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[FR Doc. 04-24433 Filed 11-1-04; 8:45 am]

BILLING CODE 6712-01-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[I.D 062804C]

Fisheries of the Northeastern United States; Atlantic Sea Scallop Fishery; Petition for Rulemaking

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

ACTION: Notice of decision on petition for emergency rulemaking.

SUMMARY: NMFS responds to a NMFS announces its decision not to undertake the rulemaking requested in a Petition for Rulemaking (Petition) submitted by the Fisheries Survival Fund (FSF) and the Garden State Seafood Association (GSSA) (Petitioners), that requested that that NMFS develop and implement an emergency rule pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) to require specific modifications to the fishing gear used by Atlantic sea scallop vessels fishing south of Long Island and north of Cape Hatteras from May 1 through October 15. The gear modifications requested are the installation of a chain mesh configuration ("turtle chains") in dredge gear and the installation of effective turtle excluder devices (TEDs) in trawl gear. The Petitioners proposed that these measures should be required for any Atlantic sea scallop vessel, whether fishing under a Limited Access or General Category permit, to prevent the incidental capture of sea turtles. NMFS announces that it will conduct rulemaking under the authority of the Endangered Species Act (ESA) to enact measures by May 2005 to address incidental sea turtle takes in the Atlantic sea scallop fishery. NMFS has decided not to undertake the rulemaking as an emergency rule under the Magnuson-Stevens Act because the circumstances outlined in the Petition do not justify an immediate need for a Magnuson-Stevens Act emergency rule and the Magnuson-Stevens Act is not the appropriate legal authority for adequately addressing incidental takes of sea turtles in the sea scallop fishery.

NMFS has denied the specific request made in the petition for the use of the emergency rulemaking authority provided in the Magnuson-Stevens Act. This decision is based on the determination that the circumstances outlined in the petition are not consistent with NMFS policy guidelines for the use of the emergency authority provided in the Magnuson-Stevens Act. While emergency action is not warranted under the Magnuson-Stevens Act, NMFS announces that it will conduct rulemaking under the authority of the Endangered Species Act (ESA) to enact measures by May 2005 to address incidental sea turtle takes in the Atlantic sea scallop fishery.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: On June 17, 2004, the Petitioners submitted a Petition requesting that NMFS promulgate an emergency rule pursuant to section 305(c) of the Magnuson-Stevens Act. The Petitioners asserted that sea turtle captures in the scallop fishery "represent a recently-emerging and relatively modest phenomenon." The Petitioners stated that, after increased incidental sea turtle captures were documented in 2001, the FSF began working with Dr. William DuPaul of the Virginia Institute of Marine Sciences (VIMS) and Captain Ronald Smolowitz, a scallop gear researcher, to design and test a chain configuration for the front of the scallop dredge to reduce or eliminate the catch of sea turtles in scallop dredges. The Petition referenced an interim report authored by W. DuPaul, D. Rudders, and R. Smolowitz, "Interim Report: Industry Trials of a Modified Sea Scallop Dredge to Minimize the Catch of Sea Turtles," VIMS Marine Research Report No. 2004-08 (May 2004), that described the 2 years of field trials during which turtle chains were tested. Preliminary results described in that report stated that the researcher's experimental dredge recorded no takes of sea turtles, while the control dredge recorded nine takes. The Petitioners noted that the VIMS Sea Grant Program and FSF had developed instruction cards for vessel captains, which set forth specifications for voluntary use of the turtle chains. The Petitioners requested that NMFS immediately initiate emergency rulemaking to require use of turtle chains on scallop dredges and TEDs on scallop trawl vessels from Long Island to Cape Hatteras from May 1 through October 15. NMFS published a notice of receipt of a Petition for rulemaking on

July 7, 2004 (69 FR 40850) and invited public comment for 30 days, through August 6, 2004. Subsequent to the publication of the notice of receipt, the researchers submitted a draft final version of the report submitted with the Petition (DuPaul *et al.*, 2004) to NMFS.

Reinitiation of Consultation

In addition to the information provided by the Petitioners and the public comments, which are addressed in detail below, a technical report was issued by the Northeast Fisheries Science Center (NEFSC) in August 2004 entitled, "Bycatch of Sea Turtles in the Mid-Atlantic Sea Scallop (*Placopecten magellanicus*) Dredge Fishery during 2003" (NEFSC Reference Document 04-11). The report presents an extrapolation of loggerhead sea turtle takes for the Mid-Atlantic sea scallop dredge fishery from June to November, 2003, and is based on data collected during observed scallop dredge fishing trips that occurred from Long Island, NY, to Cape Hatteras, NC, during the period June 1, 2003–November 30, 2003. In all, 630 loggerhead sea turtles are estimated to have been caught with scallop dredge gear that operated in this Mid-Atlantic region during that portion of the 2003 scallop fishing year. This represents new information regarding the capture of sea turtles in scallop dredge gear. Therefore, formal consultation pursuant to section 7 of the ESA was reinitiated on September 3, 2004, to reconsider the effects of the Atlantic sea scallop fishery on ESA-listed species.

NMFS Decision

NMFS has carefully considered the information contained in the Petition and supporting research report, the public comments, and the NEFSC reference document. While NMFS denies the specific request made in the Petition for the use of the emergency rulemaking authority provided in the Magnuson-Stevens Act, NMFS will conduct rulemaking under the authority of the ESA to enact measures by May 2005 to address incidental sea turtle takes in the Atlantic sea scallop fishery. This rulemaking will have the benefit of providing for full public participation under the Administrative Procedure Act.

This decision is based on the determination that the Magnuson-Stevens Act does not provide sufficient authority or flexibility to adequately address the sea turtle incidental take issue. Any measures developed under the Magnuson-Stevens Act are effective only in the Exclusive Economic Zone or to federally permitted vessels. As such,

Magnuson-Stevens Act regulations may not be sufficient to fully address incidental takes in state and Federal waters. Further, emergency measures under the Magnuson-Stevens Act can only be effective for up to 180 days with the option of extending such measures for up to an additional 180 days. It would then be necessary for the New England Fishery Management Council to develop permanent measures for the Atlantic sea scallop fishery in a timely fashion. Therefore, given the uncertainty of ensuring the promulgation of permanent measures in a timely fashion, and the lack of legal authority to regulate fully the incidental takes of sea turtles in state waters, emergency rulemaking under the Magnuson-Stevens Act is not appropriate to address the concerns of the Petitioners.

Furthermore, the Petitioners proposed that emergency measures should be required by fishery participants for the period May 1 through October 15. It would not be possible, even through emergency action, to prepare required analytical documents and enact the gear requirements before October 15, 2004. Also, when regulatory requirements for gear construction are involved, NMFS customarily provides a reasonable time period for the industry to obtain materials and make the modification to their gear. Therefore, upon publication of final regulations, NMFS would likely be compelled to delay the effectiveness of the measure to provide time for compliance.

There is no research currently available that demonstrates that the TEDs required in other fisheries would be equally effective in reducing sea turtle interactions with sea scallop trawl gear. Research conducted by NMFS has demonstrated that the development of effective TEDs is dependent upon many fishery-specific variables. Fishery-specific gear trials are needed in order to determine the most effective TED designs for use in sea scallop trawl nets.

Given the inappropriateness of implementing the Petitioners' request as an emergency measure under the Magnuson-Stevens Act, NMFS will instead pursue rulemaking under the ESA that will consider the promising results of the turtle chain gear study as a way to mitigate the impact of the fishery on sea turtles. By pursuing this rulemaking process, NMFS has determined that it will be possible to develop new regulations that would take effect in early May 2005 without jeopardizing the status of the sea turtle populations. Sea turtles are present in the waters north of the North Carolina/Virginia border only for part of the year

due to seasonal changes in water temperature. The implementation of management measures in May would coincide with sea turtles' distributional patterns in the Mid-Atlantic area.

NMFS has determined that it will not be making any irreversible or irretrievable commitment of resources under section 7(d) of the ESA during the consultation period that would have the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures. NMFS also determined that the continued implementation of the scallop fishery during the consultation period will not reduce the likelihood of survival and recovery of any ESA-listed species under NMFS jurisdiction.

Comments and Responses

NMFS received comment letters from 10 individuals and organizations during the comment period. Eight commenters expressed support for the proposed action, while one commenter expressed qualified support. One organization supported emergency action to require implementation of the proposed TED requirement, but did not support emergency action to require the use of turtle chains.

Comment 1: Eight commenters strongly supported the Petition. Four of these noted that the implementation of the proposed measures is vital to avoid unnecessary closures of the scallop fishery in the Mid-Atlantic. Two of these commenters expressed concern that such a closure would result in too much fishing effort being redirected to New England. They also expressed concern that a closure of the Mid-Atlantic scallop fishery would devastate the small boat and day boat fleet.

Response: NMFS commends the initiative shown by the scallop industry in developing a modified scallop dredge design to reduce sea turtle bycatch, and has provided support for the research. NMFS will continue to support efforts to develop innovative gear modification solutions to reduce bycatch in fishing gear. The draft final report for the turtle chain gear research trials (DuPaul *et al.*, 2004) reinforces the preliminary conclusions about the effectiveness of this gear modification. The reinitiated ESA section 7 consultation will assess the impacts of the scallop fishery on listed species. In the absence of the conclusion from this section 7 consultation, it is premature to predict whether or not implementation of the research results would prevent the need for closures of the Mid-Atlantic scallop fishery. NMFS acknowledges that such a closure would have negative impacts on some fishery participants.

Comment 2: One commenter expressed qualified support for the Petition on a temporary basis only. The commenter expressed concern that the proposed measures are overly broad because seasonal migration patterns of turtles are not clear. The commenter suggested that the measures should be implemented temporarily while additional research is conducted. The commenter expressed concern that the area within which the measures would be required is too large, and the season during which the measures would be required is too long, extending beyond the time when sea turtles leave the area. The commenter noted that the captains of vessels using the turtle chain gear on a voluntary basis have reported that there is an associated loss of efficiency in the fishing operation, which means that the gear must be deployed longer, increasing the time the gear is on the bottom and increasing vessel operating costs.

Response: NMFS agrees that regulatory measures should be modified as appropriate in response to new, reliable information. However, that does not preclude NMFS from taking action based on the best available information. As noted previously, NMFS intends to carry out rulemaking under the ESA to address the interaction between the sea scallop fishery and sea turtles. If turtle chains or similar gear modification measures are implemented in the future as a result of the upcoming rulemaking process, the timing and locations of such measures will be based upon the best available information.

Further, one benefit of proposed and final rulemaking will be to afford the full scope of public participation in rulemaking. This means that opportunities will be provided for the public to pass on information such as that provided by the commenter about the impact of the gear on fishing operations. NMFS notes that the draft final report on the turtle chain research acknowledged that, during the 2003–2004 field trials, scallop catches averaged 6.76 percent less for the experimental dredge than for the control dredge. The researchers stated that the reduction in scallop catch appears to be less for higher powered vessels than for lower powered vessels.

Comment 3: Several commenters suggested areas that should be further investigated in future research. Two commenters recommended research to better understand sea turtle behavior and reaction when encountering modified (and unmodified) dredges. One commenter recommended that video cameras should be installed on the dredge frames to monitor dredge and

sea turtle interactions. Two commenters recommended reassessing the turtle populations. One commenter recommended tracking sea turtle migrations, rotationally opening other areas for scalloping during times of likely sea turtle interactions, experimenting with other dredge modification materials, and comparing the modified dredge to a dredge without turtle chains on vessels with observers.

Response: NMFS agrees that additional research would be beneficial, but that does not mean that the current level of knowledge is insufficient to serve as the basis for action. These issues will be considered further in the upcoming rulemaking process and in other initiatives pursued by NMFS.

Comment 4: One commenter stated that the data and research provided by the Petitioners is inadequate to determine whether the use of turtles chains on dredge gear would reduce the number of sea turtle takes. This commenter felt that, rather than reducing mitigating sea turtle interactions, turtle chains may just change their nature of the interaction. Instead of being captured by a scallop dredge, sea turtles could be struck by a dredge underwater and that interaction would go unobserved and unreported. The commenter felt that further information, including underwater video, is needed to characterize turtle behavior when it encounters dredge gear in order to demonstrate that the turtle chains are beneficial to these animals.

Response: From July 17, 2003, to July 19, 2004, a series of 18 experimental fishing trips were completed for a total of 230 days and 2,675 observed tows (DuPaul *et al.*, 2004). Seven sea turtle interactions were observed, all of which were found in the unmodified scallop dredge. NMFS believes this initiative represents valuable research to evaluate the interactions between scallop dredge gear and sea turtles, and will consider the results when preparing future management measures potentially impacting the scallop dredge fishery. It is possible that sea turtles could be struck by the dredge as it is fished, and this interaction could remain unobserved and undocumented. NMFS currently has information documenting the take of sea turtles in the dredge itself, as observed from on deck, and the recent research with a modified dredge appears to have reduced those takes. NMFS recognizes that the specific nature of the interactions remain unknown, as sea turtles could be taken when the dredge is being fished on the bottom or during haulback. Video work will be conducted to provide more

information on the interactions between sea turtles and dredge gear in the water.

Comment 5: One commenter who supported the TED requirement suggested that the recent NMFS modification of TED requirements in the southern shrimp fishery (68 FR 8456, February 21, 2003) to assure the escapement of large sea turtles, especially leatherback turtles, should be applicable to the scallop fishery as well.

Response: As discussed above, there is no research that demonstrates that the TEDs required in other fisheries would be equally effective in reducing sea turtle interactions with sea scallop trawl gear. Fishery-specific gear trials are needed in order to determine the most effective TED designs for use in sea scallop trawl nets. NMFS agrees that the maximum sizes of sea turtles likely to be encountered in the Mid-Atlantic scallop fishery should be considered when designing and implementing effective TEDs for scallop trawl gear.

Comment 6: Two commenters expressed the opinion that sea turtle populations are larger than in previous years, given the existing protection measures. One of these commenters stated that the incidence of sea turtle sightings and takes in the scallop dredge fishery is infrequent, even with the increase in turtle populations. One of these commenters stated that the turtle chains will become more necessary as sea turtle populations increase.

Response: It is possible that sea turtle populations in the Mid-Atlantic have increased, but there are no current data to support that assumption. The most reliable assessment of sea turtle populations comes from evaluating the number of females on nesting beaches. Most of the observed sea turtle takes in the scallop dredge fishery have been identified as loggerhead turtles, with the rest of the takes consisting of unidentified hard-shelled turtles. Most loggerheads in U.S. waters come from one of five genetically distinct nesting subpopulations. Based on genetic data, loggerhead sea turtles found interacting with the Mid-Atlantic scallop fishery likely originate from the northern, south Florida, and Yucatán nesting subpopulations (Bass *et al.* 1998; Rankin-Baransky *et al.* 2001).

The largest loggerhead subpopulation occurs from 29° N. lat. on the east coast of Florida, to Sarasota on the west coast of Florida, and has shown 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 of loggerheads, which nests from northeast Florida through North Carolina, is much smaller than the south Florida subpopulation, and nesting numbers are stable or declining. The Yucatán nesting subpopulation, occurring on the eastern Yucatán Peninsula, Mexico, is also smaller than the south Florida subpopulation, but appears to be stable or increasing (TEWG 2000).

During the 1996–2003 fishing years, 53 sea turtle takes were documented and attributed to the scallop dredge fishery. Fifty of these takes occurred from 2001–2003, when a higher level of observer coverage was dedicated to this fishery. Most of the observed sea turtle takes in the scallop dredge fishery have been identified as loggerhead turtles. However, the ranges of five species of sea turtles overlap with portions of the Mid-Atlantic scallop grounds. All of these sea turtle species are listed as either endangered or threatened under the ESA. Kemp's ridley (*Lepidochelys kempii*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*) turtles are listed as endangered, loggerhead (*Caretta caretta*) and green (*Chelonia mydas*) turtles are listed as threatened, except for breeding populations of green turtles in Florida, which are listed as endangered. NMFS has a statutory obligation to manage and protect all of these species.

References Cited

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Dated: October 28, 2004.

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[FR Doc. 04-24430 Filed 11-1-04; 8:45 am]

BILLING CODE 3510-22-S