

the natural progress of the disease. Additionally, section 1113(a) of title 38, United States Code, indicates that a presumption of service connection based on manifestations of disability subsequent to service may be rebutted by affirmative evidence to the contrary or evidence to establish that such disability is due to an intercurrent disease or injury suffered after separation from service. We are revising § 3.307(d) to reflect these principles. Although *Splane* did not discuss the criteria for rebutting the presumption of aggravation, we believe that inclusion of these rebuttal standards is necessary to the implementation of that decision.

#### Administrative Procedure Act

Changes made by this final rule merely reflect the statutory requirements or the decision of the United States Court of Appeals for the Federal Circuit. Accordingly, there is a basis for dispensing with prior notice and comment and delayed effective date provisions of 5 U.S.C. 552 and 553.

#### Unfunded Mandates

The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector of \$100 million or more in any given year. This rule would have no consequential effect on State, local, or tribal governments.

#### Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3520).

#### Executive Order 12866

This document has been reviewed by the Office of Management and Budget under Executive Order 12866.

#### Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This amendment would not directly affect any small entities. Only individuals could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

#### Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program numbers are 64.109 and 64.110.

#### List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Individuals with disabilities, Pensions, Veterans.

Approved: September 9, 2002.

**Anthony J. Principi,**

*Secretary of Veterans Affairs.*

For the reasons set forth in the preamble, the Department of Veterans Affairs amends 38 CFR part 3 as follows:

#### PART 3—ADJUDICATION

##### Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A continues to read as follows:

**Authority:** 38 U.S.C. 501(a), unless otherwise noted.

2. Section 3.307 is amended by:

A. In paragraph (a) introductory text, removing “incurred in” and adding, in its place, “incurred in or aggravated by”.

B. In paragraph (c), removing the last sentence “The consideration of service incurrence provided for chronic diseases will not be interpreted to permit any presumption as to aggravation of a preservice disease or injury after discharge.”.

C. Revising paragraph (d) and the authority citation at the end of the section.

The revision reads as follows:

**§ 3.307 Presumptive service connection for chronic, tropical or prisoner-of-war related disease, or disease associated with exposure to certain herbicide agents; wartime and service on or after January 1, 1947.**

\* \* \* \* \*

(d) *Rebuttal of service incurrence or aggravation.* (1) Evidence which may be considered in rebuttal of service incurrence of a disease listed in § 3.309 will be any evidence of a nature usually accepted as competent to indicate the time of existence or inception of disease, and medical judgment will be exercised in making determinations relative to the effect of intercurrent injury or disease. The expression “affirmative evidence to the contrary” will not be taken to require a conclusive showing, but such showing as would, in sound medical reasoning and in the consideration of all evidence of record, support a conclusion that the disease was not incurred in service. As to

tropical diseases the fact that the veteran had no service in a locality having a high incidence of the disease may be considered as evidence to rebut the presumption, as may residence during the period in question in a region where the particular disease is endemic. The known incubation periods of tropical diseases should be used as a factor in rebuttal of presumptive service connection as showing inception before or after service.

(2) The presumption of aggravation provided in this section may be rebutted by affirmative evidence that the preexisting condition was not aggravated by service, which may include affirmative evidence that any increase in disability was due to an intercurrent disease or injury suffered after separation from service or evidence sufficient, under § 3.306 of this part, to show that the increase in disability was due to the natural progress of the preexisting condition.

(Authority: 38 U.S.C 1113 and 1153)

#### § 3.309 [Amended]

3. Section 3.309(a) is amended by removing “incurred in” and adding, in its place, “incurred in or aggravated by”.

[FR Doc. 02–28267 Filed 11–6–02; 8:45 am]

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#### DEPARTMENT OF COMMERCE

##### National Oceanic and Atmospheric Administration

##### 50 CFR Parts 222 and 223

[Docket No. 021031262–2262–01; I.D. 103002A]

RIN 0648–AQ56

##### Sea Turtle Conservation; Shrimp Trawling Requirements

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

**ACTION:** Temporary rule; request for comments.

**SUMMARY:** NMFS issues this temporary authorization to allow the use of limited tow times by shrimp trawlers as an alternative to the use of Turtle Excluder Devices (TEDs) in certain waters off Louisiana and Alabama. The exempted area in Louisiana consists of all the Louisiana state waters east of 92° 20' W. long. (approximately at Fresh Water Bayou in Vermilion Parish, Louisiana); Federal waters are not included. The

exempted area in Alabama consists of the inshore waters (inshore waters are landward of the COLREGS demarcation line) of Bon Secour Bay, Mobile Bay, and Mississippi Sound, south of the Intracoastal Waterway. This exemption will be in effect for 30 days and is necessary to relieve the economic hardship on shrimpers while ensuring adequate protection of threatened and endangered sea turtles.

**DATES:** This action is effective from November 1, 2002 through December 2, 2002. Comments on this action are requested, and must be received by December 2, 2002.

**ADDRESSES:** Comments on this action should be addressed to the Chief, Endangered Species Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

**FOR FURTHER INFORMATION CONTACT:** Bob Hoffman, 727-570-5312, or Barbara A. Schroeder, 301-713-1401.

**SUPPLEMENTARY INFORMATION:**

**Background**

All sea turtles that occur in U.S. waters are listed as either endangered or threatened under the Endangered Species Act of 1973 (ESA). The Kemp's ridley (*Lepidochelys kempi*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*) turtles are listed as endangered. The loggerhead (*Caretta caretta*) and green (*Chelonia mydas*) turtles are listed as threatened, except for breeding populations of green turtles in Florida and on the Pacific coast of Mexico, which are listed as endangered.

The incidental take and mortality of sea turtles as a result of trawling activities have been documented in the Gulf of Mexico and along the Atlantic Ocean seaboard. Under the ESA and its implementing regulations, taking sea turtles is prohibited, with exceptions identified in 50 CFR 223.206 and 50 CFR 224.104. The regulations require most shrimp trawlers and summer flounder trawlers operating in the southeastern United States (Atlantic Area, Gulf Area, and Summer flounder fishery-sea turtle protection area, all as defined in 50 CFR 222.102) to have a NMFS-approved TED installed in each net that is rigged for fishing to provide for the escape of sea turtles. TEDs currently approved by NMFS include single-grid hard TEDs and hooped hard TEDs conforming to a generic description, two types of special hard TEDs (the flounder TED and the Jones TED), and one type of soft TED (the Parker soft TED).

The TEDs incorporate an escape opening, usually covered by a webbing flap, that allows sea turtles to escape from trawl nets. To be approved by NMFS, a TED design must be shown to be at least 97 percent effective in excluding sea turtles during experimental TED testing (50 CFR 223.207(e)). The TED must meet generic criteria based upon certain parameters of TED design, configuration, and installation, including height and width dimensions of the TED opening through which the turtles escape. In the Atlantic Area, these requirements are currently  $\geq 35$  inches ( $\geq 89$  cm) in width and  $\geq 12$  inches ( $\geq 30$  cm) in height. In the Gulf Area, the requirements are  $\geq 32$  inches ( $\geq 81$  cm) in width and  $\geq 10$  inches ( $\geq 25$  cm) in height.

The regulations governing sea turtle take prohibitions and exemptions provide for the use of limited tow times as an alternative to the use of TEDs for vessels with certain specified characteristics or under certain special circumstances. For example, debris can clog a TED which renders the TED ineffective at catching shrimp as well as excluding turtles. The provisions of 50 CFR 223.206 (d)(3)(ii) specify that the NOAA Assistant Administrator for Fisheries (AA) may authorize compliance with tow time restrictions as an alternative to the TED requirement for up to 30 days, if the AA determines that the presence of algae, seaweed, debris, or other special environmental conditions in a particular area makes trawling with TED-equipped nets impracticable. The provisions of 50 CFR 223.206(d)(3)(i) specify the maximum tow times that may be used when tow-time limits are authorized as an alternative to the use of TEDs. The tow times may be no more than 55 minutes from April 1 through October 31 and no more than 75 minutes from November 1 through March 31 as measured from the time that the trawl doors enter the water until they are removed from the water. These tow time limits are designed to minimize the level of mortality of sea turtles that are captured by trawl nets not equipped with TEDs.

**Recent Events**

On October 10 and 23, 2002, the NMFS Southeast Regional Administrator received requests from the Secretary of the Louisiana Department of Wildlife and Fisheries (LADWF) and the Director of the Alabama Department of Conservation and Natural Resources' (ALDCNR) Marine Resources Division, respectively, to allow the use of tow times as an alternative to turtle excluder devices (TEDs) in state waters because

of excessive storm-related debris on the fishing grounds. The increase in debris on the shrimping grounds was the result of Tropical Storm Isidore and Hurricane Lili. After an investigation, the LADWF and ALDCNR determined that this debris is affecting the fishermen's ability to use TEDs effectively. Both Louisiana and Alabama have stated that their marine enforcement agencies will enforce the tow time restrictions.

NMFS gear technicians interviewed fishermen and surveyed parts of the affected areas in Louisiana and Alabama on October 23 and 24, 2002. The interviews and surveys conducted by the gear technicians and phone conversations between NMFS Southeast Region Protected Resources staff and state resource agency staffs confirmed that there are problems with debris in Louisiana from the Mississippi/Louisiana border around the mouth of the Mississippi River to approximately Fresh Water Bayou in Vermilion Parish, Louisiana and in Alabama from Bon Secour Bay to the Alabama/Mississippi border between the Intracoastal Waterway and the barrier islands.

**Special Environmental Conditions And Alternative to Required Use of TEDs**

The AA finds that debris washed into portions of state waters of Louisiana and Alabama from Tropical Storm Isidore and Hurricane Lili have created special environmental conditions that make trawling with TED-equipped nets impracticable. Therefore, the AA issues this notification to authorize the use of restricted tow times as an alternative to the use of TEDs in the state waters of Louisiana (no Federal waters are included with this authorization) from east of 92° 20' W. long. (approximately at Fresh Water Bayou, in Vermilion Parish, Louisiana) and in Alabama inshore waters (inside the COLREGS demarcation line) including Bon Secour Bay, Mobile Bay, and Mississippi Sound south of the Intracoastal Waterway. This authorization will be in effect for a period of 30 days, unless terminated earlier. Instead of the required use of TEDs, shrimp trawlers may opt to comply with the sea turtle conservation regulations found at 50 CFR 223.206(d)(3)(i) by using restricted tow times. A shrimp trawler utilizing this authorization must limit tow times to no more than 75 minutes measured from the time trawl doors enter the water until they are retrieved from the water.

The ALDCNR and LADWF are continuing to monitor the situation and will cooperate with NMFS in determining the ongoing extent of the debris problem in these areas. Moreover, the marine enforcement agencies of

these states have stated that they will enforce the restricted tow times. Ensuring compliance with tow time restrictions is critical to effective sea turtle protection, and the commitment from these agencies to enforce tow time restrictions is an important factor enabling NMFS to issue this authorization. NMFS and the respective state marine enforcement agencies will monitor the situation to ensure there is adequate protection for sea turtles in these areas and to determine whether debris in these areas continues to make TED use impracticable.

#### Continued Use of TEDs

NMFS encourages shrimp trawlers in the affected areas to continue to use TEDs if possible, even though they are authorized under this action to use restricted tow times. NMFS studies have shown that the problem of clogging by seagrass, algae or by other debris is not unique to TED-equipped nets. When fishermen trawl in problem areas, they may experience clogging with or without TEDs. A particular concern of fishermen, however, is that clogging in a TED-equipped net may hold open the turtle escape opening and increase the risk of shrimp loss. On the other hand, TEDs also help exclude certain types of debris and allow shrimpers to conduct longer tows.

NMFS' gear experts have provided several general operational recommendations to fishermen to maximize the debris exclusion ability of TEDs that may allow some fishermen to continue using TEDs without resorting to restricted tow times. To exclude debris, NMFS recommends the use of hard TEDs made of either solid rod or of hollow pipe that incorporate a bent angle at the escape opening, in a bottom-opening configuration. In addition, the installation angle of a hard TED in the trawl extension is an important performance element in excluding debris from the trawl. High installation angles can result in debris clogging the bars of the TED; NMFS recommends an installation angle of 45°51', relative to the normal horizontal flow of water through the trawl, to optimize the TED's ability to exclude turtles and debris. Furthermore, the use of accelerator funnels, which are allowable modifications to hard TEDs, is not recommended in areas with heavy amounts of debris or vegetation. Lastly, the webbing flap that is usually installed to cover the turtle escape opening may be modified to help exclude debris quickly: the webbing flap can either be cut horizontally to shorten it so that it does not overlap the frame of the TED or be slit in a fore-and-aft

direction to facilitate the exclusion of debris. The use of the leatherback modification or the double cover flap TED will also aid in debris exclusion.

All of these recommendations represent legal configurations of TEDs for shrimpers fishing in the affected areas. This action does not authorize any other departure from the TED requirements, nor does it authorize use of any TED modified in such a manner that it no longer meets the requirements for any of the TEDs approved pursuant to 50 CFR 223.207. In particular, if TEDs are installed in trawl nets, they may not be sewn shut.

#### Alternative to Required Use of TEDs; Termination

The AA, at any time, may modify the alternative conservation measures through publication in the **Federal Register**, if necessary to ensure adequate protection of endangered and threatened sea turtles. Under this procedure, the AA may modify the affected area or impose any necessary additional or more stringent measures, including more restrictive tow times or synchronized tow times, if the AA determines that the alternative authorized by this temporary rule is not sufficiently protecting turtles, as evidenced by observed lethal takes of turtles aboard shrimp trawlers, elevated sea turtle strandings, or insufficient compliance with the authorized alternative. The AA may also terminate this authorization for these same reasons, or if compliance cannot be monitored effectively, or if conditions do not make trawling with TEDs impracticable. A document will be published in the **Federal Register** announcing any additional sea turtle conservation measures or the termination of the tow time option in the affected areas. This authorization will expire automatically on December 2, 2002, unless it is explicitly extended through another notification published in the **Federal Register**.

#### Classification

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

The AA has determined that this action is necessary to respond to an emergency situation to allow more efficient fishing for shrimp, while providing adequate protection for endangered and threatened sea turtles pursuant to the ESA and applicable regulations.

Pursuant to 5 U.S.C. 553(b)(B), the AA finds that there is good cause to waive prior notice and opportunity to comment on this rule, because it is

impracticable. The AA finds that unusually high amounts of debris are creating special environmental conditions that make trawling with TED-equipped nets impracticable. The AA has determined that the use of limited tow times for the described area and time would not result in a significant impact to sea turtles. Notice and opportunity to comment are impracticable in this instance because providing notice and comment would prevent the agency from providing relief soon enough to provide the intended benefit. The public was provided with notice and an opportunity to comment on 50 CFR 223.206(d)(3)(ii) which authorizes the use of this emergency exemption.

Pursuant to 5 U.S.C. 553(d)(3), for the same reasons the AA determined that there was good cause to waive prior notice and opportunity to comment, the AA finds good cause to waive the 30-day delay in effective date. NMFS is making the rule effective November 1, 2002 through December 2, 2002.

Since prior notice and an opportunity for public comment are not required to be provided for this action by 5 U.S.C. 553, or by any other law, the analytical requirements of 5 U.S.C. 601 *et seq.* are inapplicable.

The AA prepared an Environmental Assessment (EA) for this rule. Copies of the EA are available (see **ADDRESSES**).

Dated: November 1, 2002.

**Rebecca Lent,**

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

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Parts 222 and 223

[Docket No. 021030260-2260-01; I.D. 102502A]

**RIN 0648-AQ52**

#### Sea Turtle Conservation; Shrimp Trawling Requirements

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

**ACTION:** Temporary rule; request for comments.

**SUMMARY:** NMFS issues this temporary action to allow the use of limited tow times by shrimp trawlers as an