valid OMB control number;
- (h) It was developed by an office that has planned and allocated resources for the efficient and effective management and use of the information to be collected (see note in Item 19 of instructions);
- (i) It uses effective and efficient statistical survey methodology; and
- (j) It makes appropriate use of information technology.

If you are unable to certify compliance with any of the provisions, identify the item below and explain the reason in Item 18 of the Supporting Statement.

Signature of Senior Official or designee

Date

Agency Certification (signature of Assistant Administrator, Deputy Assistant Administrator, Line Office Chief Information Officer, head of MB staff for L.O.s, or of the Director of a Program or StaffOffice)

Signature

Date

Signature of NOAA Clearance Officer

Signature

Date

**SUPPORTING STATEMENT
REPORTING OF SEA TURTLE INCIDENTAL TAKE
IN VIRGINIA CHESAPEAKE BAY POUND NET OPERATIONS
OMB CONTROL NO. 0648-0470**

A. JUSTIFICATION

1. Explain the circumstances that make the collection of information necessary.

This request is for a renewal of this information collection.

Since 2002, the National Oceanic and Atmospheric Administration's (NOAA) National Marine Fisheries Service (NMFS) has promulgated several rules restricting the use of large mesh and stringer pound net leaders in certain Virginia Chesapeake Bay waters during the late spring/early summer each year. On June 17, 2002, an interim final rule on this was published (67 FR 41196) restricting leader use, which also required year round reporting of sea turtle takes. In 2004, a NMFS issued a final rule further restricting pound net leader use in Virginia (69 FR 24997). The 2004 rule retained the reporting requirement from the 2002 rule. Requirements are codified in 50 CFR 222.102, 223.205(b)(15) and 223.206(d)(10). These regulations were implemented as a result of high sea turtle strandings each spring in Virginia and the documented take of sea turtles in pound net leaders. In 2002 and 2004, Biological Opinions on the issuance of these NMFS sea turtle conservation measures were completed pursuant to section 7 of the Endangered Species Act of 1973 (ESA) as amended – the most recent on April 16, 2004. In each of these Biological Opinions, an Incidental Take Statement was also completed, exempting the incidental take of a certain number of loggerhead, Kemp's ridley, green and leatherback sea turtles in pound net operations.

A non-discretionary term and condition of these Incidental Take Statements involved the reporting to NMFS of live or dead sea turtles taken in pound net operations. The collection of this information on the incidental take of sea turtles in the Virginia pound net fishery is necessary to ensure sea turtles are being conserved and protected, as mandated by the ESA. Documenting the accurate occurrence of sea turtle incidental take in pound net operations will help to determine if additional regulatory actions or management measures are necessary to protect sea turtles caught in pound net operations. This information will help NMFS better assess the Virginia pound net fishery and its impacts (or lack thereof) on sea turtle populations in the Virginia Chesapeake Bay. The collection of this information is also imperative to ensure that the April 2004 Incidental Take Statement is not being exceeded, the anticipated take levels are appropriate, and the effects analysis in the Biological Opinion is accurate. Further, reporting the take of live, injured sea turtles caught in pound net gear will ensure these turtles are transferred immediately to a stranding and rehabilitation center for appropriate medical treatment.

2. Explain how, by whom, how frequently, and for what purpose the information will be used. If the information collected will be disseminated to the public or used to support information that will be disseminated to the public, then explain how the collection complies with all applicable Information Quality Guidelines.

Virginia pound net fishermen will call and inform NMFS of any incidental takes of sea turtles in their annual pound net operations. Information provided in these phone calls will include the date and time when the specimen was found, location of pound, location where the animal was found, type and/or mesh size of leader, approximate depth of pound, environmental conditions, fate of the animal, and species information (alive or dead, condition of animal, approximate size, species description). The name and phone number of the respondent will also be noted. The information will be collected by the NMFS Northeast Region Protected Resources Division and then distributed to the NMFS Northeast Fisheries Science Center and the Office of Protected Resources. Information will be collected by NMFS only when a sea turtle is taken in pound net gear, estimated to occur 608 times annually. If an animal is found injured or dead, the fishermen will first report the incident to NMFS, and then to the appropriate stranding and rehabilitation facility (member of the state sea turtle stranding and salvage networks (STSSN)). The additional reports to the stranding and rehabilitation facility are necessary to ensure the animals are immediately retrieved and either treated for their injury (to attempt to prevent subsequent mortality) or necropsied (to help determine cause of death).

Sea turtles are typically present in Virginia waters from May to November, so reporting is expected to occur only during those warmer months. The collected information will be used to monitor the incidental take of sea turtles in pound net operations, as authorized by the Incidental Take Statement. The reporting of information will also be used to help evaluate the capture and mortality of sea turtles in Virginia waters, which is a high priority for NMFS headquarters and Northeast Region, especially during the spring months. Further, the take reports may be used to implement additional appropriate management measures, such as reducing the allowable leader mesh size or modifying the time period of the restrictions. The general intent of collecting this information is to fulfill the general actions stated in the sea turtle recovery plans (i.e., minimize mortality from commercial fisheries).

NMFS will retain control over the information and safeguard it from improper access, modification, and destruction, consistent with NOAA standards for confidentiality, privacy, and electronic information. See response to Question 10 of this Supporting Statement for more information on confidentiality and privacy. The information collection is designed to yield data that meet all applicable information quality guidelines. Although the information collected is not expected to be disseminated directly to the public, results may be used in scientific, management, technical or general informational publications. Should NMFS decide to disseminate the information, it will be subject to the quality control measures and pre-dissemination review pursuant to Section 515 of Public Law 106-554.

3. Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological techniques or other forms of information technology.

The collection of information in question involves reporting the take of sea turtles via a telephone call or fax. This method of reporting is effective means to collect this information.

While information could be collected via electronic mail, it is believed that Virginia pound net fishermen will have an easier time reporting via a telephone call or fax. Furthermore, it is unknown how many Virginia fishermen have computer access, whereas almost everyone has access to a telephone.

4. Describe efforts to identify duplication.

NMFS does not collect similar information directly from the public, but incidental take information is occasionally reported to the states. The STSSN members collect information on sea turtle strandings and, when reported, incidental take. However, based upon anecdotal information, fishermen have not typically reported incidental takes of sea turtles caught in their gear, and Virginia pound net fishermen would not likely report interactions unless the condition is mandatory. Even in response to NMFS' mandatory requirement, there are not many reports from pound net fishermen (but we suspect that there are turtles being caught in pounds). This reporting requirement enables NMFS to better obtain information on pound net takes, and respond to and collect data on such takes on a real time basis. Besides the previous reporting for which this request is a renewal, this specific type of reporting has not been previously required or requested in Virginia waters.

5. If the collection of information involves small businesses or other small entities, describe the methods used to minimize burden.

This information collection will not have a significant impact on small entities. This collection of information does involve small entities but the impacts are minimized by the relatively infrequent nature of the reporting (i.e., only from May to November, with a maximum of 609 reports: 608 entanglement reports and one stranding report) and the reporting by telephone or fax.

6. Describe the consequences to the Federal program or policy activities if the collection is not conducted or is conducted less frequently.

If this information is not collected, the evaluation and effectiveness of the Biological Opinion and Incidental Take Statement will be compromised. Further, the regulations previously developed will not be able to be evaluated to determine if they are effective in reducing sea turtle mortality. The NMFS, Northeast Region (NER) and Northeast Fisheries Science Center (NEFSC) have dedicated a significant amount of funding and staff time to evaluate and reduce spring sea turtle mortality in Virginia, and this reporting information is essential to both further those efforts and determine if the previous restrictions are appropriate. Additionally, if injured animals are taken and not reported to NMFS, those sea turtles would not receive the necessary medical care that is critical to their survival. Similarly, dead turtles found in the nets would also not be transported to a stranding and rehabilitation facility for a necropsy (if the condition of the animal enables this), and as such, important information on the health of the animal, and potentially the determination on the cause of death, would be lost. Acquiring this information to fulfill the aforementioned objectives is an important aspect of the NMFS Northeast sea turtle program.

7. Explain any special circumstances that require the collection to be conducted in a manner inconsistent with OMB guidelines.

The collection of this information may be inconsistent with the Office of Management and Budget (OMB) guidelines (Item #1). If sea turtles are incidentally taken in pound net fishing operations, fishermen are required to report that information as a result of this information collection. Sea turtles are only in Virginia waters from approximately May to November, but there is no schedule for when a sea turtle may be taken during that time. For example, three sea turtles may be taken in one week, or a sea turtle may be taken every third month. Either way, the fishermen are required to report those interactions. Therefore, there is the potential for fishermen to report sea turtle takes more often than quarterly. While the reporting of sea turtle take may occur more often than quarterly, it will not occur all year round. Further, the estimated number of sea turtles anticipated to be taken in Virginia pound net operations is only 608 turtles annually.

8. Provide information on the PRA Federal Register Notice that solicited public comments on the information collection prior to this submission. Summarize the public comments received in response to that notice and describe the actions taken by the agency in response to those comments. Describe the efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and recordkeeping, disclosure, or reporting format (if any), and on the data elements to be recorded, disclosed, or reported.

A Federal Register Notice published on December 17, 2008 (73 FR 76617) solicited public comment. No comments were received.

9. Explain any decisions to provide payments or gifts to respondents, other than remuneration of contractors or grantees.

No payments or gifts will be provided to respondents.

10. Describe any assurance of confidentiality provided to respondents and the basis for assurance in statute, regulation, or agency policy.

Personal identifiers and any commercial information will be kept confidential to the extent permitted under the Freedom of Information Act (FOIA) (5 U.S.C. 552), the Department of Commerce FOIA regulations (15 CFR Part 4, Subpart A), the Trade Secrets Act (18 U.S.C. 1905), and NOAA Administrative Order 216-100. No specific assurance of confidentiality is given to the respondents.

11. Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

This collection of information does not involve any questions of a sensitive nature.

12. Provide an estimate in hours of the burden of the collection of information.

The total hour estimate for the reporting requirement was determined from the following information:

The number of responses was determined by considering the number of sea turtles anticipated to be caught annually in Virginia pound nets. The number of loggerheads and Kemp's ridleys taken in Virginia pounds was estimated from those animals previously taken in the Potomac River pound nets, the only pounds for which sea turtle takes have been consistently reported from over the years. The number of nets set in the Potomac River has varied slightly among years (between 5 to 7), so for the purposes of this analysis, NMFS assumes that an average of 6 nets was fished per year. From 1980 to 1999, the average number of loggerheads taken in the Potomac River pound nets was 31.07 turtles per year (n=435; Mansfield and Musick 2004), with an approximate 5 loggerhead turtles taken per net. Based on the best available (most complete) information previously obtained from Virginia Marine Resources Commission (VMRC), an estimated 101 pound nets are in the area. Given the available information, the anticipated level of annual take in all pounds in the action area is 505 loggerhead sea turtles (=101 pounds * 5 turtles/net). The average number of Kemp's ridleys taken in the Potomac River pound nets was 2.2 turtles per year (=44 turtles/20 years), with an approximate 0.37 turtles taken per net, or 1 turtle per net. This would result in an anticipated level of annual take of 101 Kemp's ridley sea turtles (=101 pounds * 1 turtles/net) for all pounds in the action area. NMFS further anticipates that one green turtle could be captured in all of the pounds of pound net gear annually.

Additionally, based upon previous level of entanglement in the spring and scientific studies, NMFS anticipates that one loggerhead, Kemp's ridley, green, or leatherback sea turtle will be entangled in leaders each year in the Virginia waters of the Chesapeake Bay, even with the current regulations in effect. This entanglement is expected to result in mortality.

Over the past three years, there have not been any reports of sea turtle interactions in Virginia pound net gear. However, sea turtles occur in Virginia Chesapeake Bay waters, and may continue to be subject to interactions with pound net gear, which would make this reporting requirement applicable. It is possible that fishermen are not complying with the mandatory reporting requirements. The estimates for reporting were based on the best available information from previous studies with sea turtles and pound net gear.

The anticipated number of sea turtles taken annually in pound net operations is 505 loggerheads, 101 Kemp's ridleys, and 1 green taken in pounds (all live and uninjured), plus 1 loggerhead, Kemp's ridley, green, or leatherback in leaders (assumed to be dead). Therefore, a total of 608 turtles are anticipated to be taken by this action per year. If an animal is found injured or dead, the fishermen are first required to report the incident to NMFS, and then to the appropriate stranding and rehabilitation facility. As such, for the 1 animal that may be found dead, 2 reports for that turtle will be made. As a result, 609 reporting calls (608 to NMFS plus 1 to stranding network) should be completed each year.

The number of respondents was calculated by determining the number of licensed pound net fishermen in the Virginia Chesapeake Bay. While there are an estimated 101 pound nets in the area, the best available data from VMRC indicates that there were 41 licensed pound net fishermen in 2008.

The hourly burden was calculated by assuming a phone call to NMFS or the stranding/rehabilitation facility will last for a maximum of 10 minutes. Therefore, with 609 reports lasting 10 minutes per report, the hourly burden would be 6,090 minutes, or 101.5 (102) hours.

13. Provide an estimate of the total annual cost burden to the respondents or record-keepers resulting from the collection (excluding the value of the burden hours in Question 12 above).

The cost burden was obtained by using the information on anticipated numbers of reports as presented in Question 12 and the following information:

An estimated 609 reports (calls) are anticipated to be conducted annually. The cost of a 10 minute call was estimated to be \$3 per call. Therefore, a total cost estimate was determined to be \$1,827 for all Virginia pound net fishermen annually.

14. Provide estimates of annualized cost to the Federal government.

The estimated cost to the Federal government will be only in terms of staff hours. An anticipated 608 reports will be called in to NMFS, and each call is expected to last a maximum of 10 minutes. NMFS staff will be able to compile any written report/notes during this phone call. As such, the total hourly burden on NMFS would be 101.3 hours. The financial burden would depend upon the pay band level of the party answering the phone call. As the staff fielding these calls likely will be pay band level III, approximately 101.3 hours of work (about 2.5 weeks) would cost the Federal government approximately \$3,000. However, this task would be included in the respective staff's performance plan and would not be an additional monetary requirement (as it is included in the staff's current salary).

15. Explain the reasons for any program changes or adjustments.

The number of respondents has decreased from 53 to 41, based on new information on the number of Virginia pound net licensees. NOTE: the cost did not change, only appeared to decrease by \$173 based on rounding off of cost when migrating last version into ROCIS.

16. For collections whose results will be published, outline the plans for tabulation and publication.

The results of this information collection are not anticipated to be published.

17. If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons why display would be inappropriate.

This item is not applicable to this information collection request.

18. Explain each exception to the certification statement identified in Item 19 of the OMB 83-I.

This item is not applicable to this information collection request.

B. COLLECTIONS OF INFORMATION EMPLOYING STATISTICAL METHODS

This information collection request does not employ statistical methods.

**The Freedom of Information Act, 5 U.S.C. § 552
As Amended By
Public Law No. 110-175, 121 Stat. 2524**

Below is the full text of the Freedom of Information Act in a form showing all amendments to the statute made by the "Openness Promotes Effectiveness in our National Government Act of 2007." All newly enacted provisions are in boldface type.

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

- (A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;
- (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
- (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;
- (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
- (E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

- (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
- (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;
- (C) administrative staff manuals and instructions to staff that affect a member of the public;
- (D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and
- (E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of an index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

- (i) it has been indexed and either made available or published as provided by this paragraph; or
- (ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and

(2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to—

- (i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or
- (ii) a representative of a government entity described in clause (i).

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that—

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

In this clause, the term ‘a representative of the news media’ means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term ‘news’ means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of ‘news’) who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: Provided, That the court's review of the matter shall be limited to the record before the agency.

(viii) An agency shall not assess search fees (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request. [Effective one year from date of enactment]

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause is shown.

[(D) Repealed. Pub. L. 98-620, title IV, Sec. 402(2), Nov. 8, 1984, 98 Stat. 3357.]

(E)(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either—

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

(F)(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall—

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except—

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

[Effective one year from date of enactment]

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. **To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency. [Effective one year from date of enactment].** Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests—

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requester, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by

an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records—

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure—

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term "compelling need" means—

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(7) Each agency shall—

(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and

(B) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including—

(i) the date on which the agency originally received the request; and

(ii) an estimated date on which the agency will complete action on the request.

[Effective one year from date of enactment]

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, **and the exemption under which the deletion is made**, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, **and the exemption under which the deletion is made**, shall be indicated at the place in the record where such deletion is made.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize the withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include—

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), **the number of occasions on which each statute was relied upon**, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median **and average** number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests, **based on the date on which the requests were received by the agency**;

(F) **the average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests**;

(G) **based on the number of business days that have elapsed since each request was originally received by the agency—**

(i) **the number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days**;

(ii) **the number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days**;

(iii) **the number of requests for records to which the agency has responded with a determination within a period greater than 300 days and less than 401 days**; and

(iv) **the number of requests for records to which the agency has responded with a determination within a period greater than 400 days**;

(H) **the average number of days for the agency to provide the granted information beginning on the date on which the request was originally filed, the median number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information**;

(I) **the median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency to respond to an administrative appeal, and the lowest number of business days taken by the agency to respond to an administrative appeal**;

(J) data on the 10 active requests with the earliest filing dates pending at each agency, including the amount of time that has elapsed since each request was originally received by the agency;

(K) data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;

(L) the number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;

(M) the number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;

(N) the total amount of fees collected by the agency for processing requests; and

(O) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.

(2) Information in each report submitted under paragraph (1) shall be expressed in terms of each principal component of the agency and for the agency overall.

(3) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means. In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.

(4) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.

(5) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(6) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term—

(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) 'record' and any other term used in this section in reference to information includes—

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including—

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

(h)(1) There is established the Office of Government Information Services within the National Archives and Records Administration.

(2) The Office of Government Information Services shall—

(A) review policies and procedures of administrative agencies under this section;

(B) review compliance with this section by administrative agencies; and

(C) recommend policy changes to Congress and the President to improve the administration of this section.

(3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.

(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.

(j) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

(k) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency—

(1) have agency-wide responsibility for efficient and appropriate compliance with this section;

(2) monitor implementation of this section throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing this section;

(3) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section;

(4) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing this section;

(5) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g), and the agency's annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply; and

(6) designate one or more FOIA Public Liaisons.

(l) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

amount equal to five percent of the combined amounts covered each fiscal year into the Federal aid to wildlife restoration fund under section 3 of the Act of September 2, 1937, and paid, transferred, or otherwise credited each fiscal year to the Sport Fishing Restoration Account established under 1016 of the Act of July 18, 1984.

(2) Amounts deposited into the special fund are authorized to be appropriated annually and allocated in accordance with subsection (d) of this section.

INTERAGENCY COOPERATION

SEC. 7. §16 U.S.C. 1536i (a) FEDERAL AGENCY ACTIONS AND CONSULTATIONS.—(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an “agency action”) is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 4 or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d).

(b) OPINION OF SECRETARY.—(1)(A) Consultation under subsection (a)(2) with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

- (I) the reasons why a longer period is required;
- (II) the information that is required to complete the consultation; and
- (III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period. The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a), the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3), and an opinion based by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2), and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972; the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) BIOLOGICAL ASSESSMENT.—(1) To facilitate compliance with the requirements of subsection (a)(2) each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on the date of enactment of the Endangered Species Act Amendments of 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as in mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) LIMITATION ON COMMITMENT OF RESOURCES.—After initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2).

(e)(1) ESTABLISHMENT OF COMMITTEE.—There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the "Committee").

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with sub-

section (h) of this section whether or not to grant an exemption from the requirements of subsection (a)(2) of this action for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

- (A) The Secretary of Agriculture.
- (B) The Secretary of the Army.
- (C) The Chairman of the Council of Economic Advisors.
- ^(D) The Administrator of the Environmental Protection Agency. ¹
- (E) The Secretary of the Interior.
- (F) The Administrator of the National Oceanic and Atmospheric Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)(B) shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

(4)(A) Members of the Committee shall receive no additional pay on account of their service on the Committee.

(B) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of title 5 of the United States Code ¹

^{(5)(A)} Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the transaction of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

(B) The Secretary of the Interior shall be the Chairman of the Committee.

(C) The Committee shall meet at the call of the Chairman or five of its members.

(D) All meetings and records of the Committee shall be open to the public.

(6) Upon request of the Committee, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Committee to assist it in carrying out its duties under this section.

(7)(A) The Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Committee deems advisable.

¹So in law. At the end of section 7(e)(3)(D) of the Endangered Species Act of 1973, the second "Agency." should had been stricken.

¹So in law. At the end of section 7(e)(4)(B) of the Endangered Species Act of 1973, the period at end of the paragraph was omitted.

(B) When so authorized by the Committee, any member or agent of the Committee may take any action which the Committee is authorized to take by this paragraph.

(C) Subject to the Privacy Act, the Committee may secure directly from any Federal agency information necessary to enable it to carry out its duties under this section. Upon request of the Chairman of the Committee, the head of such Federal agency shall furnish such information to the Committee.

(D) The Committee may use the United States mails in the same manner and upon the same conditions as a Federal agency.

(E) The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

(8) In carrying out its duties under this section, the Committee may promulgate and amend such rules, regulations, and procedures, and issue and amend such orders as it deems necessary.

(9) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section the Committee may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

(10) In no case shall any representative, including a representative of a member designated pursuant to paragraph (3)(G) of this subsection, be eligible to cast a vote on behalf of any member.

(f) REGULATIONS.—Not later than 90 days after the date of enactment of the Endangered Species Act Amendments of 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary and the information to be contained in such applications. Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include but not be limited to—

(1) a description of the consultation process carried out pursuant to subsection (a)(2) of this section between the head of the Federal agency and the Secretary; and

(2) a statement describing why such action cannot be altered or modified to conform with the requirements of subsection (a)(2) of this section.

(g) APPLICATION FOR EXEMPTION AND REPORT TO THE COMMITTEE.—(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a)(2), the Secretary's opinion under subsection (b) indicates that the agency action would violate subsection (a)(2). An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

(2)(A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f), not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or

license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term "final agency action" means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review. Such application shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary—

(A) determine that the Federal agency concerned and the exemption applicant have—

(i) carried out the consultation responsibilities described in subsection (a) in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2);

(ii) conducted any biological assessment required by subsection (c); and

(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d); or

(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A)(i), (ii), and (iii). The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of title 5, United States Code.

(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3)(A) (i), (ii) and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b) (1) and (2) thereof) of title 5, United States Code, and prepare the report to be submitted pursuant to paragraph (5).

(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as in mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing—

(A) the availability and reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species of the critical habitat;

(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d).

(6) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under this subsection shall be in accordance with sections 554, 555, and 556 (other than subsection (b)(3) of section 556) of title 5, United States Code.

(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section.

(8) All meetings and records resulting from activities pursuant to this subsection shall be open to the public.

(h) EXEMPTION.—(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5). The Committee shall grant an exemption from the requirements of subsection (a)(2) for an agency action if, by a vote of not less than five of its members voting in person—

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g)(4), and on such other testimony or evidence as it may receive, that—

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d); and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation,

are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by Committee under this subsection shall be considered final agency action for purposes of chapter 7 of title 5 of the United States Code.

(2)(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action—

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) with respect to such agency action. (B) An exemption shall be permanent under subparagraph (A)

unless—

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a)(2) or was not identified in any biological assessment conducted under subsection (c), and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

(i) REVIEW BY SECRETARY OF STATE.—Notwithstanding any other provision of this Act, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

(j) Notwithstanding any other provision of this Act, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

(k) SPECIAL PROVISIONS.—An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.): *Provided*, That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

(l) COMMITTEE ORDERS.—(1) If the Committee determines under subsection (h) that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhance-

ment measures established pursuant to subsection (h) which shall be carried out and paid for by the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the preceding sentence the costs of such measures shall not be treated as project costs for the purpose of computing benefit-cost or other ratios for the proposed action. Any applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such report shall be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such reports shall be published in the Federal Register by the Council on Environmental Quality.

(m) NOTICE.—The 60-day notice requirement of section 11(g) of this Act shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a)(2) of this section.

(n) JUDICIAL REVIEW.—Any person, as defined by section 3(13) of this Act, may obtain judicial review, under chapter 7 of title 5 of the United States Code, of any decision of the Endangered Species Committee under subsection (h) in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112, of title 28, United States Code. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

(o) EXEMPTION AS PROVIDING EXCEPTION ON TAKING OF ENDANGERED SPECIES.—Notwithstanding sections 4(d) and 9(a)(1)(B) and (C) of this Act, sections 101 and 102 of the Marine Mammal Protection Act of 1972, or any regulation promulgated to implement any such section—

(1) any action for which an exemption is granted under subsection (h) of this section shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned.

(p) EXEMPTIONS IN PRESIDENTIALLY DECLARED DISASTER

AREAS.—In any area which has been declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act, the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 405 or 406 of the Disaster Relief and Emergency Assistance Act, and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

INTERNATIONAL COOPERATION

SEC. 8. ø16 U.S.C. 1537; (a) FINANCIAL ASSISTANCE.—As a demonstration of the commitment of the United States to the worldwide protection of endangered species and threatened species, the President may, subject to the provisions of section 1415 of the Supplemental Appropriation Act, 1953 (31 U.S.C. 724), use foreign currencies accruing to the United States Government under the Agricultural Trade Development and Assistance Act of 1954 or any other law to provide to any foreign country (with its consent) assistance in the development and management of programs in that country which the Secretary determines to be necessary or useful for the conservation of any endangered species or threatened species listed by the Secretary pursuant to section 4 of this Act. The President shall provide assistance (which includes, but is not limited to, the acquisition, by lease or otherwise, of lands, waters, or interests therein) to foreign countries under this section under such terms and conditions as he deems appropriate. Whenever foreign currencies are available for the provision of assistance under this section, such currencies shall be used in preference to funds appropriated under the authority of section 15 of this Act.

(b) ENCOURAGEMENT OF FOREIGN PROGRAMS.—In order to carry out further the provisions of this Act, the Secretary, through the Secretary of State shall encourage—

(1) foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species listed pursuant to section 4 of this Act;

(2) the entering into of bilateral or multilateral agreements with foreign countries to provide for such conservation; and

(3) foreign persons who directly or indirectly take fish or wildlife or plants in foreign countries or on the high seas for importation into the United States for commercial or other purposes to develop and carry out with such assistance as he may provide, conservation practices designed to enhance such fish or wildlife or plants and their habitat.

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SEC. 402. INFORMATION COLLECTION

16 U.S.C. 1881a

109-479

(a) COLLECTION PROGRAMS.—

(1) COUNCIL REQUESTS.—If a Council determines that additional information would be beneficial for developing, implementing, or revising a fishery management plan or for determining whether a fishery is in need of management, the Council may request that the Secretary implement an information collection program for the fishery which would provide the types of information specified by the Council. The Secretary shall undertake such an information collection program if he determines that the need is justified, and shall promulgate regulations to implement the program within 60 days after such determination is made. If the Secretary determines that the need for an information collection program is not justified, the Secretary shall inform the Council of the reasons for such determination in writing. The determinations of the Secretary under this paragraph regarding a Council request shall be made within a reasonable period of time after receipt of that request.

(2) SECRETARIAL INITIATION.—If the Secretary determines that additional information is necessary for developing, implementing, revising, or monitoring a fishery management plan, or for determining whether a fishery is in need of management, the Secretary may, by regulation, implement an information collection or observer program requiring submission of such additional information for the fishery.

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(b) CONFIDENTIALITY OF INFORMATION.—

(1) Any information submitted to the Secretary, a State fishery management agency, or a marine fisheries commission by any person in compliance with the requirements of this Act shall be confidential and shall not be disclosed except—

(A) to Federal employees and Council employees who are responsible for fishery management plan development, monitoring, or enforcement;

(B) to State or Marine Fisheries Commission employees as necessary to further the Department's mission, subject to a confidentiality agreement that prohibits public disclosure of the identity of business of any person;

(C) to State employees who are responsible for fishery management plan enforcement, if the States employing those employees have entered into a fishery enforcement agreement with the Secretary and the agreement is in effect;

(D) when required by court order;

(E) when such information is used by State, Council, or Marine Fisheries Commission employees to verify catch under a limited access program, but only to the extent that such use is consistent with subparagraph (B);

(F) when the Secretary has obtained written authorization from the person submitting such information to release such information to persons for reasons not otherwise provided for in this subsection, and such release does not violate other requirements of this Act;

(G) when such information is required to be submitted to the Secretary for any determination under a limited access program; or

(H) in support of homeland and national security activities, including the Coast Guard's homeland security missions as defined in section 888(a)(2) of the Homeland Security Act of 2002 (6 U.S.C. 468(a)(2)).

(2) Any observer information shall be confidential and shall not be disclosed, except in accordance with the requirements of subparagraphs (A) through (H) of paragraph (1), or—

(A) as authorized by a fishery management plan or regulations under the authority of the North Pacific Council to allow disclosure to the public of weekly summary bycatch information identified by vessel or for haul-specific bycatch information without vessel identification;

(B) when such information is necessary in proceedings to adjudicate observer certifications; or

(C) as authorized by any regulations issued under paragraph (3) allowing the collection of observer information, pursuant to a confidentiality agreement between the observers, observer employers, and the Secretary prohibiting disclosure of the information by the observers or observer employers, in order—

(i) to allow the sharing of observer information among observers and between observers and observer employers as necessary to train and prepare observers for deployments on specific vessels; or

(ii) to validate the accuracy of the observer information collected.

(3) The Secretary shall, by regulation, prescribe such procedures as may be necessary to preserve the confidentiality of information submitted in compliance with any requirement or regulation under this Act, except that the Secretary may release or make public any such information in any aggregate or summary form which does not directly or indirectly disclose the identity or business of any person who submits such information. Nothing in this subsection shall be interpreted or construed to prevent the use for conservation and management purposes by the Secretary, or with the approval of the Secretary, the Council, of any information submitted in compliance with any requirement or regulation under this Act or the use, release, or publication of bycatch information pursuant to paragraph (2)(A).

(c) RESTRICTION ON USE OF CERTAIN INFORMATION.—

(1) The Secretary shall promulgate regulations to restrict the use, in civil enforcement or criminal proceedings under this Act, the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 et seq.), and the Endangered Species Act (16 U.S.C. 1531 et seq.), of information collected by voluntary fishery data collectors, including sea samplers, while aboard any vessel for conservation and management purposes if the presence of such a fishery data collector aboard is not required by any of such Acts or regulations thereunder.

(2) The Secretary may not require the submission of a Federal or State income tax return or statement as a prerequisite for issuance of a permit until such time as the Secretary has promulgated regulations to ensure the confidentiality of information contained in such return or statement, to limit the information submitted to that necessary to achieve a demonstrated conservation and management purpose, and to provide appropriate penalties for violation of such regulations.

16 U.S.C. 1881a-1881b
MSA §§ 402-403

(d) **CONTRACTING AUTHORITY.**—Notwithstanding any other provision of law, the Secretary may provide a grant, contract, or other financial assistance on a sole-source basis to a State, Council, or Marine Fisheries Commission for the purpose of carrying out information collection or other programs if—

(1) the recipient of such a grant, contract, or other financial assistance is specified by statute to be, or has customarily been, such State, Council, or Marine Fisheries Commission; or

(2) the Secretary has entered into a cooperative agreement with such State, Council, or Marine Fisheries Commission.

(e) **RESOURCE ASSESSMENTS.**—

(1) The Secretary may use the private sector to provide vessels, equipment, and services necessary to survey the fishery resources of the United States when the arrangement will yield statistically reliable results.

(2) The Secretary, in consultation with the appropriate Council and the fishing industry--

(A) may structure competitive solicitations under paragraph (1) so as to compensate a contractor for a fishery resources survey by allowing the contractor to retain for sale fish harvested during the survey voyage;

(B) in the case of a survey during which the quantity or quality of fish harvested is not expected to be adequately compensatory, may structure those solicitations so as to provide that compensation by permitting the contractor to harvest on a subsequent voyage and retain for sale a portion of the allowable catch of the surveyed fishery; and

(C) may permit fish harvested during such survey to count toward a vessel's catch history under a fishery management plan if such survey was conducted in a manner that precluded a vessel's participation in a fishery that counted under the plan for purposes of determining catch history.

(3) The Secretary shall undertake efforts to expand annual fishery resource assessments in all regions of the Nation.

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SEC. 403. OBSERVERS

16 U.S.C. 1881b

(a) **GUIDELINES FOR CARRYING OBSERVERS.**—Within one year after the date of enactment of the Sustainable Fisheries Act, the Secretary shall promulgate regulations, after notice and opportunity for public comment, for fishing vessels that carry observers. The regulations shall include guidelines for determining—

(1) when a vessel is not required to carry an observer on board because the facilities of such vessel for the quartering of an observer, or for carrying out observer functions, are so inadequate or unsafe that the health or safety of the observer or the safe operation of the vessel would be jeopardized; and

(2) actions which vessel owners or operators may reasonably be required to take to render such facilities adequate and safe.

TITLE 18--CRIMES AND CRIMINAL PROCEDURE

PART I--CRIMES

CHAPTER 93--PUBLIC OFFICERS AND EMPLOYEES

Sec. 1905. Disclosure of confidential information generally

Whoever, being an officer or employee of the United States or of any department or agency thereof, any person acting on behalf of the Office of Federal Housing enterprise Oversight, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314), or being an employee of a private sector organization who is or was assigned to an agency under chapter 37 of title 5, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.

(June 25, 1948, ch. 645, 62 Stat. 791; Pub. L. 96-349, Sec. 7(b), Sept. 12, 1980, 94 Stat. 1158; Pub. L. 102-550, title XIII, Sec. 1353, Oct. 28, 1992, 106 Stat. 3970; Pub. L. 104-294, title VI, Sec. 601(a)(8), Oct. 11, 1996, 110 Stat. 3498; Pub. L. 107-347, title II, Sec. 209(d)(2), Dec. 17, 2002, 116 Stat. 2930.)

Historical and Revision Notes

Based on section 176b of title 15, U.S.C., 1940 ed., Commerce and Trade; section 216 of title 18, U.S.C., 1940 ed.; section 1335 of title 19, U.S.C., 1940 ed., Customs Duties (R.S. Sec. 3167; Aug. 27, 1894, ch. 349, Sec. 24, 28 Stat. 557; Feb. 26, 1926, ch. 27, Sec. 1115, 44 Stat. 117; June 17, 1930, ch. 497, title III, Sec. 335, 46 Stat. 701; Jan. 27, 1938, ch. 11, Sec. 2, 52 Stat. 8).

Section consolidates section 176b of title 15, U.S.C., 1940 ed., Commerce and Trade; section 216 of title 18, U.S.C., 1940 ed., and section 1335 of title 19, U.S.C., 1940 ed., Customs Duties.

Words ``or of any department or agency thereof'' and words ``such department or agency'' were inserted so as to eliminate any possible ambiguity as to scope of section. (See definition of ``department'' and ``agency'' in section 6 of this title.)

References to the offenses as misdemeanors, contained in all of said sections, were omitted in view of definitive section 1 of this title.

The provisions of section 216 of title 18, U.S.C., 1940 ed., relating to publication of income tax data by ``any person'', were omitted as covered by section 55(f)(1) of title 26, U.S.C., 1940 ed., Internal Revenue Code.

Minor changes were made in translations and phraseology.

References in Text

The Antitrust Civil Process Act, referred to in text, is Pub. L. 87-664, Sept. 19, 1962, 76 Stat. 548, as amended, which is classified generally to chapter 34 (Sec. 1311 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 1311 of Title 15 and Tables.

Amendments

2002--Pub. L. 107-347 inserted ``or being an employee of a private sector organization who is or was assigned to an agency under chapter 37 of title 5,'' after ``(15 U.S.C. 1311-1314),''.

1996--Pub. L. 104-294 substituted ``fined under this title'' for ``fined not more than \$1,000''.

1992--Pub. L. 102-550 inserted ``any person acting on behalf of the Office of Federal Housing Enterprise Oversight,'' after ``or agency thereof,''

1980--Pub. L. 96-349 provided for punishment and removal from office of an agent of the Department of Justice as defined in the Antitrust Civil Process Act for disclosure of confidential information.

Effective Date of 2002 Amendment

Amendment by Pub. L. 107-347 effective 120 days after Dec. 17, 2002, see section 402(a) of Pub. L. 107-347, set out as an Effective Date note under section 3601 of Title 44, Public Printing and Documents.

e-CFR Data is current as of March 5, 2009

Title 15: Commerce and Foreign Trade

PART 4a—CLASSIFICATION, DECLASSIFICATION, AND PUBLIC AVAILABILITY OF NATIONAL SECURITY INFORMATION

§ 4a.4 Classification authority.

Authority to originally classify information as Secret or Confidential may be exercised only by the Secretary of Commerce and by officials to whom such authority is specifically delegated. No official of the Department is authorized to originally classify information as Top Secret.

Title 50: Wildlife and Fisheries
PART 222—GENERAL ENDANGERED AND THREATENED MARINE SPECIES
Subpart A—Introduction and General Provisions

§ 222.102 Definitions.

Accelerator funnel means a device used to accelerate the flow of water through a shrimp trawl net.

Act means the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*

Adequately covered means, with respect to species listed pursuant to section 4 of the Act, that a proposed conservation plan has satisfied the permit issuance criteria under section 10(a)(2)(B) of the Act for the species covered by the plan and, with respect to unlisted species, that a proposed conservation plan has satisfied the permit issuance criteria under section 10(a)(2)(B) of the Act that would otherwise apply if the unlisted species covered by the plan were actually listed. For the Services to cover a species under a conservation plan, it must be listed on the section 10(a)(1)(B) permit.

Alaska Regional Administrator means the Regional Administrator for the Alaska Region of the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, or their authorized representative. Mail sent to the Alaska Regional Administrator should be addressed: Alaska Regional Administrator, F/AK, Alaska Regional Office, National Marine Fisheries Service, NOAA, P.O. Box 21668 Juneau, AK 99802–1668.

Approved turtle excluder device (TED) means a device designed to be installed in a trawl net forward of the cod end for the purpose of excluding sea turtles from the net, as described in 50 CFR 223.207.

Assistant Administrator means the Assistant Administrator for Fisheries of the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, or his authorized representative. Mail sent to the Assistant Administrator should be addressed: Assistant Administrator for Fisheries, National Marine Fisheries Service, NOAA, 1315 East-West Highway, Silver Spring, MD 20910.

Atlantic Area means all waters of the Atlantic Ocean south of 36°33'00.8" N. lat. (the line of the North Carolina/Virginia border) and adjacent seas, other than waters of the Gulf Area, and all waters shoreward thereof (including ports).

Atlantic Shrimp Fishery—Sea Turtle Conservation Area (Atlantic SFSTCA) means the inshore and offshore waters extending to 10 nautical miles (18.5 km) offshore along the coast of the States of Georgia and South Carolina from the Georgia-Florida border (defined as the line along 30°42'45.6" N. lat.) to the North Carolina-South Carolina border (defined as the line extending in a direction of 135°34'55" from true north from the North Carolina-South Carolina land boundary, as marked by the border station on Bird Island at 33°51'07.9" N. lat., 078°32'32.6" W. long.).

Authorized officer means:

- (1) Any commissioned, warrant, or petty officer of the U.S. Coast Guard;
- (2) Any special agent or enforcement officer of the National Marine Fisheries Service;
- (3) Any officer designated by the head of a Federal or state agency that has entered into an agreement with the Secretary or the Commandant of the Coast Guard to enforce the provisions of the Act; or
- (4) Any Coast Guard personnel accompanying and acting under the direction of any person described in paragraph (1) of this definition.

Bait shrimp means a shrimp trawler that fishes for and retains its shrimp catch alive for the purpose of selling it for use as bait.

Beam trawl means a trawl with a rigid frame surrounding the mouth that is towed from a vessel by means of one or more cables or ropes.

Certificate of exemption means any document so designated by the National Marine Fisheries Service and signed by an authorized official of the National Marine Fisheries Service, including any document which modifies, amends, extends or renews any certificate of exemption.

Chain mat means a device designed to be installed in a scallop dredge forward of the sweep, as described in 50 CFR 223.206, for the purpose of excluding sea turtles from the dredge.

Changed circumstances means changes in circumstances affecting a species or geographic area covered by a conservation plan that can reasonably be anticipated by plan developers and NMFS and that can be planned for (e.g., the listing of new species, or a fire or other natural catastrophic event in areas prone to such events).

Commercial activity means all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: Provided, however, that it does not include the exhibition of commodities by museums or similar cultural or historical organizations.

Conservation plan means the plan required by section 10(a)(2)(A) of the Act that an applicant must submit when applying for an incidental take permit. Conservation plans also are known as "habitat conservation plans" or "HCPs."

Conserved habitat areas means areas explicitly designated for habitat restoration, acquisition, protection, or other conservation purposes under a conservation plan.

Cooperative Agreement means an agreement between a state(s) and the National Marine Fisheries Service, NOAA, Department of Commerce, which establishes and maintains an active and adequate program for the conservation of resident species listed as endangered or threatened pursuant to section 6(c)(1) of the Endangered Species Act.

Dredge or dredge gear, with respect to the fishery operating under the Atlantic Sea Scallop Fishery Management Plan, means gear consisting of a mouth frame attached to a holding bag constructed of metal rings, or any other modification to this design, that can be or is used in the harvest of sea scallops.

Fishing, or to fish, means:

- (1) The catching, taking, or harvesting of fish or wildlife;
- (2) The attempted catching, taking, or harvesting of fish or wildlife;

(3) Any other activity that can reasonably be expected to result in the catching, taking, or harvesting of fish or wildlife; or

(4) Any operations on any waters in support of, or in preparation for, any activity described in paragraphs (1) through (3) of this definition.

Footrope means a weighted rope or cable attached to the lower lip (bottom edge) of the mouth of a trawl net along the forward-most webbing.

Footrope length means the distance between the points at which the ends of the footrope are attached to the trawl net, measured along the forward-most webbing.

Foreign commerce includes, among other things, any transaction between persons within one foreign country, or between persons in two or more foreign countries, or between a person within the United States and a person in one or more foreign countries, or between persons within the United States, where the fish or wildlife in question are moving in any country or countries outside the United States.

Four-seam, straight-wing trawl means a design of shrimp trawl in which the main body of the trawl is formed from a top panel, a bottom panel, and two side panels of webbing. The upper and lower edges of the side panels of webbing are parallel over the entire length.

Four-seam, tapered-wing trawl means a design of shrimp trawl in which the main body of the trawl is formed from a top panel, a bottom panel, and two side panels of webbing. The upper and lower edges of the side panels of webbing converge toward the rear of the trawl.

Gillnet means a panel of netting, suspended vertically in the water by floats along the top and weights along the bottom, to entangle fish that attempt to pass through it.

Gulf Area means all waters of the Gulf of Mexico west of 81° W. long. (the line at which the Gulf Area meets the Atlantic Area) and all waters shoreward thereof (including ports).

Gulf Shrimp Fishery-Sea Turtle Conservation Area (Gulf SFSTCA) means the offshore waters extending to 10 nautical miles (18.5 km) offshore along the coast of the States of Texas and Louisiana from the South Pass of the Mississippi River (west of 89°08.5' W. long.) to the U.S.-Mexican border.

Habitat restoration activity means an activity that has the sole objective of restoring natural aquatic or riparian habitat conditions or processes.

Harm in the definition of “take” in the Act means an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.

Headrope means a rope that is attached to the upper lip (top edge) of the mouth of a trawl net along the forward-most webbing.

Headrope length means the distance between the points at which the ends of the headrope are attached to the trawl net, measured along the forward-most webbing.

Import means to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the tariff laws of the United States.

Inshore means marine and tidal waters landward of the 72 COLREGS demarcation line (International Regulations for Preventing Collisions at Sea, 1972), as depicted or noted on nautical charts published by the National Oceanic and Atmospheric Administration (Coast Charts, 1:80,000 scale) and as described in 33 CFR part 80.

Modified pound net leader means a pound net leader that is affixed to or resting on the sea floor and made of a lower portion of mesh and an upper portion of only vertical lines such that: The mesh size is equal to or less than 8 inches (20.3 cm) stretched mesh; at any particular point along the leader the height of the mesh from the seafloor to the top of the mesh must be no more than one-third the depth of the water at mean lower low water directly above that particular point; the mesh is held in place by vertical lines that extend from the top of the mesh up to a top line, which is a line that forms the uppermost part of the pound net leader; the vertical lines are equal to or greater than 5/16inch (0.8 cm) in diameter and strung vertically at a minimum of every 2 feet (61 cm); and the vertical lines are hard lay lines with a level of stiffness equivalent to the stiffness of a 5/16inch (0.8 cm) diameter line composed of polyester wrapped around a blend of polypropylene and polyethylene and containing approximately 42 visible twists of strands per foot of line.

Northeast Regional Administrator means the Regional Administrator for the Northeast Region of the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, or their authorized representative. Mail sent to the Northeast Regional Administrator should be addressed: Northeast Regional Administrator, F/NE, Northeast Regional Office, National Marine Fisheries Service, NOAA, One Blackburn Drive, Gloucester, MA 01930-2298.

Northwest Regional Administrator means the Regional Administrator for the Northwest Region of the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, or their authorized representative. Mail sent to the Northwest Regional Administrator should be addressed: Northwest Regional Administrator, F/NW, Northwest Regional Office, National Marine Fisheries Service, NOAA, 7600 Sand Point Way NE, Seattle, WA 98115-0070.

Office of Enforcement means the national fisheries enforcement office of the National Marine Fisheries Service. Mail sent to the Office of Enforcement should be addressed: Office of Enforcement, F/EN, National Marine Fisheries Service, NOAA, 8484 Suite 415, Georgia Ave., Silver Spring, MD 20910.

Office of Protected Resources means the national program office of the endangered species and marine mammal programs of the National Marine Fisheries Service. Mail sent to the Office of Protected Resources should be addressed: Office of Protected Resources, F/PR, National Marine Fisheries Service, NOAA, 1315 East West Highway, Silver Spring, MD 20910.

Offshore means marine and tidal waters seaward of the 72 COLREGS demarcation line (International Regulations for Preventing Collisions at Sea, 1972), as depicted or noted on nautical charts published by the National Oceanic and Atmospheric Administration (Coast Charts, 1:80,000 scale) and as described in 33 CFR part 80.

Operating conservation program means those conservation management activities which are expressly agreed upon and described in a Conservation Plan or its Implementing Agreement. These activities are to be undertaken for the affected species when implementing an approved Conservation Plan, including measures to respond to changed circumstances.

Permit means any document so designated by the National Marine Fisheries Service and signed by an authorized official of the National Marine Fisheries Service, including any document which modifies, amends, extends, or renews any permit.

Person means an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the Federal government of any state or political subdivision thereof or of any foreign government.

Possession means the detention and control, or the manual or ideal custody of anything that may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name. Possession includes the act or state of possessing and that condition of facts under which persons can exercise their power over a corporeal thing at their pleasure to the exclusion of all other persons. Possession includes constructive possession that which means not an actual but an assumed existence one claims to hold by virtue of some title, without having actual custody.

Pound net leader means a long straight net that directs the fish offshore towards the pound, an enclosure that captures the fish. Some pound net leaders are all mesh, while others have stringers and mesh. Stringers are vertical lines in a pound net leader that are spaced a certain distance apart and are not crossed by horizontal lines to form mesh. An offshore pound net leader refers to a leader with the inland end set greater than 10 horizontal feet (3 m) from the mean low water line. A nearshore pound net leader refers to a leader with the inland end set 10 horizontal feet (3 m) or less from the mean low water line.

Pound Net Regulated Area I means Virginia waters of the mainstem Chesapeake Bay, south of 37°19.0' N. lat. and west of 76°13.0' W. long., and all waters south of 37°13.0' N. lat. to the Chesapeake Bay Bridge Tunnel (extending from approximately 37°05' N. lat., 75°59' W. long. to 36°55' N. lat., 76°08' W. long.) at the mouth of the Chesapeake Bay, and the portion of the James River downstream of the Hampton Roads Bridge Tunnel (I-64; approximately 36°59.55' N. lat., 76°18.64' W. long.) and the York River downstream of the Coleman Memorial Bridge (Route 17; approximately 37°14.55' N. lat, 76°30.40' W. long.)

Pound Net Regulated Area II means Virginia waters of the Chesapeake Bay outside of Pound Net Regulated Area I defined above, extending to the Maryland-Virginia State line (approximately 37°55' N. lat., 75°55' W. long.), the Great Wicomico River downstream of the Jessie Dupont Memorial Highway Bridge (Route 200; approximately 37°50.84' N. lat, 76°22.09' W. long.), the Rappahannock River downstream of the Robert Opie Norris Jr. Bridge (Route 3; approximately 37°37.44' N. lat, 76°25.40' W. long.), and the Piankatank River downstream of the Route 3 Bridge (approximately 37°30.62' N. lat, 76°25.19' W. long.) to the COLREGS line at the mouth of the Chesapeake Bay.

Pre-Act endangered species part means any sperm whale oil, including derivatives and products thereof, which was lawfully held within the United States on December 28, 1973, in the course of a commercial activity; or any finished scrimshaw product, if such product or the raw material for such product was lawfully held within the United States on December 28, 1973, in the course of a commercial activity.

Properly implemented conservation plan means any conservation plan, implementing agreement, or permit whose commitments and provisions have been or are being fully implemented by the permittee.

Pusher-head trawl (chopsticks) means a trawl that is spread by two poles suspended from the bow of the trawler in an inverted "V" configuration.

Resident species means, for purposes of entering into cooperative agreements with any state pursuant to section 6(c) of the Act, a species that exists in the wild in that state during any part of its life.

Right whale means, as used in §224.103(c), any whale that is a member of the western North Atlantic population of the northern right whale species (*Eubalaena glacialis*).

Roller trawl means a variety of beam trawl that is used, usually by small vessels, for fishing over uneven or vegetated sea bottoms.

Scrimshaw product means any art form which involves the substantial etching or engraving of designs upon, or the substantial carving of figures, patterns, or designs from any bone or tooth of any marine mammal of the order Cetacea. For purposes of this part, polishing or the adding of minor superficial markings does not constitute substantial etching, engraving, or carving.

Secretary means the Secretary of Commerce or an authorized representative.

Shrimp means any species of marine shrimp (Order Crustacea) found in the Atlantic Area or the Gulf Area, including, but not limited to:

- (1) Brown shrimp (*Penaeus aztecus*).
- (2) White shrimp (*Penaeus setiferus*).
- (3) Pink shrimp (*Penaeus duorarum*).
- (4) Rock shrimp (*Sicyonia brevirostris*).
- (5) Royal red shrimp (*Hymenopenaeus robustus*).
- (6) Seabob shrimp (*Xiphopenaeus kroyeri*).

Shrimp trawler means any vessel that is equipped with one or more trawl nets and that is capable of, or used for, fishing for shrimp, or whose on-board or landed catch of shrimp is more than 1 percent, by weight, of all fish comprising its on-board or landed catch.

Skimmer trawl means a trawl that is fished along the side of the vessel and is held open by a rigid frame and a lead weight. On its outboard side, the trawl is held open by one side of the frame extending downward and, on its inboard side, by a lead weight attached by cable or rope to the bow of the vessel.

Southeast Regional Administrator means the Regional Administrator for the Southeast Region of the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, or their authorized representative. Mail sent to the Southeast Regional Administrator should be addressed: Southeast Regional Administrator, F/SE, Southeast Regional Office, National Marine Fisheries Service, NOAA, 9721 Executive Center Drive N., St. Petersburg, FL 33702-2432.

Southwest Regional Administrator means the Regional Administrator for the Southwest Region of the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, or their authorized representative. Mail sent to the Southwest Regional Administrator should be addressed: Southwest Regional Administrator, F/SW, Southwest Regional Office, National Marine Fisheries Service, NOAA, 501 West Ocean Blvd, Suite 4200, Long Beach, CA 90802-4213.

Stretched mesh size means the distance between the centers of the two opposite knots in the same mesh when pulled taut.

Summer flounder means the species *Paralichthys dentatus*.

Summer flounder fishery-sea turtle protection area means all offshore waters, bounded on the north by a line along 37°05' N. lat. (Cape Charles, VA) and bounded on the south by a line extending in a direction of 135°34'55" from true north from the North Carolina-South Carolina land boundary, as marked by the border station on Bird Island at 33°51'07.9" N. lat., 078°32'32.6" W. long. (the North Carolina-South Carolina border).

Summer flounder trawler means any vessel that is equipped with one or more bottom trawl nets and that is capable of, or used for, fishing for flounder or whose on-board or landed catch of flounder is more than 100 lb (45.4 kg).

Take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.

Taper, in reference to the webbing used in trawls, means the angle of a cut used to shape the webbing, expressed as the ratio between the cuts that reduce the width of the webbing by cutting into the panel of webbing through one row of twine (bar cuts) and the cuts that extend the length of the panel of webbing by cutting straight aft through two adjoining rows of twine (point cuts). For example, sequentially cutting through the lengths of twine on opposite sides of a mesh, leaving an uncut edge of twines all lying in the same line, produces a relatively strong taper called "all-bars"; making a sequence of 4-bar cuts followed by 1-point cut produces a more gradual taper called "4 bars to 1 point" or "4b1p"; similarly, making a sequence of 2-bar cuts followed by 1-point cut produces a still more gradual taper called "2b1p"; and making a sequence of cuts straight aft does not reduce the width of the panel and is called a "straight" or "all-points" cut.

Taut means a condition in which there is no slack in the net webbing.

Test net, or *try net*, means a net pulled for brief periods of time just before, or during, deployment of the primary net(s) in order to test for shrimp concentrations or determine fishing conditions (e.g., presence or absence of bottom debris, jellyfish, bycatch, seagrasses, etc.).

Tongue means any piece of webbing along the top, center, leading edge of a trawl, whether lying behind or ahead of the headrope, to which a towing bridle can be attached for purposes of pulling the trawl net and/or adjusting the shape of the trawl.

Transportation means to ship, convey, carry or transport by any means whatever, and deliver or receive for such shipment, conveyance, carriage, or transportation.

Triple-wing trawl means a trawl with a tongue on the top, center, leading edge of the trawl and an additional tongue along the bottom, center, leading edge of the trawl.

Two-seam trawl means a design of shrimp trawl in which the main body of the trawl is formed from a top and a bottom panel of webbing that are directly attached to each other down the sides of the trawl.

Underway with respect to a vessel, means that the vessel is not at anchor, or made fast to the shore, or aground.

Unforeseen circumstances means changes in circumstances affecting a species or geographic area covered by a conservation plan that could not reasonably have been anticipated by plan developers and NMFS at the time of the conservation plan's negotiation and development, and that result in a substantial and adverse change in the status of the covered species.

Vessel means a vehicle used, or capable of being used, as a means of transportation on water which includes every description of watercraft, including nondisplacement craft and seaplanes.

Vessel restricted in her ability to maneuver has the meaning specified for this term at 33 U.S.C. 2003(g).

Wildlife means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

Wing net (butterfly trawl) means a trawl that is fished along the side of the vessel and that is held open by a four-sided, rigid frame attached to the outrigger of the vessel.

[64 FR 14054, Mar. 23, 1999, as amended at 64 FR 60731, Nov. 8, 1999; 67 FR 13101, Mar. 21, 2002; 67 FR 41203, June 17, 2002; 67 FR 71899, Dec. 3, 2002; 68 FR 8467, Feb. 21, 2003; 68 FR 17562, Apr. 10, 2003; 69 FR 25011, May 5, 2004; 70 FR 1832, Jan. 11, 2005; 71 FR 36032, June 23, 2006; 71 FR 50372, Aug. 25, 2006]

Title 50: Wildlife and Fisheries

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

Subpart B—Restrictions Applicable to Threatened Marine and Anadromous Species

§ 223.205 Sea turtles.

- (a) The prohibitions of section 9 of the Act (16 U.S.C. 1538) relating to endangered species apply to threatened species of sea turtle, except as provided in §223.206.
- (b) Except as provided in §223.206, it is unlawful for any person subject to the jurisdiction of the United States to do any of the following:
- (1) Own, operate, or be on board a vessel, except if that vessel is in compliance with all applicable provisions of §223.206(d);
 - (2) Fish for, catch, take, harvest, or possess, fish or wildlife while on board a vessel, except if that vessel is in compliance with all applicable provisions of §223.206(d);
 - (3) Fish for, catch, take, harvest, or possess, fish or wildlife contrary to any notice of tow-time or other restriction specified in, or issued under, §223.206(d)(3) or (d)(4);
 - (4) Possess fish or wildlife taken in violation of paragraph (b) of this section;
 - (5) Fail to follow any of the sea turtle handling and resuscitation requirements specified in §223.206(d)(1);
 - (6) Possess a sea turtle in any manner contrary to the handling and resuscitation requirements of §223.206(d)(1);
 - (7) Fail to comply immediately, in the manner specified at §600.730 (b) through (d) of this Title, with instructions and signals specified therein issued by an authorized officer, including instructions and signals to haul back a net for inspection;
 - (8) Refuse to allow an authorized officer to board a vessel, or to enter an area where fish or wildlife may be found, for the purpose of conducting a boarding, search, inspection, seizure, investigation, or arrest in connection with enforcement of this section;
 - (9) Destroy, stave, damage, or dispose of in any manner, fish or wildlife, gear, cargo, or any other matter after a communication or signal from an authorized officer, or upon the approach of such an officer or of an enforcement vessel or aircraft, before the officer has an opportunity to inspect same, or in contravention of directions from the officer;
 - (10) Assault, resist, oppose, impede, intimidate, threaten, obstruct, delay, prevent, or interfere with an authorized officer in the conduct of any boarding, search, inspection, seizure, investigation, or arrest in connection with enforcement of this section;
 - (11) Interfere with, delay, or prevent by any means, the apprehension of another person, knowing that such person committed an act prohibited by this section;
 - (12) Resist a lawful arrest for an act prohibited by this section;
 - (13) Make a false statement, oral or written, to an authorized officer or to the agency concerning the fishing for, catching, taking, harvesting, landing, purchasing, selling, or transferring fish or wildlife, or concerning any other matter subject to investigation under this section by such officer, or required to be submitted under this part 223;
 - (14) Sell, barter, trade or offer to sell, barter, or trade, a TED that is not an approved TED;
 - (15) Fail to comply with the restrictions set forth in §223.206(d)(10) regarding pound net leaders;
 - (16) Set, use, or fail to remove a pound net leader in Pound Net Regulated Area I or Pound Net Regulated Area II at any time from May 6 through July 15 that does not meet the leader construction specifications described in 50 CFR 223.206(d)(10) and 50 CFR 222.102;
 - (17) Set, use, or haul a modified pound net leader in Pound Net Regulated Area I or Pound Net Regulated Area II defined in 50 CFR 222.102 and referenced in 50 CFR 223.206(d)(10) at any time from May 6 through July 15 unless that leader has been inspected and tagged by NMFS in accordance with 50 CFR 223.206(d)(10)(vii) prior to deploying the leader;
 - (18) Alter or replace any portion of a pound net leader that has been previously tagged by NMFS in accordance with 50 CFR 223.206(d)(10)(vii) so that the altered or replaced portion is no longer consistent with the modified pound net leader definition in 50 CFR 222.102, unless that altered or replaced portion is inspected and tagged by NMFS in accordance with 50 CFR 223.206(d)(10)(vii) or that alteration or replacement occurs after the regulated period of May 6 through July 15;
 - (19) Remove, transfer, sell, purchase, affix, or tamper with any tags used by NMFS to mark pound net leaders;
 - (20) Fish, use, or haul a modified pound net leader at any time from May 6 through July 15 unless the fisherman has on board the vessel a letter issued by NMFS indicating that the leader has passed inspection;
 - (21) Fail to comply with the restrictions set forth in §223.206(d)(11) regarding sea scallop dredges; or
 - (22) Attempt to do, solicit another to do, or cause to be done, any of the foregoing.
- (c) In connection with any action alleging a violation of this section, any person claiming the benefit of any exemption, exception, or permit under this subpart B has the burden of proving that the exemption, exception, or permit is applicable, was granted, and was valid and in force at the time of the alleged violation. Further, any person claiming that a modification made to a TED that is the subject of such an action complies with the requirements of §223.207 (c) or (d) has the burden of proving such claim.

[64 FR 14069, Mar. 23, 1999, as amended at 67 FR 41203, June 17, 2002; 69 FR 25012, May 5, 2004; 71 FR 50372, Aug. 25, 2006; 73 FR 68354, Nov. 18, 2008]

§ 223.206 Exceptions to prohibitions relating to sea turtles.

- (a) *Permits*—(1) *Scientific research, education, zoological exhibition, or species enhancement permits.* The Assistant Administrator may issue permits authorizing activities which would otherwise be prohibited under §223.205(a) for scientific or educational purposes, for zoological

exhibition, or to enhance the propagation or survival of threatened species of sea turtles, in accordance with and subject to the conditions of part 222, subpart C—General Permit Procedures.

(2) *Incidental-take permits.* The Assistant Administrator may issue permits authorizing activities that would otherwise be prohibited under §223.205(a) in accordance with section 10(a)(1)(B) of the Act (16 U.S.C. 1539(a)(1)(B)), and in accordance with, and subject to, the implementing regulations in part 222 of this chapter. Such permits may be issued for the incidental taking of threatened and endangered species of sea turtles.

(b) *Exception for injured, dead, or stranded specimens.* If any member of any threatened species of sea turtle is found injured, dead, or stranded, any agent or employee of the National Marine Fisheries Service, the Fish and Wildlife Service, the U.S. Coast Guard, or any other Federal land or water management agency, or any agent or employee of a state agency responsible for fish and wildlife who is designated by his or her agency for such purposes, may, when acting in the course of his or her official duties, take such specimens without a permit if such taking is necessary to aid a sick, injured, or stranded specimen or dispose of a dead specimen or salvage a dead specimen which may be useful for scientific study. Whenever possible, live specimens shall be returned to their aquatic environment as soon as possible. Every action shall be reported in writing to the Assistant Administrator within 30 days, and reports of further occurrence shall be made as deemed appropriate by the Assistant Administrator until the specimen is either returned to its environment or disposed of. Reports shall be mailed by registered or certified mail, return receipt requested, to the Assistant Administrator and shall contain the following information:

- (1) Name and position of the official or employee involved;
- (2) Description of the specimen(s) involved;
- (3) Date and location of disposal;
- (4) Circumstances requiring the action;
- (5) Method of disposal;
- (6) Disposition of the specimen(s), including, where the specimen(s) has been retained in captivity, a description of the place and means of confinement, and the measures taken for its maintenance and care; and
- (7) Such other information as the Assistant Administrator may require.

(c) *Exception for research or conservation.* Any employee or agent of the National Marine Fisheries Service, the Fish and Wildlife Service, or a state fish and wildlife agency operating a conservation program pursuant to the terms of a Cooperative Agreement with the National Marine Fisheries Service or the Fish and Wildlife Service in accordance with section 6(c) of the Act, designated by his or her agency for such purposes, may, when acting in the course of his or her official duties, take any threatened species to carry out scientific research or conservation programs. All such takings shall be reported within 30 days of the taking to the Assistant Administrator who may request additional reports of the taking and research at the Assistant Administrator's discretion.

(d) *Exception for incidental taking.* The prohibitions against taking in §223.205(a) do not apply to the incidental take of any member of a threatened species of sea turtle (i.e., a take not directed towards such member) during fishing or scientific research activities, to the extent that those involved are in compliance with all applicable requirements of paragraphs (d)(1) through (d)(11) of this section, or in compliance with the terms and conditions of an incidental take permit issued pursuant to paragraph (a)(2) of this section.

(1) *Handling and resuscitation requirements.* (i) Any specimen taken incidentally during the course of fishing or scientific research activities must be handled with due care to prevent injury to live specimens, observed for activity, and returned to the water according to the following procedures:

(A) Sea turtles that are actively moving or determined to be dead as described in paragraph (d)(1)(i)(C) of this section must be released over the stern of the boat. In addition, they must be released only when fishing or scientific collection gear is not in use, when the engine gears are in neutral position, and in areas where they are unlikely to be recaptured or injured by vessels.

(B) Resuscitation must be attempted on sea turtles that are comatose, or inactive, as determined in paragraph (d)(1) of this section, by:

(1) Placing the turtle on its bottom shell (plastron) so that the turtle is right side up and elevating its hindquarters at least 6 inches (15.2 cm) for a period of 4 up to 24 hours. The amount of the elevation depends on the size of the turtle; greater elevations are needed for larger turtles. Periodically, rock the turtle gently left to right and right to left by holding the outer edge of the shell (carapace) and lifting one side about 3 inches (7.6 cm) then alternate to the other side. Gently touch the eye and pinch the tail (reflex test) periodically to see if there is a response.

(2) Sea turtles being resuscitated must be shaded and kept damp or moist but under no circumstance be placed into a container holding water. A water-soaked towel placed over the head, carapace, and flippers is the most effective method in keeping a turtle moist.

(3) Sea turtles that revive and become active must be released over the stern of the boat only when fishing or scientific collection gear is not in use, when the engine gears are in neutral position, and in areas where they are unlikely to be recaptured or injured by vessels. Sea turtles that fail to respond to the reflex test or fail to move within 4 hours (up to 24, if possible) must be returned to the water in the same manner as that for actively moving turtles.

(C) A turtle is determined to be dead if the muscles are stiff (rigor mortis) and/or the flesh has begun to rot; otherwise the turtle is determined to be comatose or inactive and resuscitation attempts are necessary.

(ii) In addition to the provisions of paragraph (d)(1)(i) of this section, a person aboard a vessel in the Atlantic, including the Caribbean Sea and the Gulf of Mexico, that has pelagic or bottom longline gear on board and that has been issued, or is required to have, a limited access permit for highly migratory species under §635.4 of this title, must comply with the handling and release requirements specified in §635.21 of this title.

(iii) Any specimen taken incidentally during the course of fishing or scientific research activities must not be consumed, sold, landed, offloaded, transhipped, or kept below deck.

(2) *Gear requirements for trawlers* —(i) *TED requirement for shrimp trawlers.* Any shrimp trawler that is in the Atlantic Area or Gulf Area must have an approved TED installed in each net that is rigged for fishing. A net is rigged for fishing if it is in the water, or if it is shackled, tied, or otherwise connected to any trawl door or board, or to any tow rope, cable, pole or extension, either on board or attached in any manner to the shrimp trawler. Exceptions to the TED requirement for shrimp trawlers are provided in paragraph (d)(2)(ii) of this section.

(ii) *Exemptions from the TED requirement* —(A) *Alternative tow-time restrictions.* A shrimp trawler is exempt from the TED requirements of paragraph (d)(2)(i) of this section if it complies with the alternative tow-time restrictions in paragraph (d)(3)(i) of this section and if it:

(1) Has on board no power or mechanical-advantage trawl retrieval system (i.e., any device used to haul any part of the net aboard);

(2) Is a bait shrimper that retains all live shrimp on board with a circulating seawater system, if it does not possess more than 32 lb. (14.5 kg) of dead shrimp on board, if it has a valid original state bait-shrimp license, and if the state license allows the licensed vessel to participate in the bait shrimp fishery exclusively;

(3) Has only a pusher-head trawl, skimmer trawl, or wing net rigged for fishing;

(4) Is in an area during a period for which tow-time restrictions apply under paragraphs (d)(3)(ii) or (iii) of this section, if it complies with all applicable provisions imposed under those paragraphs; or

(5) Is using a single test net (try net) with a headrope length of 12 ft (3.6 m) or less and with a footrope length of 15 ft (4.6 m) or less, if it is pulled immediately in front of another net or is not connected to another net in any way, if no more than one test net is used at a time, and if it is not towed as a primary net, in which case the exemption under this paragraph (d)(2)(ii)(A) applies to the test net.

(B) *Exempted gear or activities.* The following fishing gear or activities are exempted from the TED requirements of paragraph (d)(2)(i) of this section:

(1) A beam or roller trawl, if the frame is outfitted with rigid vertical bars, and if none of the spaces between the bars, or between the bars and the frame, exceeds 4 inches (10.2 cm); and

(2) A shrimp trawler fishing for, or possessing, royal red shrimp, if royal red shrimp constitutes at least 90 percent (by weight) of all shrimp either found on board, or offloaded from that shrimp trawler.

(iii) *Gear requirement—summer flounder trawlers —(A) TED requirement.* (1) Any summer flounder trawler in the summer flounder fishery-sea turtle protection area must have an approved TED installed in each net that is rigged for fishing. A net is rigged for fishing if it is in the water, or if it is shackled, tied, or otherwise connected to any trawl door or board, or to any tow rope, cable, pole or extension, either on board or attached in any manner to the summer flounder trawler. Exceptions to the TED requirement for summer flounder trawlers are provided in paragraph (d)(2)(iii)(B) of this section.

(2) Any approved hard TED or special hard TED installed in a summer flounder trawl must be installed in a TED extension. The TED extension is a cylindrical piece of webbing distinct from the main trawl's body, wings, codend, and any other net extension(s). The TED extension must be constructed of webbing no larger than 3.5 inch (8.9 cm) stretched mesh. The TED extension must extend at least 24 inches (61.0 cm) but not more than 36 inches (91.4 cm) forward of the leading edge of the TED and aft of the trailing edge of the grid.

(B) *Exemptions from the TED requirement.* Any summer flounder trawler north of 35°46.1' N. lat. (Oregon Inlet, NC) from January 15 through March 15 annually is exempt from the TED requirement of paragraph (d)(2)(iii)(A) of this section, unless the Assistant Administrator determines that TED use is necessary to protect sea turtles or ensure compliance, pursuant to the procedures of paragraph (d)(4) of this section.

(C) *Monitoring.* Summer flounder trawlers must carry onboard a NMFS-approved observer if requested by the Southeast Regional Administrator or the Northeast Regional Administrator. A written notification will be sent to the address specified for the vessel in either the NMFS or state fishing permit application, or to the address specified for registration or documentation purposes, or upon written notification otherwise served on the owner or operator of the vessel. Owners and operators must comply with the terms and conditions specified in such written notification. All NMFS-approved observers will report any violations of this section, or other applicable regulations and laws. Information collected by observers may be used for enforcement purposes.

(D) *Additional sea turtle conservation measures.* The Assistant Administrator may impose other such restrictions upon summer flounder trawlers as the Assistant Administrator deems necessary or appropriate to protect sea turtles and ensure compliance, pursuant to the procedures of paragraph (d)(4) of this section. Such measures may include, but are not limited to, a requirement to use TEDs in areas other than summer flounder fishery-sea turtle protection area, a requirement to use limited tow-times, and closure of the fishery.

(3) *Tow-time restrictions —(i) Duration of tows.* If tow-time restrictions are utilized pursuant to paragraph (d)(2)(ii), (d)(3)(ii), or (d)(3)(iii) of this section, a shrimp trawler must limit tow times. The tow time is measured from the time that the trawl door enters the water until it is removed from the water. For a trawl that is not attached to a door, the tow time is measured from the time the codend enters the water until it is removed from the water. Tow times may not exceed:

(A) 55 minutes from April 1 through October 31; and

(B) 75 minutes from November 1 through March 31.

(ii) *Alternative—special environmental conditions.* The Assistant Administrator may allow compliance with tow-time restrictions, as an alternative to the TED requirement of paragraph (d)(2)(i) of this section, if the Assistant Administrator determines that the presence of algae, seaweed, debris or other special environmental conditions in a particular area makes trawling with TED-equipped nets impracticable.

(iii) *Substitute—ineffectiveness of TEDs.* The Assistant Administrator may require compliance with tow-time restrictions, as a substitute for the TED requirement of paragraph (d)(2)(i) of this section, if the Assistant Administrator determines that TEDs are ineffective in protecting sea turtles.

(iv) *Notice; applicability; conditions.* The Assistant Administrator will publish notification concerning any tow-time restriction imposed under paragraph (d)(3)(ii) or (iii) of this section in the Federal Register and will announce it in summary form on channel 16 of the marine VHF radio. A notification of tow-time restrictions will include findings in support of these restrictions as an alternative to, or as substitute for, the TED requirements. The notification will specify the effective dates, the geographic area where tow-time restrictions apply, and any applicable conditions or restrictions that the Assistant Administrator determines are necessary or appropriate to protect sea turtles and ensure compliance, including, but not limited to, a requirement to carry observers, to register vessels in accordance with procedures at paragraph (d)(5) of this section, or for all shrimp trawlers in the area to synchronize their tow times so that all trawl gear remains out of the water during certain times. A notification withdrawing tow-time restrictions will include findings in support of that action.

(v) *Procedures.* The Assistant Administrator will consult with the appropriate fishery officials (state or Federal) where the affected shrimp fishery is located in issuing a notification concerning tow-time restrictions. An emergency notification can be effective for a period of up to 30 days and may be renewed for additional periods of up to 30 days each if the Assistant Administrator finds that the conditions necessitating the imposition of tow-time restrictions continue to exist. The Assistant Administrator may invite comments on such an action, and may withdraw or modify the action by following procedures similar to those for implementation. The Assistant Administrator will implement any permanent tow-time restriction through rulemaking.

(4) *Limitations on incidental takings during fishing activities —(i) Limitations.* The exemption for incidental takings of sea turtles in paragraph (d) of this section does not authorize incidental takings during fishing activities if the takings:

(A) Would violate the restrictions, terms, or conditions of an incidental take statement or biological opinion;

- (B) Would violate the restrictions, terms, or conditions of an incidental take permit; or
- (C) May be likely to jeopardize the continued existence of a species listed under the Act.

(ii) *Determination; restrictions on fishing activities.* The Assistant Administrator may issue a determination that incidental takings during fishing activities are unauthorized. Pursuant thereto, the Assistant Administrator may restrict fishing activities in order to conserve a species listed under the Act, including, but not limited to, restrictions on the fishing activities of vessels subject to paragraph (d)(2) of this section. The Assistant Administrator will take such action if the Assistant Administrator determines that restrictions are necessary to avoid unauthorized takings that may be likely to jeopardize the continued existence of a listed species. The Assistant Administrator may withdraw or modify a determination concerning unauthorized takings or any restriction on fishing activities if the Assistant Administrator determines that such action is warranted.

(iii) *Notice; applicability; conditions.* The Assistant Administrator will publish a notification of a determination concerning unauthorized takings or a notification concerning the restriction of fishing activities in the Federal Register. The Assistant Administrator will provide as much advance notice as possible, consistent with the requirements of the Act, and will announce the notification in summary form on channel 16 of the marine VHF radio. Notification of a determination concerning unauthorized takings will include findings in support of that determination; specify the fishery, including the target species and gear used by the fishery, the area, and the times, for which incidental takings are not authorized; and include such other conditions and restrictions as the Assistant Administrator determines are necessary or appropriate to protect sea turtles and ensure compliance. Notification of restriction of fishing activities will include findings in support of the restriction, will specify the time and area where the restriction is applicable, and will specify any applicable conditions or restrictions that the Assistant Administrator determines are necessary or appropriate to protect sea turtles and ensure compliance. Such conditions and restrictions may include, but are not limited to, limitations on the types of fishing gear that may be used, tow-time restrictions, alteration or extension of the periods of time during which particular tow-time requirements apply, requirements to use TEDs, registration of vessels in accordance with procedures at paragraph (d)(5) of this section, and requirements to provide observers. Notification of withdrawal or modification will include findings in support of that action.

(iv) *Procedures.* The Assistant Administrator will consult with the appropriate fisheries officials (state or Federal) where the fishing activities are located in issuing notification of a determination concerning unauthorized takings or notification concerning the restriction of fishing activities. An emergency notification will be effective for a period of up to 30 days and may be renewed for additional periods of up to 30 days each, except that emergency placement of observers will be effective for a period of up to 180 days and may be renewed for an additional period of 60 days. The Assistant Administrator may invite comments on such action, and may withdraw or modify the action by following procedures similar to those for implementation. The Assistant Administrator will implement any permanent determination or restriction through rulemaking.

(5)–(6) [Reserved]

(7) Restrictions applicable to gillnet fisheries in North Carolina. No person may fish with gillnet fishing gear which has a stretched mesh size larger than 41/4 inches (10.8 cm), annually from September 1 through December 15, in the inshore waters of Pamlico Sound, North Carolina, and all contiguous tidal waters, bounded on the north by 35°46.3' N. lat., on the south by 35°00' N. lat., and on the west by 76°30' W. long.

(8) *Restrictions applicable to large mesh gillnet fisheries in the mid-Atlantic region.* No person may fish with or possess on board a boat, any gillnet with a stretched mesh size 7–inches (17.8 cm) or larger, unless such gillnets are covered with canvas or other similar material and lashed or otherwise securely fastened to the deck or the rail, and all buoys larger than 6–inches (15.2 cm) in diameter, high flyers, and anchors are disconnected. This restriction applies in the Atlantic Exclusive Economic Zone (as defined in 50 CFR 600.10) during the following time periods and in the following area:

- (i) Waters north of 33° 51.0' N. (North Carolina/South Carolina border at the coast) and south of 35° 46.0' N. (Oregon Inlet) at any time;
 - (ii) Waters north of 35° 46.0' N. (Oregon Inlet) and south of 3° 22.5' N. (Currituck Beach Light, NC) from March 16 through January 14;
 - (iii) Waters north of 36° 22.5' N. (Currituck Beach Light, NC) and south of 37° 34.6' N. (Wachapreague Inlet, VA) from April 1 through January 14; and
 - (iv) Waters north of 37° 34.6' N. (Wachapreague Inlet, VA) and south of 37° 56.0' N. (Chincoteague, VA) from April 16 through January 14.
- (9) *Restrictions applicable to Pacific pelagic longline vessels.* In addition to the general prohibitions specified in §600.725 of Chapter VI, it is unlawful for any person who is not operating under a western Pacific longline permit under §660.21 to do any of the following on the high seas of the Pacific Ocean east of 150° W. long. and north of the equator (0° N. lat.):
- (i) Direct fishing effort toward the harvest of swordfish (*Xiphias gladius*) using longline gear.
 - (ii) Possess a light stick on board a longline vessel. A light stick as used in this paragraph is any type of light emitting device, including any fluorescent *glow bead*, chemical, or electrically powered light that is affixed underwater to the longline gear.
 - (iii) An operator of a longline vessel subject to this section may land or possess no more than 10 swordfish from a fishing trip where any part of the trip included fishing east of 150° W. long. and north of the equator (0° N. lat.).
 - (iv) Fail to employ basket-style longline gear such that the mainline is deployed slack when fishing.
 - (v) When a conventional monofilament longline is deployed by a vessel, no fewer than 15 branch lines may be set between any two floats. Vessel operators using basket-style longline gear must set a minimum of 10 branch lines between any 2 floats.
 - (vi) Longline gear must be deployed such that the deepest point of the main longline between any two floats, i.e., the deepest point in each sag of the main line, is at a depth greater than 100 m (328.1 ft or 54.6 fm) below the sea surface.

(10) *Restrictions applicable to pound nets in Virginia* —(i) *Offshore pound net leaders in Pound Net Regulated Area I.* During the time period of May 6 through July 15 each year, any offshore pound net leader in Pound Net Regulated Area I must meet the definition of a modified pound net leader. Any offshore pound net leader in Pound Net Regulated Area I that does not meet the definition of a modified pound net leader must be removed from the water prior to May 6 and may not be reset until July 16.

(ii) *Nearshore pound net leaders in Pound Net Regulated Area I and all pound net leaders in Pound Net Regulated Area II.* During the time period of May 6 to July 15 each year, any nearshore pound net leader in Pound Net Regulated Area I and any pound net leader in Pound Net Regulated Area II must have only mesh size less than 12 inches (30.5 cm) stretched mesh and may not employ stringers. Any nearshore pound net leader in Pound Net Regulated Area I or any pound net leader in Pound Net Regulated Area II with stretched mesh measuring 12 inches (30.5 cm) or greater, or with stringers, must be removed from the water prior to May 6 and may not be reset until July 16. A pound net leader is exempt from these measures only if it meets the definition of a modified pound net leader.

(iii) *Protocol for measuring mesh size.* This protocol applies to measuring mesh size in leaders described in 50 CFR 223.206(d)(10)(i) and 223.206(d)(10)(ii). Mesh sizes are measured by a wedge-shaped gauge having a taper of 0.79 in. (2 cm) in 3.15 in. (8 cm) and a thickness of 0.09

in. (2.3 mm) inserted into the meshes under a pressure or pull of 11.02 lb. (5 kg). The mesh size is the average of the measurement of any series of 20 consecutive meshes. The mesh in the leader is measured at or near the horizontal and vertical center of a leader panel.

(iv) *Reporting requirement.* At any time during the year, if a sea turtle is taken live and uninjured in a pound net operation, the operator of the vessel must report the incident to the NMFS Northeast Regional Office, (978) 281-9328 or fax (978) 281-9394, within 24 hours of returning from the trip in which the incidental take was discovered. The report shall include a description of the sea turtles condition at the time of release and the measures taken as required in paragraph (d)(1) of this section. At any time during the year, if a sea turtle is taken in a pound net operation, and is determined to be injured, or if a turtle is captured dead, the operator of the vessel shall immediately notify NMFS Northeast Regional Office and the appropriate rehabilitation or stranding network, as determined by NMFS Northeast Regional Office.

(v) *Monitoring.* Owners or operators of pound net fishing operations must allow access to the pound net gear so it may be observed by a NMFS-approved observer if requested by the Northeast Regional Administrator. All NMFS-approved observers will report any violations of this section, or other applicable regulations and laws. Information collected by observers may be used for law enforcement purposes.

(vi) *Expedited modification of restrictions and effective dates.* From May 6 to July 15 of each year, if NMFS receives information that one sea turtle is entangled alive or that one sea turtle is entangled dead, and NMFS determines that the entanglement contributed to its death, in pound net leaders that are in compliance with the restrictions described in paragraph (d)(10)(ii) of this section, NMFS may issue a final rule modifying the restrictions on pound net leaders as necessary to protect threatened sea turtles. Such modifications may include, but are not limited to, reducing the maximum allowable mesh size of pound net leaders and prohibiting the use of pound net leaders regardless of mesh size. In addition, if information indicates that a significant level of sea turtle entanglements, impingements or strandings will likely continue beyond July 15, NMFS may issue a final rule extending the effective date of the restrictions, including any additional restrictions imposed under this paragraph (d)(10)(vi), for an additional 15 days, but not beyond July 30, to protect threatened sea turtles.

(vii) *Modified leader inspection program.* Any fisherman planning to use a modified pound net leader in Pound Net Regulated Area I or Pound Net Regulated Area II at any time from May 6 through July 15 must make his/her leader available for inspection and tagging by NMFS according to the following procedures. At least 72 hours prior to deploying a modified pound net leader, the fisherman or his/her representative must call NMFS at 757-414-0128 between 7:00 a.m. and 5:00 p.m. local time and arrange for a mutually agreeable meeting date, time, and place. The fisherman must meet NMFS at such location at the designated time and allow NMFS to examine his or her gear to help ensure the leader is in compliance with the definition of a modified pound net leader. NMFS will ascertain whether the leader meets the following four criteria taken from that definition: (1) the lower portion of the leader is mesh and the upper portion consists of only vertical lines; (2) the mesh size is equal to or less than 8 inches (20.3 cm) stretched mesh; (3) the vertical lines are equal to or greater than 5/16 inch (0.8 cm) in diameter and strung vertically at least every 2 feet (61 cm); and (4) the vertical lines are hard lay lines with a level of stiffness equivalent to the stiffness of a 5/16 inch (0.8 cm) diameter line composed of polyester wrapped around a blend of polypropylene and polyethylene and containing approximately 42 visible twists of strands per foot of line. NMFS will also measure the height of the mesh in relation to the height of the entire leader. During the inspection, the fisherman must provide accurate and specific latitude and longitude coordinates of the location at which the leader will be deployed, as well as information on the low water depth at each end of the modified leader at the site at which it will be set. If the leader meets the four criteria previously described, the measurement of the height of the mesh in relation to the total height of the leader is recorded, and the low water depth and latitude and longitude coordinates of the specific location at which the leader will be deployed are provided and recorded, the leader will pass inspection. If it passes inspection, NMFS will tag the leader with one or more tamperproof tags. Removing or tampering with any tag placed on the leader by NMFS is prohibited. If a tag is damaged, destroyed, or lost due to any cause, the fisherman must call NMFS at 757-414-0128 within 48 hours of discovery to report this incident. After the leader is determined to have passed inspection, NMFS will issue a letter to the fisherman indicating that the leader passed inspection. The fisherman must retain that letter on board his/her vessel tending the inspected leader at all times it is deployed. Modified pound net leaders must pass inspection prior to being used at any time during the time period from May 6 through July 15 of each year.

(11) *Restrictions applicable to sea scallop dredges in the mid-Atlantic* —(i) *Gear Modification.* During the time period of May 1 through November 30, any vessel with a sea scallop dredge and required to have a Federal Atlantic sea scallop fishery permit, regardless of dredge size or vessel permit category, that enters waters south of 41°9.0' N. latitude, from the shoreline to the outer boundary of the Exclusive Economic Zone must have on each dredge a chain mat described as follows. The chain mat must be composed of horizontal (“tickler”) chains and vertical (up-and-down) chains that are configured such that the openings formed by the intersecting chains have no more than 4 sides. The length of each side of the openings formed by the intersecting chains, including the sweep, must be less than or equal to 14 inches (35.5 cm). The chains must be connected to each other with a shackle or link at each intersection point. The measurement must be taken along the chain, with the chain held taut, and include one shackle or link at the intersection point and all links in the chain up to, but excluding, the shackle or link at the other intersection point.

(ii) Any vessel that enters the waters described in paragraph (d)(11)(i) of this section and that is required to have a Federal Atlantic sea scallop fishery permit must have the chain mat configuration installed on all dredges for the duration of the trip.

(iii) Vessels subject to the requirements in paragraphs (d)(11)(i) and (d)(11)(ii) of this section transiting waters south of 41°9.0' N. latitude, from the shoreline to the outer boundary of the Exclusive Economic Zone, will be exempted from the chain-mat requirements provided the dredge gear is stowed in accordance with §648.23(b) and there are no scallops on-board.

[64 FR 14070, Mar. 23, 1999, as amended at 64 FR 55863, Oct. 15, 1999; 66 FR 1603, Jan. 9, 2001; 66 FR 44551, Aug. 24, 2001; 66 FR 50354, Oct. 3, 2001; 66 FR 52362, Oct. 15, 2001; 66 FR 67496, Dec. 31, 2001; 67 FR 13101, Mar. 21, 2002; 67 FR 41203, June 17, 2002; 67 FR 56934, Sept. 6, 2002; 67 FR 71899, Dec. 3, 2002; 67 FR 78392, Dec. 24, 2002; 68 FR 8467, Feb. 21, 2003; 68 FR 41945, July 16, 2003; 68 FR 69967, Dec. 16, 2003; 69 FR 11545, Mar. 11, 2004; 69 FR 25012, May 5, 2004; 69 FR 18453, Apr. 7, 2004; 69 FR 40753, July 6, 2004; 71 FR 24796, Apr. 26, 2006; 71 FR 36033, June 23, 2006; 71 FR 50372, Aug. 25, 2006; 71 FR 66468, Nov. 15, 2006; 72 FR 5641, Feb. 7, 2007; 72 FR 43186, Aug. 3, 2007; 73 FR 19000, Apr. 8, 2008; 73 FR 68354, Nov. 18, 2008]

Effective Date Notes: 1. At 64 FR 14070, Mar. 23, 1999, newly redesignated §223.206 was revised. Paragraph (d)(5) contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

2. At 67 FR 41203, June 17, 2002, §223.206 was amended by adding paragraph (d)(2)(v). Paragraph (d)(2)(v)(C) contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

requirements of the Petition for Relocation.

(c) *Petition after failure to reach an agreement.* If the parties fail to reach an agreement as provided in § 301.120 and non-binding arbitration has occurred pursuant to § 301.130, the licensee may file a petition for relocation with NTIA after a decision has been rendered by the arbitrator. Any recommended decision by the arbitrator may be requested by NTIA as part of the record in a petition for relocation under § 301.140. The recommended decision may be a factor, among others, in the NTIA determination on the Petition for Relocation.

§ 301.150 Request for withdrawal.

As an alternative to a Petition for Relocation, if the parties reach an agreement in negotiations or mediation or agree with the decision of the arbitrator, the Federal entity may seek voluntary withdrawal of the assignments that are the subject of the relocation.

[FR Doc. 02-15118 Filed 6-14-02; 8:45 am]

BILLING CODE 3510-60-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 350 and 385

[Docket No. FMCSA-2001-11060]

RIN 2126-AA64

Certification of Safety Auditors, Safety Investigators, and Safety Inspectors; Delay of Effective Date

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Interim final rule; delay of effective date.

SUMMARY: The FMCSA delays for 30 days the effective date of the interim final rule titled "Certification of Safety Auditors, Safety Investigators, and Safety Inspectors," published in the *Federal Register* on March 19, 2002 at 67 FR 12776. That rule establishes procedures to certify and maintain certification for auditors and investigators. It also requires certification for State or local government Motor Carrier Safety Assistance Program (MCSAP) employees performing driver/vehicle roadside inspections. The FMCSA needs more time to review all of the comments received on this rulemaking.

DATES: The effective date of the interim final rule amending 49 CFR parts 350

and 385 published at 67 FR 12776, March 19, 2002, is delayed for 30 days from June 17, 2002 until July 17, 2002.

FOR FURTHER INFORMATION CONTACT: Mr. Larry Minor, 202-366-4009, Acting Chief, Driver and Carrier Operations Division, Federal Motor Carrier Safety Administration, 400 Seventh Street, SW., MC-PSD, Washington, DC 20590-0001. Office hours are from 7:45 a.m. to 4:15 p.m. EST, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: The FMCSA believes that an additional 30 days are necessary to fully consider all of the comments received on the rule, including those related to potential environmental impacts of this action. The FMCSA's implementation of this action without opportunity for public comment, effective immediately upon publication today in the *Federal Register*, is based on the good cause exceptions in 5 U.S.C. 553(b)(B) and 553(d)(3). Seeking public comment is impracticable, unnecessary, and contrary to the public interest. The brief 30-day delay in effective date is necessary to give agency officials the opportunity to do further analysis in response to the comments. Given the imminence of the effective date, seeking prior public comment on this brief delay would have been impracticable, as well as contrary to the public interest in the orderly promulgation and implementation of regulations. The imminence of the effective date is also good cause for making this action effective immediately upon publication.

Dated: June 12, 2002.

Joseph M. Clapp,
Administrator.

[FR Doc. 02-15272 Filed 6-13-02; 11:55 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 222 and 223

[Docket No. 020319061-2122-02; I.D. 031402B]

RIN 0648-AP81

Sea Turtle Conservation Measures for the Pound Net Fishery in Virginia Waters

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

ACTION: Interim final rule; request for comments.

SUMMARY: NMFS is prohibiting the use of all pound net leaders measuring 12 inches (30.5 cm) and greater stretched mesh and all pound net leaders with stringers in the Virginia waters of the mainstem Chesapeake Bay effective immediately through June 30 and then from May 8 to June 30 each year. The affected area includes all Chesapeake Bay waters between the Maryland and Virginia state line (approximately 38° N. lat.) and the COLREGS line at the mouth of the Chesapeake Bay, and the waters of the James River, York River, and Rappahannock River downstream of the first bridge in each tributary. NMFS is also imposing year round reporting and, when requested, monitoring requirements for the Virginia pound net fishery. This action, taken under the Endangered Species Act of 1973 (ESA), is necessary to conserve sea turtles listed as threatened or endangered and to enable the agency to gather further information about sea turtle interactions in the pound net fishery.

DATES: Effective June 12, 2002, with the exception of 50 CFR 223.206(d)(2)(v)(C), which requires approval by the Office of Management and Budget pursuant to the Paperwork Reduction Act. The effective date of 50 CFR 223.206(d)(2)(v)(C) will be announced in the *Federal Register*.

Comments on this interim final rule are requested, and must be received at the appropriate address or fax number (**ADDRESSES**) by no later than 5 p.m., eastern daylight time, on July 17, 2002.

ADDRESSES: Written comments on this action or requests for copies of the literature cited, the Environmental Assessment (EA), or Regulatory Impact Review (RIR) should be addressed to the Assistant Regional Administrator for Protected Resources, NMFS, One Blackburn Drive, Gloucester, MA 01930. Comments and requests for supporting documents may also be sent via fax to 978-281-9394. Comments will not be accepted if submitted via e-mail or the Internet.

FOR FURTHER INFORMATION CONTACT: Mary A. Colligan (ph. 978-281-9116, fax 978-281-9394), or Barbara A. Schroeder (ph. 301-713-1401, fax 301-713-0376).

SUPPLEMENTARY INFORMATION:

Background

Pound net leaders with greater than or equal to 12 inches (30.5 cm) stretched mesh and leaders with stringers have been documented to incidentally take sea turtles (Bellmund *et al.*, 1987). High strandings of threatened and endangered sea turtles are documented on Virginia beaches each spring, and the magnitude of the stranding event has

increased in recent years. No cause of mortality is immediately apparent for the majority of turtles that strand in Virginia, but the circumstances surrounding the recent stranding events are consistent with fishery interactions. In 2001, NMFS explored the various mortality sources potentially contributing to the high annual stranding event. While a number of fisheries may contribute to sea turtle strandings, based upon the best available information, pound net leaders were a likely contributor to high sea turtle strandings in Virginia in May and June of 2001. The documented incidental take of sea turtles in leaders, the ability of leaders to continue to take sea turtles in the future, and the annual high mortality of sea turtles in Virginia in May and June are of particular concern because approximately 50 percent of the Chesapeake Bay loggerhead foraging population is composed of the northern subpopulation, a subpopulation that may be declining. In addition, recently most of the stranded turtles have been juveniles, a life stage found to be critical to the long term survival of the species. This action is necessary to provide for the conservation of threatened and endangered turtles by minimizing incidental take in the Virginia pound net fishery during the spring. Details concerning the justification for the pound net leader restriction regulations and the high sea turtle stranding events in Virginia were provided in the preamble to the proposed rule (67 FR 15160, March 29, 2002) and are not repeated here.

Approved Measures

To conserve sea turtles, the Assistant Administrator, NOAA, (AA) prohibits the use of all pound net leaders measuring 12 inches (30.5 cm) or greater stretched mesh and all pound net leaders with stringers in the Virginia waters of the mainstem Chesapeake Bay and portions of the Virginia tributaries from May 8 to June 30 each year. The area where this gear restriction applies includes the Virginia waters of the mainstem Chesapeake Bay from the Maryland-Virginia state line (approximately 37° 55' N. lat., 75° 55' W. long.) to the COLREGS line at the mouth of the Chesapeake Bay; the James River downstream of the Hampton Roads Bridge Tunnel (I-64; approximately 36° 59.55' N. lat., 76° 18.64' W. long.); the York River downstream of the Coleman Memorial Bridge (Route 17; approximately 37° 14.55' N. lat., 76° 30.40' W. long.); and the Rappahannock River downstream of the Robert Opie Norris Jr. Bridge (Route

3; approximately 37° 37.44' N. lat., 76° 25.40' W. long.).

This prohibition of pound net leaders is effective upon filing through June 30 for this year, and from 12:00 a.m. local time on May 8 through 11:59 p.m. local time on June 30 each subsequent year. For the duration of this gear restriction, fishermen are required to stop fishing with pound net leaders measuring 12 inches (30.5 cm) or greater stretched mesh and pound net leaders with stringers in the designated area.

In addition to establishing the annual restriction on leader mesh size and leaders with stringers, this interim final rule also establishes year-round reporting (enforceable after OMB approval pursuant to the Paperwork Reduction Act (PRA)) and monitoring requirements for this fishery.

This interim final rule also establishes a framework mechanism by which NMFS may make changes to the restrictions and/or their effective dates on an expedited basis in order to respond to new information and protect sea turtles. Under this framework mechanism, if NMFS believes based on, for example, vessel reports, observer information, or water temperature and the timing of sea turtles' migration, that sea turtles may still be vulnerable to entanglement in pound net leaders after June 30, the AA may extend the effective dates of the prohibition established by this regulation. Should an extension of the effective dates of the prohibition of pound net leaders measuring 12 inches (30.5 cm) or greater stretched mesh and pound net leaders with stringers be necessary, NMFS would issue a final rule to be effective upon publication in the **Federal Register** explicitly stating the duration of the extension of the prohibition. Under this framework provision, such an extension would not exceed thirty days, or beyond July 30. Should NMFS determine that this gear restriction needs to be in place at other times of the year, NMFS would take action either pursuant its emergency rulemaking authority under the ESA or under the Administrative Procedure Act, but not under the framework mechanism established by this rule.

NMFS intends to continue to monitor sea turtle stranding levels and other fisheries active in the Virginia Chesapeake Bay and ocean waters, including pound net leaders with a stretched mesh size measuring less than 12 inches (30.5 cm). If monitoring of pound net leaders during the time frame of the gear restriction, May 8 through June 30 of each year, reveals that one sea turtle is entangled alive in a pound net leader less than 12 inches (30.5 cm)

stretched mesh or that one sea turtle is entangled dead and NMFS determines that the entanglement contributed to its death, then NMFS may determine that additional restrictions are necessary to conserve sea turtles and prevent entanglements. Such additional restrictions may include reducing the allowable mesh size for pound net leaders or prohibiting all pound net leaders regardless of mesh size in Virginia waters. Should NMFS determine that an additional restriction is warranted, NMFS would immediately file a final rule with the Office of the Federal Register. Such a rule would explicitly state the new mandatory gear restriction as well as the time period, which may also be extended for up to 30 days by a final rule pursuant to this framework mechanism. The area where additional gear restrictions would apply includes the same area as the initial restriction, namely the Virginia waters of the mainstem Chesapeake Bay from the Maryland-Virginia State line (approximately 38° N. lat.) to the COLREGS line at the mouth of the Chesapeake Bay, and portions of the James River, the York River, and the Rappahannock River.

Comments and Responses

On March 29, 2002, NMFS published a proposed rule that would prohibit the use of all pound net leaders measuring 12 inches (30.5 cm) and greater stretched mesh and all pound net leaders with stringers in the Virginia waters of the mainstem Chesapeake Bay from May 8 to June 30 each year. Comments on this proposed action were requested through April 15, 2002. Nine comment letters were received during the public comment period for the proposed rule. NMFS considered these comments on the proposed rule as part of its decision making process. A complete summary of the comments and NMFS' responses, grouped according to general subject matter, is provided here.

General Comments

Comment 1: Six commenters supported the adoption of the proposed regulations to ensure sea turtle populations are not further compromised in the Virginia Chesapeake Bay.

Response: NMFS agrees that the restriction of pound net leaders is necessary to conserve sea turtles listed as threatened or endangered under the ESA.

Comment 2: Two commenters stated that the proposed pound net restrictions may not be effective at reducing spring sea turtle strandings in Virginia waters. Both commenters suggested NMFS

consider the contribution of other fisheries active in Virginia during the spring to the high turtle strandings.

Response: NMFS does not believe that pound nets are the sole source of spring turtle mortalities in Virginia. NMFS does believe that pound nets play a role in the annual spring stranding event. Prohibiting a gear type known to entangle sea turtles, leaders with greater than or equal to 12 inches (30.5 cm) stretched mesh and leaders with stringers, will protect sea turtles from entanglement in pound net leaders while minimizing the impacts to the pound net fishery. However, should sea turtle entanglement in compliant pound net leaders occur, NMFS may enact additional management measures as appropriate.

Based upon available information, it does not appear that another fishery was a significant contributor to the high strandings exhibited in 2001. In fact, a number of the fisheries active in the spring had adequate observer coverage, and few turtle takes were observed. However, NMFS recognizes that variations in fishery-turtle interactions may occur in any given year, and is committed to continued monitoring of fisheries active in Virginia state waters. Again, it should be stressed that NMFS believes that high spring strandings may be a result of an accumulation of factors, most notably fishery interactions, but pound net leaders are known to take sea turtles and likely contribute to the overall strandings.

Comment 3: Three comments were received on the timing of the regulations, namely May 8 to June 30. Two commenters supported the time frame of the restrictions. One commenter felt that the time frame of the restrictions was too long given the distribution of strandings in Virginia waters, and suggested a time period of approximately late May to mid-June.

Response: NMFS believes that, given the available information, the time period for the pound net restrictions is appropriate. From 1994 to 2001, the average date of the first reported stranding in Virginia was May 15. However, sea turtle mortality would have occurred before the animals stranded on Virginia beaches. While the peak of the spring strandings may occur later in May, historical strandings data indicate that sea turtle mortality begins in early May and regulations should be in effect as close to that time as possible if sea turtle protection measures are to be effective at reducing takes in leaders and strandings. In order for the proposed pound net restrictions to reduce sea turtle interactions with pound net leaders and reduce

subsequent strandings on Virginia beaches, the proposed measures should go into effect at least 1-week prior to the stranding commencement date, or on May 8 each year. Information submitted with one of the comments shows that in approximately 7 years prior to 1994, the date of the first turtle stranding was earlier than May 15. This supports the implementation of the leader restrictions in early May.

Strandings data from 1999 to 2001 show that the state of decomposition for the majority of stranded turtles progresses with the season, suggesting that most turtles stranding in later June may have been subjected to mortality sources earlier in the season (Mansfield *et al.*, 2002). Turtles stranding in June may have been dead for anywhere from a few days to two weeks. Whether the differences in decomposition levels by week are statistically significant remains to be determined. Based on historical Sea Turtle Stranding and Salvage Network (STSSN) stranding data, strandings in Virginia typically remain elevated until June 30, indicating that turtles may be vulnerable to entanglement in pound net leaders until this time. Implementing management measures for only a 3 to 4-week period (ending in approximately early to mid-June) may result in a large number of sea turtles remaining vulnerable to pound net leader entanglement after the restrictions are lifted. Furthermore, information submitted with one of the comments shows that the stranding peak persists until late June in some years. In some years the peak period of high strandings may be shorter than the time period of the regulations, but historically, high sea turtle strandings have been documented throughout the proposed time period of the leader restrictions. Implementation of the gear restrictions from May 8 to June 30 will account for stranding peak variability among years and is expected to prevent the occurrence of sea turtle takes in the pound net fishery in the spring and reduce the high numbers of strandings in Virginia. NMFS retains the option to lift the restriction if information such as stranding levels, monitoring, or observations of turtles, suggests that it would be appropriate.

Comment 4: One commenter suggested that the initiation of large mesh and stringer prohibitions coincide with 16°C surface water temperature.

Response: While monitoring surface water temperature and implementing restrictions based on reaching a pre-designated water temperature may account for seasonal variability, enacting regulations based upon real time water temperature is impractical

due to the amount of time required for the agency to implement and for fishermen to comply with the regulations, and the potential variability of water temperature within different locations in the Chesapeake Bay and within the water column. NMFS understands that the Virginia Institute of Marine Science (VIMS) has collected strandings data for 22 years, and spring strandings occur every year, generally when surface water temperature reaches 18°C. NMFS has considered historical surface water temperatures (not real time monitoring) in establishing previous area closures, but real time monitoring of water temperature as a trigger for regulations is not practical for this situation, nor is it appropriate given the predictable time period of annual spring strandings in Virginia. Further, NMFS believes that a consistent effective date better enables industry to plan their fishing activities, as fishermen would know in advance specifically when the restrictions would be effective. As mentioned, from 1994 to 2001, the average stranding commencement date in Virginia was May 15. While NMFS recognizes that the commencement date of strandings may vary from year to year, NMFS believes that an average date of May 15 accounts for seasonal variability and should be used as the average date when turtles begin to strand on Virginia shores.

Comment 5: One commenter expressed concern with the delay in publishing the proposed regulations and the limited public comment period.

Response: NMFS has been working with the Commonwealth of Virginia, in particular the Virginia Marine Resources Commission (VMRC), since August of 2001 to address potential sea turtle interactions with Virginia pound nets. In September 2001, VMRC forwarded to NMFS a proposed plan, developed in conjunction with the pound net industry and VIMS, intending to reduce sea turtle interactions with pound net leaders in Virginia. As NMFS wanted to ensure that the Commonwealth of Virginia had ample opportunity to develop a plan for reducing sea turtle interactions with pound nets, discussions on the specifics and content of this proposed plan continued until mid-December 2001. By that time, it became clear that NMFS should initiate its own rulemaking process to develop a plan to conserve listed sea turtles. NMFS has been committed to enacting regulations on the Virginia pound net fishery as expeditiously as possible, in order to give the fishermen advance notification and ensure measures are in place before the historical period of high

strandings. NMFS issued the proposed rule as soon as possible after taking the necessary time to acquire and sufficiently analyze the available data, explore all of the management alternatives, and prepare and review the appropriate documents.

Further, NMFS believes that the 15-day comment period was a reasonable amount of time given the relative simplicity of the proposed rule, consisting of only a restriction on leader mesh size and use of stringers, plus the framework procedure. A notice of the proposed regulation was also sent to all Virginia pound net licensees on March 29, 2002, to augment notice provided through the **Federal Register** and expedite public comments.

Regulation Justification Comments

Comment 6: One commenter supported that the strandings were specifically a result of fishery interactions.

Response: NMFS believes that the circumstances surrounding the recent spring strandings are consistent with fishery interactions, which include relatively healthy turtles prior to the time of their death, a large number of strandings in a short time period, no external wounds on the majority of the turtles, no common characteristic among stranded turtles that would suggest disease as the main cause of death, and turtles with fish in their stomach. Sea turtles are generally not agile enough to capture finfish under natural conditions, and thus would only consume large quantities of finfish by interacting with fishing gear or bycatch (Mansfield, *et al.* 2002, Bellmund, *et al.* 1987, Shoop and Ruckdechel 1982).

Comment 7: Two commenters felt that there is not a significant relationship between pound nets and sea turtle strandings. Both commenters noted that there are currently fewer pound nets in the Chesapeake Bay, but strandings have increased in recent years. One commenter was concerned that justification for the proposed regulations were based upon 1980s strandings data, when there were more pound nets being fished.

Response: NMFS recognizes that there are currently fewer pound net leaders, in particular those utilizing large mesh leaders, in the Virginia Chesapeake Bay in comparison to the 1980s. NMFS disagrees that turtle strandings cannot be attributed to large mesh leaders because strandings have increased while the number of large mesh leaders have decreased. The best available information does date back to the mid-1980s, but this study found that in 173 pound nets examined with large mesh

leaders (defined as greater than 12 to 16 inches (30.5 to 40.6 cm) stretched mesh), 30 turtles were found entangled (0.2 turtles *per net*; Bellmund *et al.*, 1987). This study also found that in 38 nets examined with stringer mesh, 27 turtles were documented entangled (0.7 turtles *per net*). NMFS recognizes that the increase in documented sea turtle mortalities could be a function of the increase and improvement in the level of stranding effort and coverage that has occurred, as well as a function of the apparent increase in abundance of the southern population of loggerheads, which make up approximately 50 percent of the loggerheads found in the Virginia Chesapeake Bay. However, even with a decline in pound net leaders, interactions proportional to what have been documented in this gear type in the past could lead to an increase in strandings. Listed sea turtles in the Chesapeake Bay must be protected to ensure that populations recover.

In response to the claim that the information available to link the recent sea turtle mortalities to the pound net fishery is limited and old, NMFS recognizes that many of the documented sea turtle entanglements in large mesh and stringer leaders are from the 1980s, but the factors involved in entanglement remain the same now as they were then—sea turtle head and flipper size relative to leader mesh size and stringer use. Large mesh nets (regardless of how many are in the Chesapeake Bay) still entangle sea turtles, based upon the mesh size and manner in which they are fished. Additionally, the ESA requires NMFS to use the best available scientific information. There have been several documented sea turtle entanglements in large mesh leaders that were determined to have caused mortality by drowning. While it is possible that some turtles documented in 2001 may have been dead prior to entanglement and floated into the leaders, there have been observations of live turtles entangled in leaders under water.

Few sea turtles strand with evidence of fishery interactions, but the lack of gear on a carcass is not indicative of a lack of fishery interaction (see response to Comment 6). While none of the sea turtles in Virginia have had pound net fishing gear on them when they have washed up on shore, it is not unusual for turtles to strand without gear on them, especially given the fact that pound net leaders are fixed fishing structures and secured to stakes set in the ground. It is very unlikely that a turtle would dislodge the gear so that it remained on the turtle when it stranded.

Comment 8: Three commenters disagreed that pound nets are a significant factor in the high spring stranding events, given other potential mortality sources in Virginia waters (e.g., boat strikes). One commenter stated that the location of the average percentage of strandings (55 percent) from 1986 to 2001 occurred in Virginia Beach Ocean and Western Chesapeake Bay areas, and it is likely that other mortality sources outside of Virginia waters resulted in a number of these strandings.

Response: NMFS recognizes that additional mortality sources may result in sea turtle strandings in Virginia during the spring. Consequently, NMFS has investigated other potential causes for the annual spring sea turtle mortality event and concludes that natural or non-fishing related anthropogenic causes are not consistent with the nature of most of the strandings. The absence of other species in the most recent stranding events and the absence of consistently high sea turtle strandings in other Atlantic states during the time period when turtles are migrating are inconsistent with cold stunning, a toxic algae bloom, epizootic or other disease. Further, the stranded turtles exhibited no major traumatic injuries such as might be caused by dredging or blasting. From May through December 2001, Virginia STSSN members documented 34 turtles with injuries that appeared to be from boat strikes, 4 entangled or hooked in hook and line fishing gear, and 2 entangled in longline/trotline gear, but most of the stranded sea turtles appeared to be relatively healthy. It is possible that vessel collisions or recreational fishing gear resulted in some spring strandings, but if these factors were a major contributor to strandings, a larger number of stranded sea turtles would exhibit carapace wounds or imbedded fish hooks. As mentioned, the majority of the strandings were consistent with fishery interactions. Nevertheless, NMFS will continue to explore and consider the contributions of other mortality sources to the annual spring stranding event.

It is possible that some Virginia Chesapeake Bay turtle strandings are swept into the Chesapeake Bay from elsewhere, or that some sea turtles are swept out of the Chesapeake Bay and onto ocean-facing beaches (if they strand at all), as the water patterns and currents entering or leaving the Chesapeake Bay could concentrate sea turtle strandings around the mouth of the Chesapeake Bay. However, it is likely that in the Virginia Chesapeake Bay, most mortalities have occurred relatively close to the stranding location

(Lutcavage, 1981). Further, it has been estimated that strandings on ocean facing beaches represent, at best, only approximately 20 percent of the at-sea nearshore mortality, as only those turtles killed close to shore are most likely to strand (NMFS SEFSC 2001). NMFS agrees that, historically, most of the spring strandings in Virginia have been documented on the ocean facing beaches south of Cape Henry and the inshore beaches in the southern Chesapeake Bay. However, the majority of the spring strandings in 1998, 2000, and 2001 occurred in inshore waters with concentrations around the southern tip of the eastern shore and the southern portion of the Chesapeake Bay around Virginia Beach and Hampton. Strandings in 2001 were of particular concern because the majority of the strandings in May and June occurred along the Chesapeake Bay side of the eastern shore of Virginia and along the southern tip near Kiptopeke and Fisherman's Island, indicating a possible localized interaction. Pound nets are the dominant fishing gear observed immediately offshore of this area. During 1980, high strandings were also documented in areas where there were large numbers of working pound nets (Lutcavage, 1981).

As mentioned in the proposed rule (67 FR 15160, March 29, 2002), NMFS evaluated the potential inshore and offshore contributors to high strandings in 2001. While a number of the fisheries active in Virginia were observed, NMFS did not detect significant sea turtle incidental take. However, additional observer coverage is needed to better determine the level of sea turtle interactions with the various fisheries operating during the spring. NMFS intends to continue both monitoring and characterizing the offshore and nearshore Virginia fisheries that may potentially contribute to the spring strandings.

As presented in the responses to Comments 6 and 7, sea turtle interactions with fishing gear are not always apparent. NMFS must rely on the best available information to determine the cause of sea turtle mortality and enact appropriate measures to reduce this mortality. Based on the best available information, including the nature and location of turtle strandings, the type of fishing gear in the vicinity of the greatest number of strandings, the lack of observed takes in other fisheries operating in Virginia waters during the 2001 stranding period, the known interactions between sea turtles and large mesh and stringer pound net leaders, and several documented sea turtle entanglements in

pound net leaders, NMFS concluded that pound nets contributed to the high sea turtle strandings in Virginia in May and June 2001.

Stranding/Entanglement Data Comments

Comment 9: Two commenters noted that the recent data on sea turtle entanglements in pound net leaders are limited (e.g., 10 turtles documented in 2001).

Response: NMFS recognizes that the data on observed sea turtle entanglements in pound net leaders are limited, and that other factors likely contribute to some spring sea turtle mortality in Virginia. The level of sea turtle interactions with other potential mortality sources (e.g., other fisheries) has not yet been conclusively determined, but available information suggests that the level of interaction between non-pound net fisheries and sea turtles in Virginia waters during the spring has not been high. Conversely, NMFS has data indicating that pound net leaders have resulted in sea turtle entanglements. The documentation of live sea turtles entangled in pound net leaders (e.g., 1 documented in 2001, 2 in 2000) with limited observer coverage, as well as previous scientific studies indicating that entanglements occur in large mesh and stringer leaders, indicates that sea turtle entanglements occur in pound net leaders and the frequency of these interactions may not have been sufficiently documented in recent years.

The exact number of turtles found in association with pound net leaders has been difficult to definitively determine, due to the number of entities involved in collecting the data and the interpretation of whether the turtle was entangled in the leader, floated in post-mortem, or impinged on the leader and died as a result. It is likely that many more turtles interacted with pound net leaders last year than were reported. Observers (NMFS, VMRC, and VIMS) did not begin to monitor pound nets until mid-June, well after the high stranding period, so some sea turtle entanglements could have been missed earlier in the season. NMFS has established a reporting system for 2002 to ensure that all involved monitoring personnel are collecting the appropriate data should an entanglement of a sea turtle in a pound net leader be documented.

Comment 10: One commenter noted that there were no turtle entanglements observed during side scan sonar surveys conducted on 55 active leaders from June 1 to October 31, 2001.

Response: The use of side scan sonar as a means to detect sub-surface sea turtle entanglements has potential, but is still being explored. A number of factors may influence the utility of sonar to detect sea turtle entanglements, including weather, sea conditions, water turbidity, the size and decomposition state of the animal, and the orientation of the turtle in the net. Further research on the effectiveness and practicality of side scan sonar techniques in observing sea turtle entanglements in pound net leaders, and real time verification of the side scan sonar surveys by video, will be conducted during May and June 2002. Until this technique can be validated with ground truthing and verification, NMFS is reluctant to base management decisions on the lack of sea turtle acoustical signatures.

Additionally, sonar surveys conducted after the initiation of the mass stranding period may not be reflective of what was occurring in May. It appears that a large number of spring sea turtle mortalities occur in May, given the decomposition states of the stranded sea turtles (Mansfield *et al.*, 2002). Sea turtles may be more common in the upper water column in May, where the surface temperatures range from 18° to 24° C (Musick and Mansfield, 2001), but they are known to occur in water temperatures 11° C or greater. As such, turtles may be periodically near the bottom during the spring and subject to entanglement in leaders sub-surface. The lack of sea turtle acoustic signatures in pound net leaders at depth during the VIMS June to October 2001 survey does not necessarily indicate that turtles are not periodically entangled sub-surface during the spring.

Comment 11: One commenter stated that the majority of strandings on the eastern shore were severely decomposed, when one would expect much fresher turtle strandings if the pound nets in close proximity to the eastern shore were responsible for the strandings.

Response: NMFS can understand how one might think that mortality sources close to shore should result in a higher proportion of fresh dead turtles. Nearshore mortality sources also would increase the likelihood for the carcasses reaching the shore. However, one factor that may contribute to the decomposition state of a stranded sea turtle is the duration of time the sea turtle is entangled in the water, or in this case, the pound net leader. It is NMFS' understanding that pound net fishermen do not typically tend their leaders, so a turtle entangled in a leader, even at the surface, may go undetected.

While additional information is necessary to adequately determine how often sea turtles become disentangled from pound net leaders, it is plausible that entangled turtles may become dislodged from pound net leaders either by the strong current in certain areas of the Chesapeake Bay, by the decomposition process, or by fishermen disentangling dead sea turtles if detected. This hypothesis needs to be explored, but it is possible that turtles remain in leaders and wash onto beaches several days, or even weeks, after their death in various stages of decomposition from slight to severe.

Gear Restriction Comments

Comment 12: Two commenters requested additional time to equip leaders with a mesh size that would be in compliance with the regulations.

Response: NMFS is sensitive to the industry's time constraints required to outfit their gear with mesh in compliance with the regulations. However, the time frame for the implementation of this regulation is also of concern, as the large mesh and stringer leader restriction should be in effect 1 week prior to the historical average stranding date to effectively protect sea turtles. Therefore, to maximize the ability to conserve sea turtles, the restrictions should be in effect immediately.

Comment 13: One commenter supported the implementation of the plan proposed by VMRC and the pound net industry (Non-Preferred Alternative 3 analyzed in the EA/RIR), namely the component of the plan requiring pound net leaders with stringers to drop the mesh to 9 feet (2.7 m) below mean low water and to space stringer lines at least 3 feet (0.9 m) apart. This commenter specifically requested implementation of a plan that would permit a leader with 16 inches (40.6 cm) stretched mesh 10 ft (3 m) below the surface.

Response: Lowering the mesh on those leaders using stringers may allow the sea turtles near the surface to swim over the larger mesh leaders and through the stringers. However, sea turtles are still vulnerable to entanglement in leaders more than 9 ft (2.7 m) below the surface. Musick *et al.*, (1984) documented two sea turtles entangled in pound net leaders approximately 9 ft (2.7 m) below the surface in early June 1983. Turtles may be more common in the upper water column during the spring, but if they are foraging for preferred prey, they are periodically near the bottom, and thus subject to entanglement in leaders more than 9 ft (2.7 m) below the surface. Sea turtle entanglements have been

documented in large mesh leaders and are likely to occur in stretched mesh greater than 16 inches (40.6 cm). Without adequate support that these measures will reduce sea turtle entanglement in the stringers themselves and in the mesh dropped more than 9 ft (2.7 m) below mean low water, the specific benefits to sea turtles remain unclear. A detailed description and review of all of the components of this plan are included in the EA/RIR.

Comment 14: One commenter disagreed with NMFS' assumption that fishermen are using the minimum leader mesh size that is operational, and indicated that mesh in compliance with the regulations will not be available by May 8.

Response: NMFS explained in the EA/RIR that, because the data used for the economic analysis did not give the exact location of pound nets, it would assume for the purposes of the impact analysis that fishermen were using the minimum leader mesh size that they believed to be operational. The EA/RIR then described the economic impacts based on that assumption, which provided for a worst-case analysis. However, the EA/RIR also indicated that another scenario is possible; namely that fishermen could switch to a smaller leader mesh size and remain operational. The EA/RIR also described the impacts based on that different assumption. This regulation is necessary to conserve listed sea turtles, so for the regulation to be effective at reducing sea turtle mortality and preventing entanglement in large mesh and stringer pound net leaders, all pound net leaders, in the geographical area affected by the restriction, must have mesh smaller than 12 inches (30.5 cm) stretched mesh during the restricted period or fishermen must remove their non-compliant leaders.

Observer Coverage/Monitoring Comments

Comment 15: Two commenters supported the framework in the proposed rule, which includes monitoring the smaller mesh pound net leaders and the implementation of additional restrictions if necessary.

Response: NMFS believes that prohibiting leaders with greater than or equal to 12 inches (30.5 cm) stretched mesh and leaders with stringers will reduce sea turtle entanglements and subsequent spring strandings. The framework monitoring program will document any sea turtle interactions with smaller leader mesh sizes, which will provide information beneficial for future management, both in Virginia and potentially in other states. Should the monitoring of pound net leaders

during May and June document turtle entanglement, under the framework mechanism NMFS may impose additional restrictions during the gear restriction period on an expedited basis. The gear restriction as proposed and any additional restrictions could be extended by NMFS for a period not to exceed 30 days after June 30, or not beyond July 30.

Comment 16: Four commenters recognized the need for NMFS to continue monitoring the sea turtle stranding situation in Virginia and supported increased observer coverage on the other spring fisheries in the Virginia Chesapeake Bay, nearshore, and offshore waters.

Response: NMFS will continue to closely monitor sea turtle stranding levels and other fisheries active in Virginia waters. While NMFS believes that pound nets contribute to the high spring sea turtle strandings, NMFS also recognizes that other fisheries may contribute to some of the annual sea turtle stranding event in Virginia and is committed to appropriately addressing the mortality sources. The NMFS 2002 monitoring program includes observer coverage of the large mesh and small mesh gillnet fisheries in offshore Virginia and Chesapeake Bay waters; alternative platform observer coverage of the large mesh gillnet black drum and sandbar shark fisheries; offshore and inshore aerial surveys to record sea turtle distribution, sea surface temperature, and commercial fishing gear; investigations into sea turtle interactions with the whelk and crab pot fisheries; and pound net monitoring. Coverage of the pound net fishery will include alternative platform observer coverage of pound net leaders, pound net leader monitoring using side scan sonar and video, and aerial monitoring of the pound net fishery. Additionally, NMFS will continue to evaluate interactions with other fisheries not previously considered that may contribute to sea turtle strandings.

Comment 17: Two commenters expressed their concern with the level of 2001 observer coverage on fisheries in the Virginia area (e.g., on large mesh and small mesh gillnet fisheries), and felt that more observer coverage was necessary.

Response: NMFS believes the coverage on these fisheries in 2001 was sufficient to monitor the take of sea turtles. The federally managed monkfish large mesh gillnet fishery (approximately 10–12 inch (25.4–30.5 cm) mesh) had approximately 41 percent observer coverage in waters off Virginia from May 1 until it stopped operating off Virginia on May 29 when

the fleet moved northward. In Virginia, 107 monkfish trips were observed, and one dead and two live loggerhead turtles were incidentally captured in this fishery. The state water black drum large mesh (approximately 10–14 inch (25.4–35.6 cm) mesh) gillnet fishery had approximately 8 percent observer coverage during May and June, and no turtle takes were observed. Twenty-two trips targeting both black drum and sandbar shark were conducted from May 15 to June 6. The amount of small mesh (smaller than 6 inch (15.2 cm) mesh) gillnet effort occurring in the Chesapeake Bay waters during May and June appears to be relatively minimal. NMFS observed 2 percent of the Atlantic croaker fishery and 12 percent of the dogfish fishery during May and June; no turtle takes were observed.

While 100-percent observer coverage was intended for the Federal monkfish fishery in 2001 (note that the percent coverage off of North Carolina was higher than off of Virginia), the limited number of observers and increase in the number of vessels fishing for monkfish resulted in less than 100-percent coverage. NMFS intends to continue observer coverage in these gillnet fisheries during 2002 to document any sea turtle takes that may ensue.

Comment 18: One commenter stated that aerial surveys are needed from mid-April through June to identify the active spring fisheries and determine the number of participants in these fisheries.

Response: In 2001, aerial surveys in both offshore and inshore Virginia waters were conducted to document sea turtle distribution and commercial fishing gear. During May and June, offshore aerial surveys from the beach out to the shelf break were conducted from the Virginia/North Carolina border to the Virginia/Maryland border. Inshore aerial surveys were flown from late May to October, surveying transect lines from the mouth of the Chesapeake Bay to the Virginia/Maryland border. NMFS considered the results of these aerial surveys (e.g., observations of fishing activity) in the development of the 2001 temporary rule on the Virginia pound net fishery (66 FR 33489, June 22, 2001), as well as this action. NMFS will conduct similar aerial surveys in May and June 2002.

Comment 19: One commenter suggested that NMFS work with the VMRC, VIMS, and the Virginia Department of Game and Inland Fisheries (VA DGIF), on the development of monitoring plans.

Response: NMFS has been in close coordination with VMRC and VIMS on the development of the pound net

monitoring plan and schedule, as well as the aerial survey flights and observer coverage on other spring fisheries in Virginia. To date, NMFS has had limited contact with the VA DGIF, as their role in managing the fisheries that may be resulting in sea turtle mortality was not previously defined.

Changes from Proposed Rule

Based on review of the comments received on the proposed rule and on its own review, NMFS has added two new paragraphs in the interim final rule. One requires that when a turtle is captured live and uninjured in the pound, fishers in the Virginia pound net fishery notify NMFS within 24 hours of returning from the trip. This provision also requires fishers to immediately notify NMFS and the appropriate rehabilitation or stranding network, as determined by NMFS, if a turtle is captured live but injured or if a turtle is entangled or captured dead in the pound net gear. The second requires that pound net fishing operations must be observed by a NMFS-approved observer if requested by the Northeast Regional Administrator. It also provides that all NMFS-approved observers will report any violations of this section, or other applicable regulations and laws, and that information collected by observers may be used for law enforcement purposes.

The interim final rule also does not include the proposed revision to 50 CFR 224.104, which provided NMFS' proposed policy determination that no civil penalties will be sought against those who are in compliance with the gear restrictions and other requirements above, but that nevertheless incidentally take an endangered sea turtle. While NMFS has the discretion to make that determination, NMFS at this time chooses not to issue a regulatory statement to that effect.

Review and Request for Additional Comments

NMFS continues to request public comments on this interim final rule to assist in the development of a final rule on Virginia pound nets and perhaps a management scheme for pound nets in other states via NMFS' Strategy for Sea Turtle Conservation and Recovery in Relation to Atlantic Ocean and Gulf of Mexico Fisheries (66 FR 39474, July 31, 2001).

Classification

This interim final rule has been determined to be significant for purposes of Executive Order 12866.

The AA finds good cause under 5 U.S.C. 553(d)(3) not to delay the

effective date of this interim final rule for 30 days. Such a delay would be contrary to the public interest because sea turtles typically migrate into Virginia waters in May, and at this time, they would likely be subject to entanglement in pound net leaders and potential subsequent mortality, unless this rule is in effect immediately (see response to Comment 3). Any delay in the effective date of this interim final rule would prevent NMFS from meeting its obligations under the ESA to prevent harm to sea turtles.

NMFS has prepared a final regulatory flexibility analysis (FRFA) that describes the economic impact this interim final rule would have on small entities. The FRFA is as follows: This rule prohibits pound net leaders with stretched mesh 12 inches (30.5 cm) or greater and leaders with stringers, requires year round reporting and monitoring, and provides a mechanism for modifying the restrictions from May 8 to June 30, and for extending the original or additional restrictions through July 30. The purpose is to prevent entanglement of threatened and endangered sea turtles in pound net leaders. This action is necessary to conserve listed sea turtles, help promote their recovery, and aid in the enforcement of the ESA.

The fishery affected by this interim final rule is the Virginia pound net fishery in the Chesapeake Bay. According to the 2001 VMRC survey data, of the 160 pound net licenses issued in Virginia, where one license is assigned to each pound net, 72 licenses are fishing in the waters potentially affected by this proposed (67 FR 15160, March 29, 2002) rule. According to VMRC data from 1999 to 2001, 27 fishermen were fishing approximately 64 pound nets from May 8 to June 30. Prohibiting the use of all pound net leaders with greater than or equal to 12 inches (30.5 cm) stretched mesh and leaders with stringers from May 8 to June 30 would potentially affect approximately 11 fishermen fishing approximately 24 pound nets. If pound net leaders greater than or equal to 8 inches (20.3 cm) are prohibited, approximately 13 fishermen fishing approximately 31 pound nets would be affected. If all pound net leaders regardless of mesh size are prohibited, 27 fishermen fishing approximately 64 pound nets would be affected.

This interim final rule prohibits pound net leaders with 12 inches (30.5 cm) and greater stretched mesh, as well as those using stringers, from May 8 to June 30, and provides a mechanism for extending and/or modifying the restrictions. This interim final rule

employs the best available information on sea turtle and pound net leader interactions to reduce sea turtle entanglement and strandings, while minimizing the impacts to the pound net industry. Four alternatives to the interim final rule have been considered. Given the inability to provide a quantitative analysis of these regulatory alternatives, the alternatives were considered with respect to mitigating the known costs on small entities while providing sea turtle protection. One alternative being status quo would not provide any protection to sea turtles, but would not have any economic consequences at least in the short term. No action now may lead to more severe and costly action to protect sea turtles in the future. The non-preferred alternative 1 would have prohibited pound net leaders with 8 inches (20.3 cm) and greater stretched mesh, as well as those using stringers, from May 8 to June 30. Compared to this interim final rule's restrictions, the non-preferred alternative 1 may not necessarily have provided greater sea turtle protection, and the industry costs would have been higher. The level of interaction between sea turtles and pound net leaders with between 8 inches (20.3 cm) and 12 inches (30.5 cm) stretched mesh has not been adequately documented in Virginia waters. The non-preferred alternative 2 that would have prohibited all pound net leaders from May 8 to June 30, would not necessarily have provided the most protection to sea turtles, but it would have been the most costly to the industry. The level of interaction between sea turtles and pound net leaders with less than 12 inches (30.5 cm) stretched mesh has not been adequately documented in Virginia waters. Finally, the non-preferred alternative 3 would have prohibited pound net leaders with greater than 16 inches (40.6 cm) stretched mesh, and would have required fishermen to drop the mesh of those leaders using stringers to 9 ft (2.7 m) below mean low water and to space stringer lines at least 3 ft (0.9 m) apart, for approximately a three and a half week period beginning on May 15. This alternative would have been the least burdensome to industry, but would have offered the lowest expected protection to sea turtles, with the exception of the no action alternative. Without adequate support to ensure that sea turtles would not have become entangled in the allowable leaders of this alternative, the benefits of this alternative to sea turtles are uncertain.

No comments were received on the initial regulatory flexibility analysis.

New § 223.206(d)(2)(v)(C) requires a collection of information which is not approved pursuant to the PRA. This section will only be effective upon receipt of that approval and publication of that approval in the **Federal Register**.

A formal consultation pursuant to section 7 of the ESA was conducted on this action. The biological opinion on this action concluded that NMFS' sea turtle conservation measures for the Virginia pound net fishery, may adversely affect but are not likely to jeopardize the continued existence of the loggerhead, leatherback, Kemp's ridley, green, or hawksbill sea turtle, or shortnose sturgeon. An incidental take statement was issued for this action. Copies of this biological opinion are available (see **ADDRESSES**).

This interim final rule contains policies with federalism implications that were sufficient to warrant preparation of a federalism assessment under Executive Order 13132. Accordingly, the Assistant Secretary for Legislative and Intergovernmental Affairs provided notice of the proposed action to the Governor of Virginia on April 2, 2002. No comments on the federalism implications of the proposed action were received in response to the April 2002 letter.

Dated: June 11, 2002.

Rebecca Lent,

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

List of Subjects

50 CFR Part 222

Administrative practice and procedure, Endangered and threatened Species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

50 CFR Part 223

Administrative practice and procedure, Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 50 CFR parts 222 and 223, are amended as follows:

PART 222—GENERAL ENDANGERED AND THREATENED MARINE SPECIES

1. The authority citation for part 222 continues to read as follows:

Authority: 16 U.S.C. 1531 *et seq.*; 16 U.S.C. 742a *et seq.*; 31 U.S.C. 9701

2. In § 222.102, the definition of "Pound net leader" is added in alphabetical order to read as follows:

§ 222.102 Definitions.

Pound net leader means a long straight net that directs the fish offshore towards the pound, an enclosure that captures the fish. Some pound net leaders are all mesh, while others have stringers and mesh. Stringers are vertical lines in a pound net leader that are spaced a certain distance apart and are not crossed by horizontal lines to form mesh.

* * * * *

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

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

Authority: 16 U.S.C. 1531 *et seq.*; subpart B, § 223.12 also issued under 16 U.S.C. 1361 *et seq.*

2. In § 223.205, paragraphs (b)(14) and (b)(15) are revised and paragraph (b)(16) is added to read as follows:

§ 223.205 Sea turtles.

* * * * *

(b) * * *

(14) Sell, barter, trade or offer to sell, barter, or trade, a TED that is not an approved TED;

(15) Fail to comply with the restrictions set forth in § 223.206(d)(2)(v) regarding pound net leaders; or

(16) Attempt to do, solicit another to do, or cause to be done, any of the foregoing.

* * * * *

3. In § 223.206, paragraph (d)(2)(v) is added to read as follows:

§ 223.206 Exceptions to prohibitions relating to sea turtles.

* * * * *

(d) * * *

(2) * * *

(v) *Gear requirement—pound net leaders—(A) Restrictions on pound net leaders.* During the time period of May 8 through June 30 of each year, any pound net leader in the waters described in paragraph (d)(2)(v)(B) of this section must have a mesh size less than 12 inches (30.5 cm) stretched mesh and may not employ stringers. Any pound net leader with stretched mesh measuring 12 inches (30.5 cm) or greater or any pound net leader with stringers must be removed from the waters described in paragraph (d)(2)(v)(B) of this section prior to May 8 of each year and may not be reset until July 1 of each year unless that date is extended by the AA pursuant to paragraph (d)(2)(v)(E) of this section.

(B) *Regulated waters.* The restrictions on pound net leaders described in paragraph (d)(2)(v)(A) of this section

apply to the following waters: the Virginia waters of the mainstem Chesapeake Bay from the Maryland-Virginia State line (approximately 37° 55' N. lat., 75° 55' W. long.) to the COLREGS line at the mouth of the Chesapeake Bay; the James River downstream of the Hampton Roads Bridge Tunnel (I-64; approximately 36° 59.55' N. lat., 76° 18.64' W. long.); the York River downstream of the Coleman Memorial Bridge (Route 17; approximately 37° 14.55' N. lat., 76° 30.40' W. long.); and the Rappahannock River downstream of the Robert Opie Norris Jr. Bridge (Route 3; approximately 37° 37.44' N. lat., 76° 25.40' W. long.).

(C) *Reporting requirement.* At any time during the year, if a turtle is taken live and uninjured in a pound net operation, in the pound or in the leader, the operator of vessel must report the incident to the NMFS Northeast Regional Office, (978) 281-9388 or fax (978) 281-9394, within 24 hours of returning from the trip in which the incidental take occurred. The report

shall include a description of the turtle's condition at the time of release and the measures taken as required in paragraph (d)(1) of this section. At any time during the year, if a turtle is taken in a pound net operation, and is determined to be injured, or if a turtle is captured dead, the operator of the vessel shall immediately notify NMFS Northeast Regional Office and the appropriate rehabilitation or stranding network, as determined by NMFS Northeast Regional Office.

(D) *Monitoring.* Pound net fishing operations must be observed by a NMFS-approved observer if requested by the Northeast Regional Administrator. All NMFS-approved observers will report any violations of this section, or other applicable regulations and laws. Information collected by observers may be used for law enforcement purposes.

(E) *Expedited modification of restrictions and effective dates.* From May 8 to June 30 of each year, if NMFS receives information that one sea turtle is entangled alive or that one sea turtle is entangled dead, and NMFS

determines that the entanglement contributed to its death, in pound net leaders that are in compliance with the restrictions described in paragraph (d)(2)(v)(A) of this section on pound net leaders in the waters identified in paragraph (d)(2)(v)(B) of this section, the AA may issue a final rule modifying the restrictions on pound net leaders as necessary to protect threatened sea turtles. Such modifications may include, but are not limited to, reducing the maximum allowable mesh size of pound net leaders and prohibiting the use of pound net leaders regardless of mesh size. In addition, if information indicates that a significant level of sea turtle strandings will likely continue beyond June 30, the AA may issue a final rule extending the effective date of the restrictions, including any additional restrictions imposed under this subparagraph, for an additional 30 days, but not beyond July 30, to protect threatened sea turtles.

* * * * *

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BILLING CODE 3510-22-S

the Commission certified that the proposed rule amendments, if promulgated, would not have a significant economic impact on a substantial number of small business entities, as defined in section 601(3) of the RFA because the rule amendments do not apply to small business entities. Rather, these rules apply to individuals who are interested in radio technique solely with a personal aim and without pecuniary interest.

II. Ordering Clauses

4. Parts 0 and 97 of the Commission's rules *is amended* as specified in rule changes effective June 1, 2004.

5. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this *Order*, including the Initial Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects

47 CFR Part 0

Radio.

47 CFR Part 97

Radio, Volunteers.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Rule Changes

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 0 and 97 as follows:

PART 0—COMMISSION ORGANIZATION

■ 1. The authority citation for part 0 continues to read as follows:

Authority: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, 225, unless otherwise noted.

■ 2. Section 0.131 is amended by revising paragraph (n) to read as follows:

§ 0.131 Functions of the Bureau.

* * * * *

(n) Administers the Commission's amateur radio programs (part 97 of this chapter) and the issuing of maritime mobile service identities (MMSIs).

* * * * *

PART 97—AMATEUR RADIO SERVICE

■ 3. The authority citation for part 97 continues to read as follows:

Authority: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303. Interpret or apply 48 Stat. 1064–1068, 1081–1105, as amended; 47 U.S.C. 151–155, 301–609, unless otherwise noted.

■ 4. Section 97.3 is amended by revising paragraph (a)(1) and by removing and reserving paragraph (a)(17) to read as follows:

§ 97.3 Definitions.

(a) * * *

(1) *Amateur operator.* A person named in an amateur operator/primary license station grant on the ULS consolidated licensee database to be the control operator of an amateur station.

* * * * *

■ 5. Section 97.109 is amended by revising paragraph (d) and removing paragraph (e) to read as follows:

§ 97.109 Station control.

* * * * *

(d) When a station is being automatically controlled, the control operator need not be at the control point. Only stations specifically designated elsewhere in this part may be automatically controlled. Automatic control must cease upon notification by a District Director that the station is transmitting improperly or causing harmful interference to other stations. Automatic control must not be resumed without prior approval of the District Director.

* * * * *

§ 97.203(h) [Redesignated]

■ 6. Section 97.203(h) is redesignated as Section 97.205(h).

■ 7. Section 97.307 is amended by revising paragraph (d) to read as follows:

§ 97.307 Emission standards.

* * * * *

(d) For transmitters installed after January 1, 2003, the mean power of any spurious emission from a station transmitter or external RF power amplifier transmitting on a frequency below 30 MHz must be at least 43 dB below the mean power of the fundamental emission. For transmitters installed on or before January 1, 2003, the mean power of any spurious emission from a station transmitter or external RF power amplifier transmitting on a frequency below 30 MHz must not exceed 50 mW and must be at least 40 dB below the mean power of the fundamental emission. For a transmitter of mean power less than 5 W installed on or before January 1, 2003, the attenuation must be at least 30 dB. A transmitter built before April 15, 1977, or first marketed before January 1, 1978, is exempt from this requirement.

* * * * *

■ 8. Section 97.505 is amended by revising paragraph (a)(9) to read as follows:

§ 97.505 Element credit.

(a) * * *

(9) An expired FCC-issued Technician Class operator license document granted before February 14, 1991: Element 1.

* * * * *

■ 9. Section 97.507 is amended by revising paragraph (a)(2) to read as follows:

§ 97.507 Preparing an examination.

(a) * * *

(2) Elements 1 and 2: Advanced or General Class operators.

* * * * *

[FR Doc. 04–10203 Filed 5–4–04; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 222 and 223

[Docket No. 040127028–4130–02; I.D 012104B]

RIN 0648–AR69

Sea Turtle Conservation: Additional Exception to Sea Turtle Take Prohibitions

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

ACTION: Final rule.

SUMMARY: NMFS is prohibiting the use of all pound net leaders, set with the inland end of the leader greater than 10 horizontal feet (3 m) from the mean low water line, from May 6 to July 15 each year in the Virginia waters of the mainstem Chesapeake Bay, south of 37° 19.0' N. lat. and west of 76° 13.0' W. long., and all waters south of 37° 13.0' N. lat. to the Chesapeake Bay Bridge Tunnel at the mouth of the Chesapeake Bay, and the James and York Rivers downstream of the first bridge in each tributary. Outside this area, the prohibition of leaders with greater than or equal to 12 inches (30.5 cm) stretched mesh and leaders with stringers, as established by the June 17, 2002 interim final rule, will apply from May 6 to July 15 each year. This final action also includes a framework mechanism by which NMFS may take additional action as necessary. This action, taken under the Endangered Species Act of 1973 (ESA), is necessary to conserve sea turtles listed as threatened or endangered. NMFS also provides an exception to the prohibition on incidental take of threatened sea turtles

for pound net fishermen in compliance with these regulations.

DATES: Effective May 5, 2004.

FOR FURTHER INFORMATION CONTACT: Carrie Upite (ph. 978-281-9328 x6525, fax 978-281-9394, email carrie.upite@noaa.gov), or Barbara Schroeder (ph. 301-713-1401, fax 301-713-0376, email barbara.schroeder@noaa.gov).

SUPPLEMENTARY INFORMATION:

Background

Incidental take, defined to include the harassing, harming, wounding, trapping and capturing, of threatened sea turtles is not lawful (50 CFR 223.205). On June 17, 2002, based upon the best available information on sea turtle and pound net interactions at the time, NMFS issued an interim final rule that authorized incidental take of threatened sea turtles for pound net fishermen who complied with NMFS' rule. In the rule, NMFS prohibited the use of all pound net leaders measuring 12 inches (30.5 cm) and greater stretched mesh and all pound net leaders with stringers in the Virginia waters of the mainstem Chesapeake Bay and portions of the Virginia tributaries from May 8 to June 30 each year (67 FR 41196). Included in this interim final rule were a year-round requirement for fishermen to report all interactions with sea turtles in their pound net gear to NMFS within 24 hours of returning from a trip, and a year-round requirement for pound net fishing operations to be observed by a NMFS-approved observer if requested by the Northeast Regional Administrator. The interim final rule also established a framework mechanism by which NMFS may make changes to the restrictions and/or their effective dates on an expedited basis in order to respond to new information and protect sea turtles. Prior to issuance of this rule, takes of threatened sea turtles in pound nets were not authorized, and a fisherman who incidentally took a threatened sea turtle risked criminal penalties and fines.

To better understand the interactions between pound net gear and sea turtles, NMFS conducted pound net monitoring during the spring of 2002 and 2003. This monitoring documented 23 sea turtles either entangled in or impinged on pound net leaders, 18 of which were in leaders with less than 12 inches (30.5 cm) stretched mesh. Nine animals were found entangled in leaders, of which 7 were dead, and 14 animals were found impinged on leaders, of which one was dead. In this situation, impingement refers to a sea turtle being held against the leader by the current, apparently

unable to release itself under its own ability. For these purposes, an animal was still considered impinged if it had its head and flipper poking through the mesh. An animal was considered entangled if a body part was tightly wrapped one or more times in the mesh.

The 2002 and 2003 monitoring results represent new information not previously considered in prior assessments of the Virginia pound net fishery, and entanglements in and impingements on these leaders appear to be more of a problem than previously believed. As such, NMFS believes that additional restrictions are warranted to reduce sea turtle entanglement in and impingement on pound net gear.

The documented incidental take of sea turtles in leaders, the ability for sea turtles to continue to become entangled in and impinged on pound net leaders in the future, and the annual high mortality of sea turtles in Virginia during the spring, as evidenced by the high number of dead sea turtles stranding on beaches, are of particular concern because approximately 50 percent of the Chesapeake Bay loggerhead foraging population is composed of the northern subpopulation, a subpopulation that may be declining. In addition, most of the stranded turtles in Virginia are juveniles, a life stage found to be critical to the long term survival of the species. This action is necessary to provide for the conservation of threatened and endangered sea turtles by reducing incidental take in the Virginia pound net fishery during the spring. Details concerning sea turtle and pound net interactions, the potential impact of pound net leaders on sea turtles, and justification for the need for additional pound net leader regulations were provided in the preamble to the proposed rule (69 FR 5810, February 6, 2004).

Approved Measures

To conserve sea turtles, NMFS prohibits the use of all offshore pound net leaders from May 6 to July 15 each year in the Virginia waters of the mainstem Chesapeake Bay, south of 37° 19.0' N. lat. and west of 76° 13.0' W. long., and all waters south of 37° 13.0' N. lat. to the Chesapeake Bay Bridge Tunnel (extending from approximately 37° 05' N. lat., 75° 59' W. long. to 36° 55' N. lat., 76° 08' W. long.) at the mouth of the Chesapeake Bay, and the portion of the James River downstream of the Hampton Roads Bridge Tunnel (I-64; approximately 36° 59.55' N. lat., 76° 18.64' W. long.) and the York River downstream of the Coleman Memorial Bridge (Route 17; approximately 37°

14.55' N. lat, 76° 30.40' W. long.). Offshore pound nets are defined as those nets set with the inland end of their leader greater than 10 horizontal feet (3 m) from the mean low water line. Additionally, outside this area, NMFS retains the leader mesh size restriction included in the previous interim final rule on the pound net fishery (67 FR 41196, June 17, 2002), which prohibited the use of all leaders with stretched mesh greater than or equal to 12 inches (30.5 cm) and leaders with stringers, from May 6 to July 15 each year in the Virginia waters of the Chesapeake Bay outside the aforementioned closed area, extending from the Maryland-Virginia State line (approximately 37° 55' N. lat., 75° 55' W. long.), the Great Wicomico River downstream of the Jessie Dupont Memorial Highway Bridge (Route 200; approximately 37° 50.84' N. lat, 76° 22.09' W. long.), the Rappahannock River downstream of the Robert Opie Norris Jr. Bridge (Route 3; approximately 37° 37.44' N. lat, 76° 25.40' W. long.), and the Piankatank River downstream of the Route 3 Bridge (approximately 37° 30.62' N. lat, 76° 25.19' W. long.), to the COLREGS line at the mouth of the Chesapeake Bay. South of 37° 19.0' N. lat. and west of 76° 13.0' W. long., and all waters south of 37° 13.0' N. lat. to the Chesapeake Bay Bridge Tunnel, the leader restriction applies to those nets set with the inland end of the leader 10 horizontal feet (3 m) or less from the mean low water line. In addition to avoiding applicable penalties for failure to comply with ESA regulations, Virginia pound net fishermen who comply with these restrictions may incidentally take listed sea turtles without being subject to penalties and fines for that take.

This final rule also retains the framework mechanism currently in place (that was included and analyzed in the status quo alternative), by which NMFS may make changes to the restrictions and/or their effective dates on an expedited basis in order to respond to new information and protect sea turtles. Under this framework mechanism, if NMFS believes based on, for example, water temperature and the timing of sea turtles' migration, that sea turtles may still be vulnerable to entanglement in pound net leaders after July 15, NMFS may extend the effective dates of this regulation. Should an extension be necessary, NMFS would issue a final rule in the **Federal Register** explicitly stating the duration of the extension. The extension would not last beyond July 30. Additionally, under this framework mechanism, if monitoring of pound net leaders reveals that one sea

turtle is entangled alive in a pound net leader or that one sea turtle is entangled dead and NMFS determines that the entanglement contributed to its death, then NMFS may determine that additional restrictions are necessary to conserve sea turtles and prevent entanglements. Such additional restrictions may include reducing the allowable mesh size for pound net leaders or prohibiting all pound net leaders regardless of mesh size in Virginia waters. Should NMFS determine that an additional restriction is warranted, NMFS would expeditiously issue a final rule that would explicitly state any new gear restriction as well as the applicable time period for the restriction, which may be extended through July 30. The area where additional gear restrictions might apply includes the same area as the initial restriction, namely the Virginia waters of the mainstem Chesapeake Bay from the Maryland-Virginia State line (approximately 38° N. lat.) to the COLREGS line at the mouth of the Chesapeake Bay, and portions of the James River, the York River, Piankatank River, the Rappahannock River, and the Great Wicomico River.

The year-round reporting and monitoring requirements for this fishery established by the 2002 interim final rule also remain in effect.

From 12:01 a.m. local time on May 6 through 11:59 p.m. local time on July 15 each year, fishermen are required to stop fishing with and remove from the water pound net leaders altogether or pound net leaders measuring 12 inches (30.5 cm) or greater stretched mesh and pound net leaders with stringers, depending upon the location of their pound net site as indicated above.

Comments and Responses

On February 6, 2004, NMFS published a proposed rule that would prohibit the use of all pound net leaders south of 37° 19.0' N. lat. and west of 76° 13.0' W. long., and all waters south of 37° 13.0' N. lat. to the Chesapeake Bay Bridge Tunnel at the mouth of the Chesapeake Bay, and the James and York Rivers downstream of the first bridge in each tributary, and all leaders with stretched mesh greater than or equal to 8 inches (20.3 cm) and leaders with stringers outside the aforementioned area, extending to the Maryland-Virginia State line and the Rappahannock River downstream of the first bridge, and from the Chesapeake Bay Bridge Tunnel to the COLREGS line at the mouth of the Chesapeake Bay, from May 6 to July 15 each year. Comments on this proposed action were requested through March 8, 2004.

Nineteen comment letters from eighteen different individuals or organizations were received during the public comment period for the proposed rule. Four comment letters provided support for the action, while 14 letters expressed their opposition to the proposed regulations. One comment letter was neither in favor nor against the proposed action. Additionally, a petition signed by 1,077 individuals was received requesting that the proposal be withdrawn and terminated. A public hearing was also held in Virginia Beach, VA on February 19, 2004, and 11 individuals provided spoken comments. Three of the 11 individuals also provided written comments. All of the spoken comments were in opposition to the proposed action. NMFS considered these comments on the proposed rule as part of its decision making process. A complete summary of the comments and NMFS' responses, grouped according to general subject matter in no particular order, is provided here.

General Comments

Comment 1: One commenter recommended that the pound net leader prohibitions and restrictions extend throughout the year and that marine sanctuaries be established in Virginia waters.

Response: NMFS considered regulating pound net leaders in Virginia's Chesapeake Bay during the period of May through November, which would encompass the full time period when sea turtle presence and pound net fishing in the Chesapeake Bay overlap. However, few direct observations of sea turtle impingement on and entanglement in pound net leaders exist after early summer. A pound net characterization study by the Virginia Institute of Marine Science (VIMS) documented the entanglement of one dead juvenile loggerhead sea turtle in a pound net leader (approximately 11 inches (27.9 cm)) in October of 2000 (Mansfield *et al.*, 2001), and one dead loggerhead was found entangled in a pound net leader in August 2001 (Mansfield *et al.*, 2002). It is not conclusively known if those animals were dead prior to entanglement or if the interaction with the pound net leader resulted in their death. Additionally, the level of sea turtle strandings is substantially diminished during the summer and fall months which indicates a lower mortality rate. With few direct observations of entanglement in and impingement on pound net leaders and without high levels of strandings, similar to those documented in the spring, there is not a sufficient basis at this time to

conclude that pound net leaders are responsible for high levels of sea turtle mortality from August through November. Accordingly, NMFS has determined that it will not impose gear restrictions on the Virginia pound net fishery during the full time period of the fishery from May through November.

National marine sanctuaries are designated and managed by NOAA's National Marine Sanctuary Program. The sanctuary designation process takes several years and is not an option that could be implemented currently. NMFS has forwarded the comment to the National Marine Sanctuary Program for its consideration.

Comment 2: One commenter recommended that pound nets be prohibited in high recreational areas due to potential hazards to human personal safety.

Response: Under the ESA, NMFS' authority to implement restrictions on activities is restricted to those activities that affect a species that NMFS manages (e.g., federally endangered and threatened sea turtles). Available information does not indicate that the level of sea turtle interactions with pound nets in high recreational areas necessitates restrictions to protect sea turtles.

Comment 3: One commenter recommended that formal ESA section 7 consultation be initiated on the Virginia pound net fishery to adequately assess the impacts of this fishery on listed species.

Response: A formal consultation, pursuant to section 7 of the ESA, was previously conducted on the operation of the Virginia pound net fishery, as modified by the implementation of the sea turtle conservation measures enacted in 2002. This Biological Opinion, issued on May 14, 2002, concluded the Virginia pound net fishery as conducted under NMFS' implementation of sea turtle conservation regulations (including the issuance of an interim final rule that restricted the use of pound net leaders in the Virginia Chesapeake Bay from May 8 to June 30, and required year round monitoring and reporting) may adversely affect but is not likely to jeopardize the continued existence of the loggerhead, leatherback, Kemp's ridley, green, or hawksbill sea turtle, or shortnose sturgeon. Consultation on this action has been reinitiated due to the previously unanticipated take of sea turtles in less than 12 inches (30.5 cm) stretched mesh during 2003. Additionally, a formal section 7 consultation has also been completed on the proposed issuance of this new regulation, including review of the

operation of the pound net fishery with new sea turtle conservation measures for the Virginia pound net fishery. Due to similarities in the proposed actions and the effects on listed species, the reinitiated 2002 consultation and the new consultation on this final rule have been combined. The Biological Opinion was issued on April 16, 2004, and concluded that the proposed action may adversely affect, but is not likely to jeopardize, the continued existence of the loggerhead, leatherback, Kemp's ridley, green, or hawksbill sea turtle, or shortnose sturgeon. The Incidental Take Statement exempted the anticipated annual take of no more than 505 loggerhead, 101 Kemp's ridley, and 1 green sea turtle in all pounds set in the action area. These takes are anticipated to be live, uninjured animals. Additionally, no more than 1 loggerhead, 1 Kemp's ridley, 1 green, or 1 leatherback sea turtle are anticipated to be either entangled or impinged in leaders throughout the action area from July 16 to May 5 each year. NMFS further anticipates that, outside the leader prohibited area, 1 loggerhead, 1 Kemp's ridley, 1 green, or 1 leatherback sea turtle will be entangled in leaders with less than 12 inches (30.5 cm) stretched mesh from May 6 to July 15 each year. For the purposes of the analysis in the Biological Opinion, entanglements and impingements are considered to result in sea turtle mortality. No incidental take of hawksbill sea turtles or shortnose sturgeon is anticipated.

Comment 4: Two commenters stated that the authority and experience to regulate state fisheries rests with the Virginia Marine Resources Commission (VMRC) and not NMFS, and, therefore, characterized this action as inappropriate. One additional commenter believed that NMFS regulatory and decision making processes are being dictated by environmental groups.

Response: NMFS agrees that the authority to regulate state fisheries rests with the respective state agency, in this case, the VMRC. However, VMRC cannot authorize incidental take of threatened sea turtles; only NMFS has the authority to do so. NMFS has the authority and obligation to protect and conserve all sea turtles that occur in U.S. waters that are listed as endangered or threatened under the ESA, regardless of whether they occur in Federal or state waters. This action is taken under the authority of the ESA to conserve sea turtles listed as threatened or endangered.

NMFS bases its decision on the best available data and knowledge of the

situation; the decision is not dictated by the opinion of any outside entity, be it an environmental group, industry participant, or other stakeholder.

Comment 5: One commenter noted that recent sea turtle mortalities in Virginia hopper dredging operations have been higher than observed takes in the Virginia pound net fishery, and dredging has been allowed to continue. Two additional commenters felt that there was inequity with how NMFS addresses and regulates potential impacts to sea turtles.

Response: Under section 7 of the ESA, Federal agencies must consult with either NMFS or the U.S. Fish and Wildlife Service (USFWS) to ensure their proposed agency actions do not jeopardize the continued existence of listed species. The Norfolk and Baltimore Districts of the Army Corps of Engineers (ACOE) have previously consulted with NMFS on dredging operations in the Virginia Chesapeake Bay. The impacts of hopper dredging on listed species were previously considered via formal section 7 consultations (NMFS NER 2002, NMFS NER 2003), and Incidental Take Statements were prepared to account for the anticipated take in these operations. From July 2000 to October 2003, 54 sea turtles have been taken by Virginia dredge operations. Some of the incidents involved decomposed turtle flippers and/or carapace parts, but most of these takes were fresh dead turtles. Most of these previous sea turtle takes were exempted in the Incidental Take Statements of the Biological Opinions. Efforts are ongoing to work with the ACOE to further minimize this take and enhance existing monitoring programs. NMFS continues to work with the ACOE to reduce sea turtle takes in dredging operations, as well as to research and attempt to minimize sea turtle mortality from other sources (e.g., fisheries, vessels, debris/water quality).

NMFS attempts to consider all of the impacts to sea turtles cumulatively and to reduce threats from all known sources. NMFS and USFWS are in fact working to minimize the impacts to sea turtles from other activities as well (e.g., nesting habitat degradation, marine debris, dredging, power plant impingement). Nevertheless, fishing activities have been recognized as one of the most significant threats to sea turtle survival (Magnuson et al., 1990, Turtle Expert Working Group 2000). To respond to these threats, NMFS is comprehensively evaluating the impacts of fishing gear types on sea turtles throughout the U.S. Atlantic Ocean and Gulf of Mexico, as part of the Strategy for Sea Turtle Conservation and

Recovery in Relation to Atlantic Ocean and Gulf of Mexico Fisheries (Strategy) (NMFS 2001). Based on the information developed for the Strategy, NMFS may impose restrictions on or modifications to other activities that put sea turtles at risk.

Comment 6: Eight commenters felt that leaders with greater than or equal to 12 inches (30.5 cm) stretched mesh and leaders with stringers result in the most sea turtle mortalities, and specifically recommended the status quo option. One of the commenters noted that decreasing the allowable mesh size to less than 8 inches (20.3 cm) stretched mesh would not help sea turtles and solve the stranding problem, but, because the problem is with the sea turtles, it would only hurt the fishermen.

Response: Based on historical observations of pound net leaders (Bellmund *et al.*, 1987) and for the reasons discussed in the preamble to the 2002 rule, NMFS recognizes that the frequency of sea turtle takes in leaders with stretched mesh 12 inches (30.5 cm) and greater and leaders with stringers may be higher than in smaller mesh leaders. However, during 2002 and 2003, NMFS documented sea turtle interactions with mesh leaders ranging from 14 inches (35.6 cm) stretched mesh down to 8 inches (20.3 cm) stretched mesh. All but one of these takes were in the leader prohibited area, as defined in this final rule. Therefore, NMFS has determined to prohibit all leaders in this area to prevent takes in the area with previous high sea turtle/pound net interactions.

The justification for the further leader mesh size restriction included in the proposed rule was based upon the occurrence of sea turtle takes in 8 inch (20.3 cm) and greater stretched mesh leaders. However, based upon additional analysis of impingement to entanglement ratios by NMFS, it appears that restricting mesh size to less than 8 inches (20.3 cm) stretched mesh would not necessarily provide additional conservation benefit to sea turtles, over that provided by restricting mesh size to less than 12 inches. In addition to mesh size, the frequency of sea turtle takes appears to be a function of where the pound nets are set, with pound nets set in certain areas having a higher potential for takes for a variety of possible reasons, such as depth of water, current velocity, and proximity to certain environmental characteristics or optimal foraging grounds. For instance, it is possible that takes may continue to occur on 7.5-inch (19.1-cm) stretched mesh leaders if set in certain geographical areas. Additional analyses,

and perhaps data collection, will be completed that may provide insights into the relationship between mesh size and sea turtle interactions. At this time, the mesh size threshold that would prevent sea turtle entanglements has not been determined for mesh size below 12 inches (30.5 cm). As such, NMFS is retaining the mesh size restriction included in the 2002 interim final rule, which is the restriction of leaders with greater than or equal to 12 inches (30.5 cm) stretched mesh and leaders with stringers, in areas outside the leader prohibited area. It should also be noted that during the public comment period, it was recognized that an 8-inch (20.3-cm) stretched mesh leader may in fact be slightly smaller than 8 inches (20.3 cm), after it is coated and hung in the water. For example, NMFS observers measured nets to the nearest 0.125 inches (0.318 cm), so a sea turtle entanglement recorded in an 8-inch (20.3-cm) stretched mesh leader may have in fact been in a leader with 7.95-inches (20.2-cm) stretched mesh. Whenever NMFS mentions that sea turtles have been taken in 8 inch (20.3 cm) stretched mesh leaders, it refers to nets that may have been slightly smaller or larger (within 0.125 inches (0.318 cm)) than 8 inches (20.3 cm).

Comment 7: One commenter continued to be concerned with the potential take in leaders with less than 8 inches (20.3 cm) stretched mesh, particularly as a result of impingement.

Response: NMFS has only documented sea turtles in leaders with 8 inches (20.3 cm) and greater stretched mesh and in leaders with stringers. Given that gillnets with less than 8 inches (20.3 cm) stretched mesh have been found to entangle sea turtles (Gearhart, 2002), NMFS recognizes the possibility that entanglements in leader stretched mesh smaller than 8 inches (20.3 cm) could occur. There are differences between gillnet gear and pound net leaders (e.g., monofilament vs. multifilament material; drift, set, and runaround vs. fixed stationary gear; gilling vs. herding fishing method), which likely factor into the potential for sea turtle interactions and should be considered when conducting any mesh size comparison. NMFS does not expect sea turtle impingements on pound net leaders to occur outside the leader prohibited area, because of the lack of observed impingements on pound net leaders outside of this area. Sea turtles may continue to be entangled in leaders with less than 12 inches (30.5 cm) stretched mesh outside the leader prohibited area. Further, given that only one turtle was found entangled outside the leader prohibited area in two years

of monitoring, NMFS has chosen to keep the restriction to leaders with greater than or equal to 12 inches (30.5 cm) stretched mesh. However, NMFS will continue monitoring pound nets for sea turtle interactions and the framework mechanism included in this final rule will enable the enactment of additional management measures if determined necessary.

Comments on Validity of Scientific Information

Comment 8: Sixteen commenters felt that the limited observer data do not support the conclusion that the pound net fishery is a major source of mortality, especially as the spring strandings have been much higher than the observed interactions in pound net gear. Three commenters believed sea turtles will not biologically benefit with the proposed measures given the limited take data. One commenter additionally felt that this regulation, and its supporting justification, establishes a bad precedent for managing Virginia fisheries.

Response: In 2002 and 2003, 23 sea turtles were found either entangled in or impinged on pound net leaders, while in May, June and the first half of July of 2002 and 2003, approximately 563 sea turtles were found stranded on Virginia beaches. NMFS acknowledges that other factors likely contribute to spring sea turtle mortality in Virginia, and NMFS does not assume that all sea turtle strandings are the result of pound net interactions. Sea turtle mortality sources are difficult to detect from evaluating the stranded animal. Few sea turtles strand with evidence of fishery interactions, but the lack of gear on a carcass is not necessarily indicative of a lack of fishery interaction. NMFS has observed other fisheries and investigated other potential causes, such as dredge operations, for the annual spring sea turtle mortality event and determined that natural or non-fishing related anthropogenic causes are not consistent with the nature and timing of most of the strandings (67 FR 15160, March 29, 2002, 69 FR 5810, February 6, 2004). For instance, during the approximate time period of the proposed measures (May 16 to July 31, 2003), a preliminary count of 26 of 375 turtles were found on Virginia beaches with carapace/plastron damage or propeller-like wounds. It is unknown how many of these injuries were pre or post-mortem. Unlike for pound net leaders, the level of sea turtle interactions with other potential mortality sources (e.g., other fisheries) has not yet been conclusively determined as few takes have been

documented. As noted above, NMFS has data showing that pound net leaders result in sea turtle entanglement and impingement. NMFS believes that it is likely that pound nets contribute to, but do not cause all of, the high sea turtle strandings documented each spring on Virginia beaches. Under the ESA, NMFS is responsible for protecting sea turtles from various mortality sources.

There are several caveats, ones more likely to result in underestimates, associated with the pound net monitoring studies that should be noted when evaluating the number of animals found in the gear. The sea turtles observed in leaders were found at depths ranging from the surface to approximately 6 feet (1.8 m) under the surface. The ability to observe a turtle below the surface depends on a number of variables, including water clarity, sea state, and weather conditions. Generally, turtles entangled a few feet below the surface cannot be observed due to the poor water clarity in the Chesapeake Bay. In several instances in 2002 and 2003, due to tide state and water clarity, even the top line of the leader was unable to be viewed. Additionally, NMFS' sampling effort was confined to two boats in 2002 and one vessel during 2003, and each net could not be sampled during every tidal cycle, every hour, or even every day. Some impingements, and some entanglements, were undoubtedly missed as a small fraction of the fishing effort was observed. Due to funding and staff constraints, NMFS observers did not monitor pound nets after early June in 2002 and 2003, and did not monitor during the high spring stranding period in 2003. As such, some sea turtle entanglements and/or impingements could have been missed later in the season. Given these caveats, even if pound nets caused every sea turtle mortality in the Virginia Chesapeake Bay, it is not expected that the number of observed sea turtle interactions would equal the number of strandings. It should also be noted that a revised analysis by NMFS found that nets were observed a total of 838 times in 2002 and 2003, not 1463 times as noted in the draft EA. This modification is a factor of discounting the non-active nets and the nets that were not able to be completely observed due to shallow water depth and lack of boat access.

NMFS considers the monitoring information collected in 2002 and 2003 to be noteworthy, given that entanglements were not previously anticipated on leaders with less than 12 inches (30.5 cm) stretched mesh and impingements on leaders were observed, a phenomenon not previously

believed to occur with such frequency. NMFS believes that this data represent new information on the interactions between sea turtles and pound net leaders and should be used to further reduce takes in this fishery.

Sea turtles will benefit from this action, as pound net leaders entangle and impinge these animals and this action will reduce these interactions. The exact population benefit cannot be determined, but as sea turtle populations found in the Virginia Chesapeake Bay have not yet recovered, diligence must be used to reduce mortality sources. Loggerheads and Kemp's ridleys have been found interacting with pound net gear and are the most common species found in the Chesapeake Bay. Most loggerheads in U.S. waters come from one of five genetically distinct nesting subpopulations. The largest loggerhead subpopulation occurs from 29° N. lat. on the east coast of Florida to Sarasota on the west coast and shows recent increases in numbers of nesting females based upon an analysis of annual surveys of all nesting beaches. However, a more recent analysis limited to nesting data from the Index Nesting Beach Survey program from 1989 to 2002, a period encompassing index surveys that are more consistent and more accurate than surveys in previous years, has shown no detectable trend (B. Witherington, Florida Fish and Wildlife Conservation Commission, pers. comm., 2002). The northern subpopulation that nests from northeast Florida through North Carolina is much smaller, and nesting numbers are stable or declining. Genetic studies indicate that approximately one-half of the juvenile loggerheads inhabiting Chesapeake Bay during the spring and summer are from the smaller, northern subpopulation (TEWG, 2000; Bass *et al.*, 1998; Norrgard, 1995).

Kemp's ridleys are considered to be one of the world's most endangered sea turtle species. The population has been drastically reduced from historical nesting numbers, but the Turtle Expert Working Group (1998, 2000) indicated that the Kemp's ridley population appears to be in the early stage of a recovery trajectory. Nesting data, estimated number of adults, and percentage of first time nesters have all increased from lows experienced in the 1970's and 1980's. From 1985 to 1999, the number of nests observed at Rancho Nuevo and nearby beaches has increased at a mean rate of 11.3 percent per year, allowing cautious optimism that the population is on its way to recovery. Given the vulnerability of these populations to chronic impacts

from human-related activities, the high level of spring sea turtle mortality in Virginia must be reduced to help ensure that these populations of loggerheads and Kemp's ridleys recover.

Additionally, most of the turtles found in Virginia waters, as well as found stranded during the spring, are of the juvenile life stage (Mansfield *et al.*, 2001, Musick *et al.*, 2000, Musick and Limpus, 1997). Studies have concluded that sea turtles must have high annual survival as juveniles and adults to ensure that sufficient numbers of animals survive to reproductive maturity to maintain stable populations (Crouse *et al.*, 1987; Crowder *et al.*, 1994; Crouse, 1999). Given their long maturation period, relatively small decreases in annual survival rates of both juvenile and adult loggerhead sea turtles may destabilize the population, thereby potentially reducing the likelihood of survival and recovery of the population. As such, the historical high level of mortality in Virginia plus the increase in mortality documented during the last several years may negatively affect recovery. Any action that helps reduce sea turtle mortality will biologically benefit these species.

Regardless of whether NMFS issued this final regulation, if NMFS identifies additional sea turtle mortality sources, NMFS would consider additional management actions pursuant to its obligations under the ESA. Therefore, this final rule, or the justification for it, does not set any precedent.

Comment 9: Two commenters expressed their concern with closing a portion of the fishery without a complete understanding of the problem and recommended more research, particularly with respect to impingements.

Response: NMFS is committed to undertaking additional research to not only continue studying the interactions between pound nets and sea turtles, but also to continue monitoring and investigating sea turtle mortality in Virginia during the spring. If any scientific research results or future study plans are available that would provide more information, NMFS would welcome receiving or discussing those studies. However, given the results of the pound net monitoring studies in 2002 and 2003, it is necessary to act on the results at this time to minimize additional sea turtle entanglements and impingements in the future. The data show that sea turtles are entangled in and impinged on leader mesh sizes smaller than what are currently restricted and most of these interactions have occurred in a specific geographical area (i.e., in the leader prohibited area).

Note that at this time NMFS chose to retain the leader mesh size restriction as included in the previous action on this fishery (in areas outside the leader prohibited area) in order to complete additional analyses, and perhaps data collection, on the conservation benefit of different mesh size thresholds. NMFS is committed to continuing to explore the issue as well as working with the industry to develop a gear modification solution that would minimize sea turtle takes and retain an acceptable level of target catch.

Comment 10: Two commenters disagreed that most impingements lead to mortality, given the normal diving behavior of sea turtles, the variable strength of the tidal currents, and the lack of observation time for the impinged animals.

Response: NMFS observers documented 14 sea turtles, 13 of these alive, impinged on pound net leaders by the current, during monitoring surveys in 2002 and 2003. When an animal was found impinged on the leader, it was immediately released from the net by the observer. Impinged sea turtles were not observed on the net for any length of time, due to the need to release an air-breathing endangered or threatened species from fishing gear as soon as the animal is found, and the uncertainty surrounding how long the animal had already been impinged and how potentially compromised it was. If an animal was impinged on a leader by the current with its flippers inactive, based on other observations of impinged sea turtles, NMFS believes that without any human intervention the turtle could either swim away alive when slack tide occurred, become entangled in the leader mesh when trying to free itself, or drift away dead if it drowned prior to slack tide. In 2002 and 2003, six of the live impingements occurred near the surface, but seven turtles were found underwater, unable to reach the surface to breathe, with an average of 3 hours until slack tide. It is likely that if a turtle could not breathe from the position where it was impinged on the net, it would have a low likelihood of survival if it remained on the net for longer than approximately one hour.

While a public comment noted that sea turtles in Virginia have been found to remain submerged for durations of 40 minutes under normal conditions, it is unlikely that struggling, physiologically stressed sea turtles in fishing gear could do the same, as forcibly submerged turtles rapidly consume their oxygen stores (Lutcavage and Lutz, 1997). In forcibly submerged loggerhead turtles, blood oxygen was depleted to negligible levels in less than 30 minutes (Lutz and

Bentley, 1985 in Lutcavage and Lutz, 1997). The rapidity and extent of internal changes are likely functions of the intensity of underwater struggling and the length of submergence. For instance, oxygen stores were depleted within 15 minutes in tethered green sea turtles diving to escape (Wood *et al.*, 1984 in Lutcavage and Lutz, 1997). Given that some forcibly submerged sea turtles on pound net leaders have been observed struggling, it is unlikely that the submergence duration of impinged animals would be the same as for non-impinged sea turtles. Besides the one specimen of an unknown species of sea turtle found in June 2003, the turtles observed impinged in 2002 and 2003 were not observed moving vertically on the net, given that in most cases, at least one of their flippers were rendered inactive as they were held against the net. The unidentified sea turtle found in June 2003, that either slipped deeper down the net or escaped before the observer could evaluate it further, had both of its front flippers active. Four impinged sea turtles had their head and/or flipper through the leader mesh, but because the part was not wrapped multiple times in the net, it was not considered entangled. Often the impinged turtles were documented as held against the nets by very slight, almost slack, currents. It is unknown how long those animals were impinged on the net before being observed. It could be that those animals were held against the net for more than approximately an hour and when observed impinged with the slight current, they were already in a compromised state. If a sea turtle remains alive after an impingement and swims freely, it could become impinged on or entangled in another nearby pound net leader. This animal would likely already be in a compromised state, which would further augment the impacts of forced submergence.

Comment 11: Five commenters noted the difference between nearshore and offshore nets along the Eastern shore of Virginia, with respect to the different current strength, water depth and observed turtle takes. Two of these commenters felt that the potential for impingements could not be extrapolated to the entire fishery or to nets in shallower waters with weaker currents.

Response: NMFS observed sea turtles impinged on nets with what appeared to be varying current strengths. NMFS agrees that additional research is necessary on the current strength needed to impinge a sea turtle, and recognizes that there appear to be differences between nearshore and offshore nets with respect to

impingement potential and sea turtle interactions. It was NMFS' previous assumption that all net locations in the leader prohibited area experienced similar conditions, namely relatively high currents regardless of water depth, given that impingements have been documented in those nets set in the Western Bay and along the Eastern shore and NMFS' observations documented swift moving currents in all of those net locations. Information from the public comments suggested that the differences between nearshore and offshore nets are noteworthy, and the difference in impingement potential must be considered. Based on these comments, NMFS re-analyzed the 2002 and 2003 monitoring records and the data do support that there is a statistically significant difference between observed sea turtle takes in nearshore and offshore nets. In 2002 and 2003, offshore nets accounted for all of the observed impingements (n=14) and 8 of the 9 observed entanglements. One dead loggerhead was documented in a nearshore 8 inch (20.3 cm) stretched mesh leader in June 2003. During 2002 and 2003, there were 345 surveys of nearshore nets and 480 surveys of offshore nets. Thirteen surveys did not have a nearshore or offshore designation. Based upon the observations of nearshore nets, it does appear that they pose a significantly lower risk to sea turtles and as such, NMFS has modified the leader prohibited area in this final rule to exclude nearshore nets. Nearshore nets are defined to include those nets with the inland end of their leader 10 horizontal feet (3 m) or less from the mean low water line, and offshore nets include all other nets set in various water depths. The revised leader prohibited area includes all areas where sea turtles were documented impinged on pound net leaders.

Generally, areas close to shore are often shallower and have less current than those areas further from shore, but exceptions may occur because environmental conditions can vary locally. Distance from shore is likely a proxy for other factors (e.g., water depth, current speed) influencing sea turtle interaction rates. For this action, distance from the mean low water line was used as a common characteristic of those nets considered to be nearshore. NMFS will be collecting more data on current strengths in the Virginia Chesapeake Bay, and until additional information may indicate otherwise, NMFS considers distance from shore to be suitable to separate nearshore and offshore nets.

Comment 12: Three commenters disagreed with NMFS' statement that there are unreported sub-surface sea turtle mortalities in pound net leaders, because the previous side scan sonar surveys did not detect any sea turtle takes.

Response: In 2001, 7 days of side scan sonar surveys were completed from May 24 through August 3 (with no surveys completed from June 24 to July 22 due to weather), for a total of 825 images for the 55 active pound net leaders surveyed (Mansfield *et al.*, 2002a). In 2002, 9 days of surveys were conducted from May 22 to June 27, for a total of 1,848 images for the 61 active pound net leaders surveyed (Mansfield *et al.*, 2002b). In 2001 and 2002, surveys were conducted almost equally in the Western Bay and along the Eastern shore. No sub-surface acoustical signatures were noted during these surveys. The use of side scan sonar as a means to detect sub-surface sea turtle entanglements may have potential, but additional research on sub-surface interactions is needed. Mansfield *et al.* (2002a, 2002b) state that a number of factors may influence the use of side scan sonar, including weather, sea conditions, water turbidity, the size and decomposition state of the animal, and the orientation of the turtle in the net. NMFS recognizes that survey scheduling is limited by weather and sea conditions, but considers that side scan survey results may continue to be affected by water turbidity, the size and decomposition state of the animal, and the orientation of the turtle in the net. These issues must be addressed in future surveys before conclusively determining that sea turtles are not found in pound net leaders sub-surface. NMFS conducted forward searching sonar testing in April 2003 to further explore the issue, but due to technical difficulties (e.g., narrow band width, time needed to familiarize staff with equipment and image interpretation, scheduling), testing had to be curtailed while visual monitoring was conducted. Additional sonar testing is anticipated to be conducted in the spring of 2004.

However, because sea turtles can be present throughout the water column, it is possible that subsurface entanglements and impingements occur. Data indicate that while the spring water column temperatures are stratified and sea turtles may prefer warmer surface waters, sea turtles may also be found at depth. Sea turtles generally inhabit water temperatures greater than 11° C (Epperly *et al.*, 1995), and loggerheads and Kemp's ridleys in Virginia waters forage on benthic species. As sea turtles use the

Chesapeake Bay as developmental foraging grounds (Byles, 1988, Lutcavage and Musick, 1985, Musick and Limpus, 1997), they will be periodically near the bottom if they are foraging and may come in contact with pound net leaders at depth. Musick et al. (1984) found that crustaceans aggregate on large epibiotic loads that grow on the pound net stakes and horseshoe crabs (a preferred prey for loggerheads) become concentrated at the bottom of the net. Additionally, Mansfield and Musick (2003) found that seven sea turtles (six loggerheads and one Kemp's ridley) tracked in the Virginia Chesapeake Bay from May 22 to July 17, 2002, dove to maximum depths ranging from approximately 13.1 ft (4 m) to 41 ft (12.5 m). Further, Byles (1988) and Mansfield and Musick (2003, 2004) found that sea turtles in the lower Chesapeake Bay commonly make dives of over 40 minutes during the day. While the percentage of time spent at each depth range needs to be clarified, it is improbable that turtles, during a 40 minute period, are never found at depths deeper than the depth at which sea turtles were observed entangled and impinged (e.g., approximately 6 feet (1.8 m)). This information suggests that sea turtles will be found through the water column, even though they may prefer warmer surface waters. While side scan sonar survey results have not documented the sub-surface entanglement of sea turtles in two years of surveys, NMFS believes these results should be treated cautiously, recognizing the potential limitations of this technique and known sea turtle behavior patterns.

Comment 13: One commenter disagreed with NMFS' statement that the mesh size characteristics are generally consistent from the top to bottom of the leader.

Response: It is possible that different nets in different areas of the Chesapeake Bay are set with different mesh sizes from top to bottom. The statement in the proposed rule was that pound net leader characteristics are generally consistent from top to bottom. NMFS conducted pound net leader observations during 2002 and 2003 for a total of 126 individual active nets observed, and documented different mesh sizes in the top and bottom of the leader in only one or two nets, but notes that nets were not routinely monitored from top to bottom. In 2002 and 2003 combined, there were approximately 26 nets that did change mesh sizes from the shallower end to the deeper end of the leader (moving horizontally along the leader), but that is not what was referred to in NMFS' original statement. Additionally, NMFS

discussed this issue with four pound net fishermen and this subset of fishermen indicated that they used one mesh size in their leaders.

Comment 14: One commenter disagreed with NMFS' statement that pound net leaders in the Virginia Chesapeake Bay are one mile (1,609 m) long.

Response: The Economic and Social Environment section (Section 4.3) of the draft EA stated that "...fish swimming along the shore are turned towards the pound by the leader (sometimes a mile long), guided into the heart, and then into the pound..." The purpose of this paragraph was to provide background information on the configuration of pound net gear, and it is NMFS' understanding that in certain areas pound net leaders can be one mile (1,609 m) long (Dumont and Sundstron, 1961). Based upon field observations in Virginia however, NMFS agrees with the comment that pound net leaders in Virginia do not reach one mile (1,609 m) long. In fact, Section 28.2-307 of the Code of Virginia restricts the total length of a single fixed fishing device to 1,200 feet (365.8 m) or less. The reference to the leader length of one mile (1,609 m) was deleted in the final EA.

Comment 15: One commenter noted that pound net operations are critical sources of food for birds, protected under the Migratory Bird Treaty Act, in the Virginia Chesapeake Bay, and NMFS failed to consider this biological benefit in its analysis. Further, this commenter felt that pound net operations are beneficial for sea turtles, as important sources of food from the discards of the pound nets.

Response: NMFS recognizes that a variety of birds feed on the catch and discards from the pound net fishery. That potential benefit to avian species was analyzed in the final EA. However, birds have also been documented entangled, dead and alive, in the leaders and have been documented entangled and entrapped in the pounds and hearts, both dead and alive. Monitoring efforts in 2002 and 2003 documented several dead birds entangled in leaders, hearts, or pounds with varying mesh sizes, including 12 pelicans, 10 cormorants, 6 gulls, 2 gannets, 2 common loons, 1 royal tern, and 130 birds of unidentified species. Since individual nets were surveyed multiple times, and since it is difficult to identify decomposing birds, some birds may have been counted multiple times. Regardless, the avian mortality documented during 2002 and 2003 does not represent total mortality to these species, as surveys documented only a portion of total fishing effort. Birds foraging in Chesapeake Bay may

exploit pound nets for prey but they are not dependent on this source of forage. NMFS believes that the risk of mortality, disruption of normal feeding behaviors, and other unknown ecological effects to avian species resulting from pound nets outweighs any perceived benefit of concentrating prey resources.

Sea turtles have been found alive and uninjured in the pounds of pound net gear, and are assumed to be foraging on the entrapped species. Tagging data collected by VIMS suggest that some sea turtles exhibit strong site fidelity to certain pound nets (Mansfield and Musick, in press). Turtles may also feed on the discards of pound net gear outside the pound, but the harm or benefit of this foraging resource are unknown. Turtles' proximity to the gear may in fact increase the potential for interactions with the leaders. NMFS believes the negative impact from interactions with the leaders outweighs any potential benefit from the concentration of prey items or availability of discards. It is also unknown what impact pound nets have on the behavior and development of sea turtles in the Chesapeake Bay.

Comments Related to Stranding Levels

Comment 16: Thirteen commenters stated that the proposed pound net restrictions will not solve the high spring sea turtle stranding problem in Virginia waters, and NMFS should continue to explore other sources of sea turtle mortality (e.g., vessel impacts, habitat degradation, water quality, lack of prey items, other fisheries). One of the commenters recommended that the menhaden fishery be regulated so there would be more food and better water quality for marine species, sea turtles included. Observer coverage on other spring fisheries in Virginia, as well as continued observer coverage on the pound net fishery, was recommended by four of the commenters.

Response: As discussed in Comment 8, NMFS does not believe that pound nets are the sole source of spring turtle mortalities in Virginia. NMFS does believe that pound nets play a role in the annual spring stranding event. Prohibiting a gear type known to entangle and impinge sea turtles in an area with documented takes will protect sea turtles from potential mortality associated with these pound net leaders, and reduce the strandings that occur from this gear type.

Since 2001, several fisheries have been observed in Virginia with few documented sea turtle takes. However, NMFS recognizes that variations in fishery-turtle interactions may occur between years, and is committed to

continued monitoring of fisheries in and around Virginia. The NMFS 2004 monitoring program is anticipated to include observer coverage of the gillnet fisheries in offshore and nearshore Virginia and Chesapeake Bay waters; alternative platform observer coverage of the large mesh gillnet black drum fishery; observer coverage of the trawl and scallop dredge fisheries in offshore Virginia waters; investigations into sea turtle interactions with the whelk and crab pot fisheries; and pound net monitoring. NMFS is also working to place observers on board the menhaden purse seine fishery in the Chesapeake Bay. NMFS will also be providing funding for professional necropsies and associated lab costs on fresh dead sea turtles in Virginia to get a better picture of the health of a subset of stranded sea turtles, and working with Virginia organizations to institute an educational campaign aimed at reducing sea turtle interactions with recreational fishermen and boaters. NMFS will continue to closely monitor sea turtle stranding levels and to evaluate interactions with other mortality sources not previously considered that may contribute to sea turtle strandings.

NMFS recognizes that water quality and habitat degradation from many sources can influence sea turtle distribution, prey availability, foraging ability, reproduction, and survival. Sea turtles are not very easily directly affected by changes in water quality or increased suspended sediments, but if these alterations make habitat less suitable for turtles and hinder their capability to forage, eventually they might tend to leave or avoid these less desirable areas (Ruben and Morreale, 1999). The Chesapeake Bay watershed is highly developed and may contribute to impaired water quality via stormwater runoff or point sources. However, due to the volume of water in the mainstem Chesapeake Bay, the impacts of pollutants may be slightly reduced compared to certain tributaries. In a characterization of the chemical contaminant effects on living resources in the Chesapeake Bay's tidal rivers, the mainstem Bay was not characterized due to the historically low levels of chemical contamination, but the James River was characterized as an area with potential adverse chemical contaminant effects to living resources (Chesapeake Bay Program Office 1999). NMFS, USFWS, and the Environmental Protection Agency (EPA) are currently engaged in ESA section 7 consultations on EPA's water quality standards and aquatic life criteria. Through those consultations, the effects of EPA's water

quality standards will be evaluated with respect to potential impacts to listed species.

NMFS recognizes that the blue crab population in the Chesapeake Bay has declined from previous levels (Seney, 2003). A diet analysis of stranded loggerhead and Kemp's ridley sea turtles in Virginia found that the diet of loggerheads appears to have shifted to a fish dominated diet in the mid-1990s and in 2001 to 2002, from horseshoe crab dominance during the early to mid-1980s and blue crab dominance in the late 1980s and early 1990s (Seney, 2003). Menhaden, croaker, seatrout, striped bass and bluefish were the fish species most frequently found in the recent loggerhead samples, with all of these fish species being commercially important in Virginia's gillnet and pound net fisheries (Mansfield *et al.*, 2001, 2002a in Seney, 2003). Seney (2003) stated the fish species composition and the fact that few turtles had consumed both fish and scavenging mud snails suggests that the turtles examined were feeding on primarily live and fresh dead fish from nets. It remains uncertain whether these results are biased because sampling was conducted on only stranded animals and it could be that more fish was found in the stomachs of stranded loggerheads because some were interacting with fishing gear, which contributed to their demise. Based upon these results however, it does appear that loggerheads are shifting their diet and the decline of the horseshoe and blue crab populations may be increasing loggerheads' interaction rate with fishing gear. The future ramifications of this are unclear and it warrants further research. A small subset of Kemp's ridleys was sampled and data suggest that blue crabs and spider crabs were key components of the Virginia Kemp's ridley diet from 1987 to 2002. However, based on the body condition of the majority of stranded turtles, sea turtles in the Chesapeake Bay do not appear to be compromised by a lack of food. The decline of the horseshoe and blue crab populations may result in a diet shift to different species (e.g., different species of crab) or potential move to a different foraging area.

Again, it should be stressed that NMFS believes that high spring strandings may be a result of an accumulation of factors, most notably fishery interactions, but pound net leaders are known to take sea turtles and NMFS believes that interactions with pound net leaders likely contribute to the overall strandings.

Comment 17: Twelve commenters noted that the number of active pound

nets (large mesh and stringer leaders in particular) have decreased since the 1980s while the number of strandings have increased in recent years.

Response: NMFS agrees that there are currently fewer pound net leaders, in particular those utilizing large mesh and stringer leaders, in the Virginia Chesapeake Bay in comparison to the 1980s. It is unclear whether the reduction in pound nets has been consistent throughout the Virginia Chesapeake Bay, or whether the number of pound nets in one area has decreased significantly and the number in another area has remained relatively the same or potentially increased. The number of pound net licenses issued in Virginia has remained the same since 1994, due to a limited entry program, and one license is assigned to each pound net. So while the number of pound nets has apparently decreased since the 1980s, the number of licenses issued (n=161) has been approximately the same since 1994. This suggests that the number of pound nets in the Virginia Chesapeake Bay has been approximately the same since 1994, but NMFS recognizes that the number of active nets in any given season may vary among years. Also, NMFS notes that pound net landings from 1990 to 1999 have increased at an annual rate of 8.33 percent, while the annual revenues from pound net landings have increased by 17.31 percent (Kirkley *et al.*, 2001).

Regardless, NMFS disagrees with the conclusion that some turtle strandings cannot be attributed to pound net leaders because strandings have increased while the number of leaders have decreased. NMFS recognizes that the increase in documented sea turtle mortalities could be a function of the increase and improvement in the level of stranding effort, coverage, and reporting that has occurred, especially along the Eastern shore, and perhaps a function of the apparent increase in abundance of the southern population of loggerheads, which make up approximately 50 percent of the loggerheads found in the Virginia Chesapeake Bay. Pound net leaders (regardless of how many are in the Chesapeake Bay) still entangle and impinge sea turtles and the ESA requires NMFS to use the best available scientific information to protect the species. There have been documented sea turtle entanglements in leaders that were determined to have caused mortality by drowning. Impingements represent a take under the ESA that may lead to mortality.

Comment 18: Four commenters acknowledged that elevated strandings abate by the end of June or early July

and the pound net fishery operates throughout the turtle residency period in the Chesapeake Bay. They noted that if pound nets were the problem, one would expect strandings to remain at elevated levels throughout the season. One of the commenters noted that there have been no documented takes after June 15, 2003, to the present.

Response: From 1995 to 2002, the average monthly sea turtle strandings for Virginia (oceanside and Chesapeake Bay combined) were the highest in June (117), followed by May (39), July (28), August (26), October (18), and September (17). Strandings do continue throughout the sea turtle residency period, but not at the elevated levels seen in the spring. As noted in Comment 1, to NMFS' knowledge, there have been 2 observed turtles in pound net leaders after the spring, but there also has been very limited observer coverage during that time. It is possible that entanglements and impingements are occurring in pound net leaders after the spring, and contributing to stranding levels, but there are no notable observations to suggest that, or that the frequency of takes is the same as in the spring. It is also possible that sea turtles are more vulnerable to pound net entanglement and impingement in the spring, as they are moving into the Chesapeake Bay, migrating through a concentration of pound nets set near the mouth of the Chesapeake Bay. NMFS acknowledges that additional information would be beneficial to adequately assess the risk of entanglement/impingements in pound net leaders after the spring, and to determine why sea turtles may not be interacting as frequently with leaders during this time. The only directed study on temporal entanglements dates back to the 1980s, and the sampling area was concentrated in the western Chesapeake Bay. Bellmund *et al.*, (1987) stated that entanglements in pound net leaders began in mid-May, increased in early June, and reached a plateau in late June. In 1984, surveys were conducted through September, and no entanglements were observed after late June. Bellmund *et al.* (1987) further stated that these data suggest pound nets pose mortality threats to sea turtles in the Chesapeake Bay for a relatively short period of the year even though most sea turtles reside in the Chesapeake Bay from May through October. Additionally, from 1981 to 1984, 14 loggerheads and 2 Kemp's ridleys were monitored via radio tracking (Byles, 1988). Three of the animals became entangled in leaders; the other animals tracked in the summer

and fall were able to forage around the nets with little apparent entanglement threat (Byles, 1988, Musick *et al.*, 1994, Mansfield *et al.*, 2002b).

NMFS acknowledges that there are few documented sea turtle interactions with pound net leaders after mid-June. However, there also have not been any directed monitoring efforts during this time; NMFS monitoring in 2003 ended on June 11 due to funding and logistical constraints. Monitoring was not conducted during the peak of the 2003 stranding period and it is possible that many more sea turtles would have been observed entangled in or impinged on leaders during that time. As stated in the responses to Comments 8 and 16, NMFS does not believe pound nets cause all of the strandings in Virginia, and as noted in the proposed rule, a cause and effect relationship between pound net interactions and high spring strandings cannot be statistically derived based on the available data, even though a concentration of strandings has been consistently found in the vicinity of pound nets and a number of dead floating sea turtles were documented around pound nets in recent years. The facts remain that turtles have been observed entangled in and impinged on pound net leaders during the spring.

Comment 19: Two commenters noted that the proposed rule failed to identify what action NMFS would take if the final rule is implemented as proposed and high strandings continue in the spring.

Response: Monitoring of potential mortality sources will continue to occur this spring, and the information gathered from these monitoring initiatives would inform what action NMFS would take if strandings continue. It is possible that additional mortality sources may be identified and appropriate actions taken. NMFS believes this final rule will result in reduced sea turtle mortality associated with pound net gear in the Chesapeake Bay. The final rule includes the framework mechanism that enables NMFS to make changes to the restrictions and/or their effective dates on an expedited basis in order to respond to new information and protect sea turtles.

Comment 20: Two commenters felt that healthy sea turtles can forage around the pound nets without being entangled or impinged, and the animals observed in pound net gear, and found stranded on Virginia's beaches, are sick, diseased (like some of those found in Florida), cold stunned, and tired. One additional commenter felt that strandings are a result of natural

selection, and that NMFS should not interfere with lack of recovery of those animals with weak genes.

Response: The ESA's prohibition against take applies to all endangered or threatened animals. A capture in fishing gear is still a take, regardless of the animal's condition and whether it is weak, sick, or in any other way compromised. Unless the take is authorized pursuant to a regulation, a permit, or in the Incidental Take Statement of a Biological Opinion, the person who incidentally takes a listed animal is subject to criminal penalties and fines. The condition of sea turtles is therefore not relevant to NMFS' determination to permit an additional exception to the take prohibitions.

In any event, NMFS has no information to suggest that the animals found entangled or impinged on leaders during the spring of 2002 and 2003 were unhealthy before their capture. The animals observed by NMFS as entangled and impinged have visually appeared healthy (e.g., not emaciated, not externally compromised). Granted, the live turtles and the dead turtles not necropsied may have had other problems besides those that are able to be visually observed. Necropsies were performed on 4 of the 7 dead entangled turtles found in pound net leaders in 2002 and 2003. One additional Kemp's ridley sea turtle is anticipated to be necropsied (found in May 2003); NMFS is waiting for the necropsy results from this animal. The other two dead animals were left in situ to monitor their status. Necropsy results from 2 of the 7 dead entangled turtles showed that the turtles had adequate fat stores, full stomach and/or intestines, and no evidence of disease. A necropsy by the Armed Forces Institute of Pathology on one of the dead Kemp's ridleys recovered from a leader found that "the animal was active and in good nutritional condition at the time of death" and concluded that entrapment in fishing gear was the cause of death. One of the 4 necropsy reports only stated that the turtle was female with nematodes and digested tissue in its digestive tract.

Most of the turtles stranded in Virginia have been moderately to severely decomposed (e.g., 85 percent in 2003). The ability to conduct necropsies is limited by the condition of the stranded animals, and severely decomposed turtles are not usually necropsied. The majority of the stranded turtles that were examined by necropsy in the spring of previous years had relatively good fat stores and full stomachs/digestive tracts, suggesting that they were in good health prior to their death. NMFS has no evidence to

suggest that sea turtles found in the Chesapeake Bay during the spring are weakened from their seasonal migration. There is also no evidence of widespread disease in these stranded animals. As referred to in a public comment, a Florida epizootic occurred from October 2000 through March 2001, although a few cases a year have been seen since then. The epizootic appears to have been limited to south Florida. The hallmark symptom was a varying degree of paralysis which affected voluntarily movements and certain reflexes. Forty-nine alive stranded loggerheads were confirmed to have been caused by the epizootic. However, a living animal was necessary to make the diagnosis. Many of the dead loggerheads found during that period may have also died from the same disease, but it was not possible to determine their cause of death. The animals that have stranded in Virginia have not exhibited the same symptoms as those found in the Florida stranding event that was associated with an epizootic, nor has the epizootic continued in any significant way beyond early 2001. In the early 1990s, four live stranded animals in Virginia exhibited signs of a central nervous system disturbance, later determined to be a bacterial encephalitis (George *et al.*, 1995). These animals were dull and listless when undisturbed, but when handled, they moved their flippers spastically and showed a hyperflexion of the neck. At this time, NMFS has no data indicating that the sea turtles found in Virginia pound nets have a central nervous system problem. As mentioned, NMFS is providing funding to conduct necropsies and lab analyses on fresh dead sea turtles this spring, which will hopefully provide additional information on the health of some of these stranded animals.

It is unlikely that the spring stranded animals in Virginia were cold stunned. The average water temperature on May 6 at the NOAA National Ocean Service Kiptopeke, Virginia station was 16.1 C from 1999 to 2002, 16.6 C on May 7, and 17.2 C on May 8. Average water temperatures in 2003 were 14.3 C, 15.1 C, and 17.1 C on May 6, 7, and 8, respectively, not notably different from the most recent 4-year average. Water temperatures generally increase gradually over the spring and summer, and in 2003, most of the sea turtle strandings occurred during the last two weeks of June, when water temperatures were warmer. For example, on June 22, the average water temperature at the Kiptopeke station was 21° C. Mansfield *et al.*, (2001) and Mansfield and Musick (2003) state that analyses by VIMS have

estimated that sea turtles migrate into the Chesapeake Bay when water temperatures warm to approximately 16 to 18° C. However, sea turtles do frequent waters as cool as 11° C (Epperly *et al.*, 1995). Cold stunning typically occurs during the time of the year when water temperatures are decreasing, not increasing, and is well documented in other areas. Sea turtles, the majority of them Kemp's ridleys, wash ashore cold stunned each fall/winter along the beaches of Cape Cod Bay, Massachusetts, beginning with the first sustained storm front after the Cape Cod Bay water temperatures have dropped to or below 10° C. From the available data on cold stunning and sea turtle preferences for water temperature, it is unlikely that the sea turtles found stranded and in pound net gear in Virginia during May and June are cold stunned.

Determining the cause of death in stranded sea turtles is difficult, given the level of decomposition of most stranded turtles and the lack of evidence, due in part to sea turtles' anatomy (e.g., hard carapace, scaly skin). However, the circumstances surrounding the spring strandings in Virginia are consistent with fishery interactions as a likely cause of mortality and, therefore, strandings. These circumstances include relatively healthy turtles prior to the time of their death, a large number of strandings in a short time period, no external wounds on the majority of the turtles, no common characteristic among stranded turtles that would suggest disease as the main cause of death, and turtles with finfish in their stomachs (which suggests interactions with fishing gear (Bellmund *et al.*, 1987) or bycatch discarded from vessels (Shoop and Ruckdeschel, 1982)).

As to whether these turtle mortalities may be the result of natural selection, anthropogenic impacts have impeded sea turtle recovery, significantly contributing to their endangered and threatened status. Anthropogenic mortality sources are considered to far outweigh natural mortality sources. There is no evidence to support the notion that turtles interacting with pound nets (or other fisheries gear) are genetically weakened and predisposed to incidental capture. As direct and indirect impacts to sea turtles continue through, for example, habitat destruction, marine debris and pollution, and incidental take in fisheries, dredging, and power plant operations, it remains necessary to attempt to recover and rehabilitate those sea turtles that may be able to be saved. Sea turtle populations have not yet

recovered, and as such, NMFS has a statutory obligation to manage and protect these species. Reduction of mortality from anthropogenic sources is necessary to achieve recovery of these species.

Comments Related to Economic and Social Impact Assessment:

Comment 21: Eleven comments were received recommending that NMFS work with the industry on this issue and develop and test pound net leader modifications.

Response: On September 3, 2003, VMRC convened a meeting with NMFS, representatives from the pound net industry, VIMS, the Virginia Marine Science Museum, and the Virginia Department of Game and Inland Fisheries, to discuss the 2002 and 2003 pound net leader monitoring results, high spring sea turtle strandings, and potential measures to reduce sea turtle interactions with pound net gear. At this meeting, NMFS expressed its desire to work with the industry to develop gear modification solutions and requested ideas on potential leader configurations.

NMFS has an effort underway, in conjunction with industry participants, to develop and test an alternative leader design along the Eastern shore during the spring of 2004. This alternative leader design is the non-preferred alternative 5 considered in the EA, but was not able to be fully analyzed with respect to benefits to sea turtles because of the lack of data. After monitoring and analyzing the results of this study, it will be determined if the modification is effective at reducing sea turtle capture, while retaining an acceptable level of target catch, or if additional research is necessary.

Additionally, NMFS has partnered with the National Fish and Wildlife Foundation to establish a fishing gear mini-grant program for sea turtles that is aimed at working with industry (and other interested public stakeholders) to promote research, development, and testing for alternative leader designs in the Virginia pound net fishery. Proposals were due on April 15 and funding decisions are expected to be made by July 15, 2004.

While research is ongoing and NMFS is committed to pursuing a gear modification solution for this fishery, it remains necessary to implement additional restrictions on the Virginia pound net fishery at this time due to the documented takes in leaders in compliance with the 2002 interim final rule and continuing levels of sea turtle mortality in Virginia waters.

Comment 22: Thirteen commenters expressed their concern with the high

economic impacts to fishermen from this proposed action, and one of these commenters believed that the economic impacts were underestimated and that economic burden from the proposed action would prohibit fishermen from fishing pound nets year round. Four of the 13 commenters recommended compensation to the fishermen that do not fish this season.

Response: NMFS used the best available information to estimate the economic costs to the pound net fishery. The overall economic impact may be considered underestimated since indirect economic impacts were not assessed. For example, processing plants or fish houses may be affected indirectly by the management measures imposed on this fishery.

NMFS only estimated the direct economic impacts, which are the impacts on the harvester. In the economic analysis of direct impacts, averages are reported, and an average may not reflect an individual's actual position. That is, what an individual actually earned in revenues may be less or more than the reported average. Also note the reported coefficient of variation (CV) for the anticipated revenue loss of \$40,474 under the proposed rule was 1.08 percent (See Table 5.1.2.6 in the EA). The CV is equal to the standard deviation divided by the mean (i.e., 1.08 percent = [$\$43,712/\$40,474$]). That is, given a standard deviation of \$43,712, some harvesters may have earned as much as \$127,024 (=mean+2*standard deviation=\$40,474+2*($\$43,712$)) in the same area and during the same time period. It is the average revenue per harvester NMFS reports along with the statistical variation (reported in a CV).

Industry losses were overestimated. The total number of harvesters in the lower portion of the Virginia Chesapeake Bay was biased up by two to three harvesters. That is, these two or three harvesters can modify their leader mesh size versus remove their leaders. This results in industry losses being overestimated.

In summary, total economic impacts may be underestimated since indirect economic impacts were not included. Direct impacts on the individual were not over or underestimated, as averages were reported. Direct industry impacts were overestimated. This response refers to the economic impacts associated with the proposed rule, as the proposed rule is what was commented upon. However, with this final rule, the economic impacts to the pound net fishery are reduced as compared to the proposed rule. The economic impacts of this final rule are smaller than those evaluated for the

proposed rule. Fewer nets are affected due to the smaller closure area and leader mesh size outside the leader prohibited area is not further restricted. With this final rule, annual revenues per harvester would be reduced by 14.7 percent to 29.4 percent, depending on how many nets the harvesters set. Industry revenues would be reduced by 7.3 percent (= \$0.19M/\$2.6M). Without authorization from Congress, NMFS cannot provide compensation to industry. For details on how the reductions in revenues were calculated, refer to Sections 5.1.2 and 5.8.2 in the EA. Virginia's 2002 landings data indicated 31 harvesters (Table 5.1.2.3 in EA) landed fish from May 6 to July 15, and there were 53 harvesters that fished year round. Excluding the May 6 to July 15 time period in 2002, 16 harvesters fished in the lower bay and earned revenues of \$48,126 (CV=1.22). This implies there were six harvesters in the lower bay that did not fish from May 6 to July 15 in 2002. Therefore, some harvesters fishing pound nets do survive from an economic perspective by harvesting outside the proposed rule time period. However, NMFS does not have any information as to whether these six harvesters have alternative supplementary sources of income.

Comment 23: Six commenters expressed concern with the delay in publishing the proposed regulations, especially as the industry begins planning for the next fishing season early in the calendar year.

Response: NMFS has been working to alleviate the impacts of the Virginia pound net fishery on sea turtles as expeditiously as possible, in order to give the fishermen advance notification and ensure measures are in place before the historical period of high strandings. NMFS recognizes that the industry begins planning for the next fishing season in approximately December or January and is sensitive to fishermen's time constraints required to outfit their gear with mesh in compliance with required measures. NMFS issued the proposed rule as soon as possible after taking the necessary time to acquire and analyze the available data, explore the management alternatives, and prepare and review the necessary documents. Similarly, NMFS issued this final rule as soon as possible after thoroughly reviewing and considering public comments and determining if modifications to the proposed rule were necessary.

Comment 24: One commenter felt that the timeframe of the restrictions was too long and that fishing would be inappropriately curtailed when water

temperatures were too cold for sea turtles.

Response: NMFS believes that, given the available information, the time period for the pound net restrictions is appropriate. From 1994 to 2003, the average date of the first reported stranding in Virginia was May 13. However, sea turtle mortality would have occurred before the animals stranded on Virginia beaches. In order for the proposed pound net restrictions to reduce sea turtle interactions with pound net leaders, the proposed measures should go into effect at least 1 week prior to the stranding commencement date, or on May 6 each year. Implementing protective measures by May 6 would ensure they are in place at the time when sea turtles are expected to be in the Chesapeake Bay and are becoming vulnerable to mortality sources.

Based on historical Sea Turtle Stranding and Salvage Network (STSSN) stranding data, typically the peak of Virginia strandings has been from mid-May to mid-June. However, the stranding data show that the peak can occur earlier and later. For instance, in 2003, the stranding peak occurred during the last two weeks of June and strandings remained consistent through the second week of July (e.g., 48 sea turtles stranded from July 1–15, 2003). The 2003 stranding peak was 10–15 days later than in 2001 and 2002 (Swingle and Barco, 2003). Given that sea turtle presence in the Chesapeake Bay is dependent upon water temperature, which makes the stranding peak somewhat variable, it is important to ensure sea turtles are protected during the period of apparent vulnerability (as indicated by elevated strandings). While there is some concern that entanglements could continue until the end of July or throughout the sea turtle residency period in the Chesapeake Bay, based upon the available data on sea turtle entanglements, impingements, and stranding patterns, the greatest potential for sea turtles to interact with pound net leaders occurs during May and June, and extends into the first half of July. In some years the peak period of high strandings may be shorter than the time period addressed by this final rule, but historically, high sea turtle strandings have been documented throughout the proposed time period of the leader restrictions. Implementation of the gear restrictions from May 6 to July 15 will account for stranding peak variability among years and is expected to minimize the occurrence of sea turtle takes in the pound net fishery in the

spring and, thus, reduce the strandings that occur from this gear type.

While monitoring surface water temperature and implementing restrictions based on reaching a pre-designated water temperature may account for seasonal variability, enacting regulations based upon real time water temperature is impractical due to the amount of time required for the agency to implement and for fishermen to comply with the regulations, and the potential variability of water temperature within different locations in the Chesapeake Bay and within the water column. NMFS has considered historical surface water temperatures (not real time monitoring) in establishing previous area closures. Real time monitoring of water temperature as a trigger for regulations is not practical for this situation, nor is it appropriate given the predictable time period of annual spring strandings in Virginia. Further, NMFS believes that a consistent effective date better enables industry to plan its fishing activities, as fishermen would know in advance specifically when the restrictions would apply.

Changes From the Proposed Rule

Based upon public comments received, NMFS has determined that several modifications to the measures included in the proposed rule are warranted. Specifically, the area in the southern portion of the Chesapeake Bay where all pound net leaders are prohibited has been reduced, and the nearshore boundary to which the prohibition applies has been moved from the beach to offshore, excluding those nets set with the inland end of the leader 10 horizontal feet (3 m) or less from the mean low water line. This modification was deemed appropriate given public comments noting that there is a difference between the nearshore and offshore nets, and that this difference may impact sea turtle interaction rates, in particular the occurrence of impingements. As noted in the response to Comment 11, NMFS had originally considered the environmental conditions in the locations where the offshore and nearshore nets are set to be similar, based upon reports from NMFS observers and general understanding of the currents in the Chesapeake Bay (e.g., strong along the Eastern shore near the mouth of the Chesapeake Bay). Given the public comments indicating that the currents and take conditions are different between offshore and nearshore nets, NMFS considered those potential differences when reanalyzing the take information. The data support

this modification, in that in 2002 and 2003, offshore nets accounted for all of the observed impingements ($n=14$) and eight of the nine observed entanglements. One dead sea turtle was observed entangled in a nearshore 8-inch (20.3-cm) stretched mesh leader along the Eastern shore. The difference in takes between the offshore and nearshore nets is statistically significant with a chi-square value of 3.841 and $p<0.01$. In the lower Chesapeake Bay (encompassing the proposed leader prohibited area), approximately 60 percent (13 of 22) of the active pound nets surveyed in 2003 were nearshore nets. In 2002 and 2003, there were 345 surveys of nearshore nets and 480 surveys of offshore nets throughout the Virginia Chesapeake Bay, and 13 surveys did not specify the location. NMFS recognizes that the best available information suggests that the boundary of the leader prohibited area should be modified to account for this distinction between the effects of offshore and nearshore nets on listed sea turtles.

Additionally, NMFS has determined that this final rule should not change the restricted leader mesh size outside the leader prohibited area from 12 inches (30.5 cm) to 8 inches (20.3 cm) stretched mesh. Based upon additional analysis on impingement to entanglement ratios by NMFS, it appears that restricting mesh size to less than 8 inches (20.3 cm) stretched mesh would not necessarily provide the anticipated conservation benefit to sea turtles. In addition to mesh size, the frequency of sea turtle takes may be a function of where the pound nets are set, with pound nets set in certain areas having a higher potential of takes for a variety of reasons, such as depth of water, current velocity, and proximity to certain environmental characteristics or optimal foraging grounds. Additional analyses, and perhaps data collection, is planned to be completed that may provide insights into the relationship between mesh size and sea turtle interactions. At this time, the mesh size threshold that would prevent sea turtle entanglements cannot be determined for mesh sizes below 12 inches (30.5 cm). Hence, at this time NMFS is not making an additional modification to leader mesh size and is retaining the mesh size restriction included in the 2002 interim final rule, specifically the restriction of leaders with greater than or equal to 12 inches (30.5 cm) stretched mesh (as well as leaders with stringers), outside the leader prohibited area. While some takes may still occur in less than 12 inches (30.5 cm) stretched mesh, retaining this mesh size restriction

should still provide a conservation benefit to sea turtles (Bellmund *et al.*, 1987).

This final rule also includes the contains the framework mechanism that was a component of the 2002 interim final rule, and of the status quo alternative included and analyzed in the EA. This mechanism enables NMFS to make changes to the restrictions based upon new information, and extend the effective date of the restrictions until July 30 on an expedited basis. This final rule does not reduce the allowable leader stretched mesh size to less than 8 inches (20.3 cm) as proposed, for reasons identified previously. NMFS intends to continue to monitor fisheries active in the Virginia Chesapeake Bay and ocean waters, including pound net leaders with a stretched mesh size measuring less than 12 inches (30.5 cm) outside the leader prohibited area. Retaining this framework mechanism is necessary to respond to any new information on the interactions between sea turtles and pound nets and ensure that sea turtles can be protected from additional take should monitoring document the entanglement of a live or dead sea turtle outside the leader prohibited area. The framework mechanism was excluded from the proposed rule due to difficulties experienced with enacting regulations on a real time basis. NMFS recognizes that delays have been experienced with the framework mechanism, as observed in 2003. To alleviate some of the temporal delays associated with the issuance of a framework measure, NMFS will prepare portions of the required documents ahead of time, in the event that a mid-season framework action is necessary.

In the proposed rule, NMFS stated that the purpose of the action was to prevent sea turtle entanglement in and impingement on pound net gear. NMFS continues to believe that sea turtles will be protected by this final rule, and that sea turtle entanglements in and impingements on pound net leaders will be reduced. However, this discussion of the final rule has noted that the goal of the action is to minimize or reduce sea turtle interactions with pound net gear, because sea turtle entanglements, and possibly impingements, may still occur in leaders outside the leader prohibited area. As noted previously, all documented sea turtle interactions, except one entanglement in an 8-inch (20.3-cm) stretched mesh leader, have occurred inside the leader prohibited area. It is believed that the measures in the final rule will be protective of sea turtles and reduce takes in this fishery, given that leaders are prohibited in the

area with most of the documented sea turtle takes. Given this information, with the recognition that NMFS is continuing to collect information on sea turtle and pound net interactions, the purpose of this action is to reduce future sea turtle entanglements in and impingements on pound net gear.

This final rule corrects an item related to year-round reporting that was inadvertently deleted in the proposed rule. The preamble to the proposed rule noted that all Virginia pound net fishermen would still be required to report all sea turtle interactions (e.g., dead or alive; entangled, impinged, or floated into their net) in any part of their pound net gear (e.g., pound, heart, or leader) to NMFS within 24 hours of returning from the trip in which the take was documented. However, the proposed regulatory text relating to the reporting of captured dead or injured sea turtles was inadvertently deleted and must be reinserted.

NMFS has also included in this final rule geographical boundaries for the leader mesh size restrictions in the Great Wicomico River and the Piankatank River, based upon a public comment requesting that the geographical areas in those Western Chesapeake Bay tributaries be better defined. This modification is for clarification purposes only and does not change the biological, economic, or social analysis included in the EA.

The final rule clarifies that this action adds a new exception to prohibitions on the take of threatened sea turtles, something that was not explicitly noted in the title of the proposed rule. The prohibitions against taking in 50 CFR 223.205(a) do not apply to the incidental take of any member of a threatened species of sea turtle during fishing or scientific research activities, to the extent that those involved are in compliance with all applicable requirements of 50 CFR 223.206(d). By adding the prohibitions and restrictions on leaders in the Virginia Chesapeake Bay to 50 CFR 223.206(d), this final rule adds a new exception and modifies the previous pound net related exception to the prohibitions on take of threatened sea turtles. NMFS has changed the title of this final rule to more accurately reflect what this rule entails, including the exception to the prohibitions on take.

Classification

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

The AA finds good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effective date of this final rule.

Such a delay would be contrary to the public interest because sea turtles are anticipated to occur in Virginia waters in May, during the 30-day delay period. Sea turtles are found to occur in water temperatures of 11° C and warmer. Analysis conducted by the NMFS Southeast Fisheries Science Center found that in week 17 (April 23 to April 29), week 18 (April 30 to May 6), and week 19 (May 7 to May 13), approximately 80 percent, 85 percent, and 90 percent, respectively, of the area encompassing the mouth of the Chesapeake Bay (from the COLREGS line to the 20-m (65.6-ft) depth contour) contained sea surface temperatures of 11° C and warmer (NOAA Fisheries, unpub. data, 2003). Data from 1993 to 2002 were included in the analysis. This indicates that water temperatures around the mouth of the Chesapeake Bay are well within sea turtles' preferred temperature range in late April and early May. There is no information to suggest that the water temperatures this year would be notably different than in previous years. As such, sea turtles are likely to be present in the Virginia Chesapeake Bay during the 30-day delay period, and at this time, these turtles would likely be subject to entanglement and impingement in pound net leaders and potential subsequent mortality.

NMFS has prepared a final regulatory flexibility analysis that describes the economic impact this final rule would have on small entities. A summary of the analysis follows:

The fishery affected by this final rule is the Virginia pound net fishery in the Chesapeake Bay. The final rule prohibits all offshore pound net leaders in a portion of the southern Chesapeake Bay, and retains the prohibition of leaders with stretched mesh greater than or equal to 12 inches (30.5 cm) and leaders with stringers in the remainder of the Virginia Chesapeake Bay, from May 6 to July 15 each year. Non-preferred alternative 1 would prohibit all pound net leaders in a portion of the southern Chesapeake Bay, and prohibit leaders with stretched mesh greater than or equal to 8 inches (20.3 cm) and leaders with stringers in the remainder of the Virginia Chesapeake Bay, from May 6 to June 30. Non-preferred alternative 2 would prohibit pound net leaders with 8 inches (20.3 cm) and greater stretched mesh, as well as leaders with stringers, in the Virginia Chesapeake Bay from May 6 to July 15. Non-preferred alternative 3 is similar to the non-preferred alternative 1, except that the pound and heart, in addition to the leader, must also be removed in a portion of the southern Chesapeake Bay,

and the time frame of the restrictions would be from May 6 to July 15 each year. Non-preferred alternative 4 would prohibit all pound net leaders from May 6 to July 15 in the Virginia Chesapeake Bay. In addition to the 8 inches (20.3 cm) and greater mesh size restrictions in a portion of the Virginia Chesapeake Bay, non-preferred alternative 5 would modify the pound net leader configuration in a portion of the southern Chesapeake Bay so that the mesh height would be restricted to one-third the depth of the water, the mesh would be required to be less than 8 inches (20.3 cm) and held with ropes 3/8 inches (0.95 cm) or greater in diameter strung vertically a minimum of every 2 feet (61 cm) and attached to a top line. Non-preferred alternative 6 includes the measures in the proposed rule, namely a prohibition of all pound net leaders in a portion of the southern Chesapeake Bay, and a prohibition of leaders with stretched mesh greater than or equal to 8 inches (20.3 cm) and leaders with stringers in the remainder of the Virginia Chesapeake Bay, from May 6 to July 15.

According to the 2002 VMRC data, there are 31 harvesters actively fishing pound nets from May 6 to July 15, with 10 harvesters located in the lower portion of the Virginia Chesapeake Bay and 21 harvesters located in the upper portion of the Virginia Chesapeake Bay. These 31 harvesters fish approximately 40 pound nets in the upper portion of the Virginia Chesapeake Bay (=21 harvesters x 1.9 pound nets/harvester) and 30 pound nets in the lower portion of the Virginia Chesapeake Bay (=10 harvesters x 3.0 pound nets/harvester). Based on 2000 to 2002 data, annual landings per harvester were 280,996 pounds (127,457 kg) in the upper portion of the Virginia Chesapeake Bay and 257,491 pounds (116,795 kg) in the lower portion of the Virginia Chesapeake Bay. Annual average revenues per harvester were \$64,483 (CV=0.73) and \$105,298 (CV=0.91) in the upper and lower region, respectively. From May 6 to July 15, landings per harvester were 96,946 pounds (43,973 kg) in the upper region and 95,380 pounds (43,263 kg) in the lower region. Estimated revenues per harvester were \$18,102 (CV=0.88) and \$40,474 (CV=1.08) in the upper and lower region, respectively.

Of the 31 harvesters, 33 percent of the harvesters (=10 located in the upper region +10 located in the lower region)/31 total harvesters) fishing from May 6 to July 15 would be affected by this action. Approximately 12 pound nets in total would be affected by this action,

all found in the lower portion of the Virginia Chesapeake Bay.

In the upper bay region, five of the seven alternatives, not counting the "no action" alternative, are the same. This final rule does not impose additional requirements on those leaders found in the upper bay region, so the revenue reductions would be zero. The non-preferred alternatives 1, 2, 3, 5, and 6 would require the leader mesh to be less than 8 inches (20.3 cm). In the upper portion of the Virginia Chesapeake Bay, two potential responses to the leader mesh size restrictions would be either choosing to not fish or switching to a smaller leader mesh size during the restricted period. If harvesters choose not to fish, their revenues decrease by 15.1 percent to 17.1 percent (depending on the time frame of the restrictions), since they incur revenue losses and the cost of removing their gear from the water. If a harvester switches to a smaller mesh leader, his or her revenues would be reduced by 8.4 percent. For purposes of this analysis, we assumed the harvesters will modify their gear since they want to minimize their economic loss. Therefore, in the upper bay region, annual revenues may be reduced by a low of 8.4 percent per harvester under non-preferred alternatives 1, 2, 3, 5, and 6, and 4 harvesters would be affected. Under non-preferred alternative 4, all leaders must be removed from the Virginia Chesapeake Bay. This alternative would impact all 21 harvesters in the upper region, and annual revenues per harvester would be reduced by 33.5 percent.

In the lower portion of the Virginia Chesapeake Bay where all offshore leaders are prohibited under the final rule, management actions vary between alternatives. Under all of the alternatives, all 10 harvesters would be impacted. With this final rule, annual revenues per harvester would be reduced by 14.7 percent to 29.4 percent, depending on how many nets the harvesters set. The economic impact under non-preferred alternative 1 would be more compared to the final action (34.5 percent reduction in annual revenues versus a maximum of 29.4 percent), because more nets would be impacted. The impact under the non-preferred alternative 3 would be greater than this final rule (50.3 percent reduction in annual revenues versus a maximum of 29.4 percent), because additional labor costs would be incurred to remove the heart and pound in addition to the leader and more nets would be affected. The impacts of non-preferred alternative 4 and non-preferred alternative 6 are the same, and

annual revenues per harvester would be reduced by 43.2 percent. Reductions in annual revenues per harvester would be less under non-preferred alternatives 2 and 5 in comparison to the final rule, since these non-preferred alternatives would allow harvesters to modify their gear and continue to fish. In the lower bay area, the non-preferred alternative 2 would reduce annual revenues per harvester by 8.6 percent to 12.1 percent, depending on how many nets they set. Under non-preferred alternative 5, annual revenues per harvester would be reduced by 12.1 percent. The status quo would not have economic consequences, at least in the short term.

Annual industry revenues are \$2.6 million for the pound net fishery. Under the final rule, industry revenues would be reduced by 7.3 percent (=\$0.19M/\$2.6M). Under non-preferred alternatives 1, 2, 3, 5, and 6, industry revenues would be reduced by 14.8 percent, 4.9 percent, 21.2 percent, 5.8 percent, and 18.3 percent, respectively. With the preceding five alternatives, 14 of 31 harvesters would be affected by the management actions. Under non-preferred alternative 4, all harvesters would be affected and forgone industry revenues would be reduced by 34.9 percent. Again, these numbers assume fishermen would switch to a smaller mesh leader and continue to fish in those areas with leader mesh size restrictions, instead of removing their leaders entirely. Non-preferred alternatives 2 and 5, although less costly to the industry, were not chosen as the preferred alternative because they cannot be evaluated for benefit to conservation of sea turtles. At this point in time, we are unable to determine whether leader mesh sizes less than 8 inches (20.3 cm) have a different catch rate than leaders with mesh between 8 and 12 inches (20.3 and 30.5 cm). As such, looking strictly at a mesh size restriction, non-preferred alternative 2 would not necessarily afford adequate protection for sea turtles in the lower Chesapeake Bay area where observed sea turtle interactions have been the highest. Non-preferred alternative 5 was rejected because it consisted of a gear modification that is currently untested as a means to reduce sea turtle interactions.

This action does not contain new reporting or record keeping requirements.

This final rule does not duplicate, overlap or conflict with other Federal rules.

Thirteen comments were received and addressed (see *Comments Related to Economic and Social Impact*

Assessment) on the initial regulatory flexibility analysis.

A formal consultation pursuant to section 7 of the ESA was conducted on this action. The Biological Opinion on this action concluded that the operation of the Virginia pound net fishery with NMFS' sea turtle conservation measures may adversely affect but is not likely to jeopardize the continued existence of the loggerhead, leatherback, Kemp's ridley, green, or hawksbill sea turtle, or shortnose sturgeon. An incidental take statement was issued for this action. Copies of this Biological Opinion are available by contacting (978) 281-9328 or FAX (978) 281-9394.

This final rule contains policies with federalism implications that were sufficient to warrant preparation of a federalism assessment under Executive Order 13132. Accordingly, the Acting Assistant Secretary for Legislative and Intergovernmental Affairs provided notice of the proposed action to the Governor of Virginia on March 3, 2004. No comments on the federalism implications of the proposed action were received in response to the March 2004 letter.

Dated: April 29, 2004.

Rebecca Lent,

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

List of Subjects

50 CFR Part 222

Administrative practice and procedure, Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements.

50 CFR Part 223

Administrative practice and procedure, Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 50 CFR parts 222 and 223 are amended as follows:

PART 222—GENERAL ENDANGERED AND THREATENED MARINE SPECIES

■ 1. The authority citation for 50 CFR part 222 continues to read as follows:

Authority: 16 U.S.C. 1631 *et seq.*

■ 2. In § 222.102, the definition of "Pound net leader" is revised to read as follows:

§ 222.102 Definitions.

* * * * *

Pound net leader means a long straight net that directs the fish offshore towards the pound, an enclosure that captures the fish. Some pound net

leaders are all mesh, while others have stringers and mesh. Stringers are vertical lines in a pound net leader that are spaced a certain distance apart and are not crossed by horizontal lines to form mesh. An offshore pound net leader refers to a leader with the inland end set greater than 10 horizontal feet (3 m) from the mean low water line. A nearshore pound net leader refers to a leader with the inland end set 10 horizontal feet (3 m) or less from the mean low water line.

* * * * *

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

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

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

■ 2. In § 223.205, paragraph (b)(15) is revised to read as follows:

§ 223.205 Sea turtles.

* * * * *

(b) * * *

(15) Fail to comply with the restrictions set forth in § 223.206(d)(10) regarding pound net leaders; or

* * * * *

■ 3. In § 223.206, paragraph (d)(2)(iv) is removed; (d) introductory text and (d)(2) paragraph heading are revised; and paragraph (d)(10) is added to read as follows:

§ 223.206 Exemptions to prohibitions relating to sea turtles.

* * * * *

(d) *Exception for incidental taking.*

The prohibitions against taking in § 223.205(a) do not apply to the incidental take of any member of a threatened species of sea turtle (i.e., a take not directed towards such member) during fishing or scientific research activities, to the extent that those involved are in compliance with all applicable requirements of paragraphs (d)(1) through (d)(10) of this section, or in compliance with the terms and conditions of an incidental take permit issued pursuant to paragraph (a)(2) of this section.

* * * * *

(2) *Gear requirements for trawlers—**

* * * * *

(10) *Restrictions applicable to pound nets in Virginia—*(i) Area closed to use of pound net leaders. During the time period of May 6 through July 15 each year, any offshore pound net leader, as defined in the definition for pound net leader in § 222.102, in the Virginia waters of the mainstem Chesapeake Bay, south of 37° 19.0' N. lat. and west of 76°

13.0' W. long., and all waters south of 37° 13.0' N. lat. to the Chesapeake Bay Bridge Tunnel (extending from approximately 37° 05' N. lat., 75° 59' W. long. to 36° 55' N. lat., 76° 08' W. long.) at the mouth of the Chesapeake Bay, and the portion of the James River downstream of the Hampton Roads Bridge Tunnel (I-64; approximately 36° 59.55' N. lat., 76° 18.64' W. long.) and the York River downstream of the Coleman Memorial Bridge (Route 17; approximately 37° 14.55' N. lat, 76° 30.40' W. long.) must be removed from the water so that no part of the leader contacts the water. All pound net leaders must be removed from the waters described in this subparagraph prior to May 6 and may not be reset until July 16.

(ii) *Area with pound net leader mesh size restrictions.* During the time period of May 6 to July 15 each year, any pound net leader in the Virginia waters of the Chesapeake Bay outside the area described in (i), extending to the Maryland-Virginia State line (approximately 37° 55' N. lat., 75° 55' W. long.), the Great Wicomico River downstream of the Jessie Dupont Memorial Highway Bridge (Route 200; approximately 37° 50.84' N. lat, 76° 22.09' W. long.), the Rappahannock River downstream of the Robert Opie Norris Jr. Bridge (Route 3; approximately 37° 37.44' N. lat, 76° 25.40' W. long.), and the Piankatank River downstream of the Route 3 Bridge (approximately 37° 30.62' N. lat, 76° 25.19' W. long.) to the COLREGS line at the mouth of the Chesapeake Bay, must have only mesh size less than 12 inches (30.5 cm) stretched mesh and may not employ stringers. South of 37° 19.0 N. lat. and west of 76° 13.0' W. long., and all waters south of 37° 13.0' N. lat. to the Chesapeake Bay Bridge Tunnel (extending from approximately 37° 05' N. lat., 75° 59' W. long. to 36° 55' N. lat., 76° 08' W. long.), the leader restriction applies to nearshore pound nets, as defined in the definition for pound net leader in § 222.102. Any pound net leader with stretched mesh measuring 12 inches (30.5 cm) or greater or any pound net leader with stringers must be removed from the waters described in this paragraph (d) prior to May 6 and may not be reset until July 16.

(iii) *Reporting requirement.* At any time during the year, if a sea turtle is taken live and uninjured in a pound net operation, the operator of the vessel must report the incident to the NMFS Northeast Regional Office, (978) 281-9328 or fax (978) 281-9394, within 24 hours of returning from the trip in which the incidental take was discovered. The report shall include a

description of the sea turtles condition at the time of release and the measures taken as required in paragraph (d)(1) of this section. At any time during the year, if a sea turtle is taken in a pound net operation, and is determined to be injured, or if a turtle is captured dead, the operator of the vessel shall immediately notify NMFS Northeast Regional Office and the appropriate rehabilitation or stranding network, as determined by NMFS Northeast Regional Office.

(iv) *Monitoring.* Owners or operators of pound net fishing operations must allow access to the pound net gear so it may be observed by a NMFS-approved observer if requested by the Northeast Regional Administrator. All NMFS-approved observers will report any violations of this section, or other applicable regulations and laws. Information collected by observers may be used for law enforcement purposes.

(v) *Expedited modification of restrictions and effective dates.* From May 6 to July 15 of each year, if NMFS receives information that one sea turtle is entangled alive or that one sea turtle is entangled dead, and NMFS determines that the entanglement contributed to its death, in pound net leaders that are in compliance with the restrictions described in paragraph (d)(10)(ii) of this section, NMFS may issue a final rule modifying the restrictions on pound net leaders as necessary to protect threatened sea turtles. Such modifications may include, but are not limited to, reducing the maximum allowable mesh size of pound net leaders and prohibiting the use of pound net leaders regardless of mesh size. In addition, if information indicates that a significant level of sea turtle entanglements, impingements or strandings will likely continue beyond July 15, NMFS may issue a final rule extending the effective date of the restrictions, including any additional restrictions imposed under this subparagraph, for an additional 15 days, but not beyond July 30, to protect threatened sea turtles.

[FR Doc. 04-10207 Filed 5-4-04; 8:45 am]

BILLING CODE 3510-22-S

effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before February 17, 2009.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 7845, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at dHynek@doc.gov).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Suzanne Kohin, (858) 546-7104 or Suzanne.Kohin@noaa.gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

The International Billfish Angler Survey began in 1969 and is an integral part of the Billfish Research Program at NOAA's Southwest Fisheries Science Center (SWFSC). The Survey tracks recreational angler fishing catch and effort for billfish in the Pacific and Indian Oceans in support of the Pacific and Western Pacific Fishery Management Councils, authorized under the Magnuson-Stevens Fishery Management and Conservation Act. The data are used by scientists and fishery managers to assist with assessing the status of billfish stocks. The Survey is intended for anglers cooperating in the Billfish Program and is entirely voluntary. The National Marine Fisheries Service collects fishing catch and effort information for most domestic and foreign fisheries. This survey is specific to recreational anglers fishing for Istiophorid billfish in the Pacific and Indian Oceans; as such it provides the only estimates of catch per unit of effort for recreational billfish fishing in those areas.

II. Method of Collection

The paper form is sent to anglers with recent participation in the SWFSC Billfish Research Program and is also available for downloading on the SWFSC Billfish Program website. Completed forms are submitted by mail.

III. Data

OMB Number: 0648-0020.
Form Number: NOAA Form 88-10.
Type of Review: Regular submission.
Affected public: Individuals or households.

Estimated Number of Respondents: 1,000.

Estimated Time Per Response: 5 minutes.

Estimated Total Annual Burden Hours: 83.

Estimated Total Annual Cost to Public: \$0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and 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: December 12, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8-29912 Filed 12-16-08; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Reporting of Sea Turtle Incidental Take in Virginia Chesapeake Bay Pound Net Operations

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before February 17, 2009.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 7845, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at dHynek@doc.gov).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Mary Colligan, (978) 281-9116 or Mary.A.Colligan@noaa.gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

This action would continue the reporting measure requiring all Virginia Chesapeake Bay pound net fishermen to report interactions with endangered and threatened sea turtles, found both live and dead, in their pound net operations. When a live or dead sea turtle is discovered during a pound net trip, the fisherman is required to report the incidental take to National Marine Fisheries Service and, if necessary, the appropriate rehabilitation and stranding network. This information will be used to monitor the level of incidental take in the state managed Virginia pound net fishery and ensure that the seasonal pound net leader restrictions (50 CFR 223.206(d)(10)) are adequately protecting listed sea turtles.

II. Method of Collection

Reports may be made either by telephone or fax.

III. Data

OMB Control Number: 0648-0470.
Form Number: None.
Type of Review: Regular submission.
Affected Public: Individuals or households.

Estimated Number of Respondents: 41.

Estimated Time Per Response: 10 minutes.

Estimated Total Annual Burden Hours: 102 hours.

Estimated Total Annual Cost to Public: \$1,827.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and 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: December 12, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8-29911 Filed 12-16-08; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF EDUCATION

[CFDA No. 84.116M]

Fund for the Improvement of Postsecondary Education (FIPSE)—Special Focus Competition: U.S.-Brazil Higher Education Consortia Program

ACTION: Extension; Notice extending the deadline dates.

SUMMARY: We extend the *Deadline for Transmittal of Applications* and *Deadline for Intergovernmental Review* dates in the notice published on November 13, 2008 (73 FR 67137).

SUPPLEMENTARY INFORMATION: On November 13, 2008, we published a notice in the **Federal Register** (73 FR 67137) inviting applications for new awards for fiscal year (FY) 2009 for the Fund for the Improvement of Postsecondary Education (FIPSE)—Special Focus Competition: U.S.-Brazil Higher Education Consortia Program. The *Deadline for Transmittal of Applications* date (as published on pages 67137 and 67138) is extended to January 22, 2009 and the *Deadline for Intergovernmental Review* date (as published on pages 67137 and 67138) is extended to March 23, 2009. All other requirements and conditions stated in the notice remain the same.

FOR FURTHER INFORMATION CONTACT: Sarah T. Beaton, Fund for the Improvement of Postsecondary Education, U.S.-Brazil Higher Education Consortia Program, 1990 K Street, NW., room 6154, Washington, DC 20006-8544. Telephone: (202) 502-7621.

If you use a TDD, call the FRS, toll free, at 1-800-877-8339.

Individuals with disabilities can obtain this document in an alternative format (e.g., braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF), on the Internet at the following site: <http://www.ed.gov/news/fedregister>.

To use PDF, you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1-888-293-6498; or in the Washington, DC, area at (202) 512-1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: <http://www.gpoaccess.gov/nara/index.html>.

Dated: December 12, 2008.

Cheryl A. Oldham,

Acting Assistant Secretary for Postsecondary Education.

[FR Doc. E8-29981 Filed 12-16-08; 8:45 am]

BILLING CODE 4000-01-P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Paducah

AGENCY: Department of Energy (DOE)

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Paducah. The Federal Advisory Committee Act (Pub. L. No. 92-463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Thursday, January 15, 2009. 6 p.m.

ADDRESSES: Barkley Centre, 111 Memorial Drive, Paducah, Kentucky 42001.

FOR FURTHER INFORMATION CONTACT: Reinhard Knerr, Deputy Designated Federal Officer, Department of Energy Paducah Site Office, Post Office Box 1410, MS-103, Paducah, Kentucky 42001, (270) 441-6825.

SUPPLEMENTARY INFORMATION: *Purpose of the Board:* The purpose of the Board is to make recommendations to DOE in the areas of environmental restoration, waste management and related activities.

Tentative Agenda:

- Call to Order, Introductions, Review of Agenda.
- Deputy Designated Federal Officer's Comments.

- Federal Coordinator's Comments.
- Liaisons' Comments.
- Presentations.
- Public Comments.
- Administrative Issues
 - Motions.
 - Recommendations.
- Final Comments.
- Adjourn.

Breaks Taken as Appropriate.

Public Participation: The meeting is open to the public. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Reinhard Knerr at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comment will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Reinhard Knerr at the address and phone number listed above. Minutes will also be available at the following Web site: <http://www.pgdpceb.org/minutes.htm>.

Issued at Washington, DC on December 11, 2008.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. E8-29923 Filed 12-16-08; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Northern New Mexico

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Northern New Mexico. The Federal Advisory Committee Act (Pub. L. No. 92-463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, January 28, 2009, 2 p.m.—8 p.m.

ADDRESSES: Holiday Inn Santa Fe, 4048 Cerrillos Road, Santa Fe, New Mexico.

FOR FURTHER INFORMATION CONTACT: Menice Santistevan, Northern New Mexico Citizens' Advisory Board