NOTICE OF OFFICE OF MANAGEMENT AND BUDGET ACTION

Diana Hynek 04/21/2006
Departmental Paperwork Clearance Officer
Office of the Chief Information Officer
14th and Constitution Ave. NW.
Room 6625
Washington, DC 20230

In accordance with the Paperwork Reduction Act, OMB has taken the following action on your request for the extension of approval of an information collection received on 02/08/2006.

TITLE: Reporting of Sea Turtle Incidental Takes in Virginia Chesapeake Bay Pound Net Operations

AGENCY FORM NUMBER(S): None

ACTION : APPROVED WITHOUT CHANGE
OMB NO.: 0648-0470
EXPIRATION DATE: 04/30/2009

BURDEN:	RESPONSES	HOURS	COSTS($,000)
Previous	441	74	1
New	609	102	2
Difference	168	28	1
Program Change		0	0
Adjustment		28	1

TERMS OF CLEARANCE: None

NOTE: The agency is required to display the OMB control number and inform respondents of its legal significance (see 5 CFR 1320.5(b)).

OMB Authorizing Official	Title
Donald R. Arbuckle	Deputy Administrator, Office of Information and Regulatory Affairs

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
DOC/NOAA/NMFS/NER

2. OMB control number b. [ ] None
a. 0648 - 0470

3. Type of information collection (*check one*)
a. [ ] New Collection
b. [ ] Revision of a currently approved collection
c. [✔] Extension of a currently approved collection
d. [ ] Reinstatement, without change, of a previously approved collection for which approval has expired
e. [ ] Reinstatement, with change, of a previously approved collection for which approval has expired
f. [ ] Existing collection in use without an OMB control number
For b-f, note Item A2 of Supporting Statement instructions

4. Type of review requested (*check one*)
a. [✔] Regular submission
b. [ ] Emergency - Approval requested by ____/____/____
c. [ ] Delegated

5. Small entities
Will this information collection have a significant economic impact on a substantial number of small entities? [ ] Yes [✔] No

6. Requested expiration date
a. [✔] Three years from approval date b. [ ] Other Specify: ____/____

7. Title
Reporting of Sea Turtle Incidental Takes in Virginia Chesapeake Bay Pound Net Operations

8. Agency form number(s) (*if applicable*)

9. Keywords
"Fishing" and "Fishing Vessels"

10. Abstract

Year-round reporting of sea turtle incidental take is necessary to (1) monitor the level of incidental take in the state-monitored pound net fishery, (2) ensure that the level of take does not exceed the Incidental Take Statement issued in conjunction with the Biological Opinion, and (3) verify that the seasonal pound net leader restrictions are adequate to protect sea turtles. The respondents will be Virginia pound net fishermen.

11. Affected public (*Mark primary with "P" and all others that apply with "x"*)
a. P Individuals or households d. ___ Farms
b. x Business or other for-profit e. ___ Federal Government
c. ___ Not-for-profit institutions f. ___ State, Local or Tribal Government

12. Obligation to respond (*check one*)
a. [ ] Voluntary
b. [ ] Required to obtain or retain benefits
c. [✔] Mandatory

13. Annual recordkeeping and reporting burden
a. Number of respondents 53
b. Total annual responses 609
1. Percentage of these responses collected electronically 0 %
c. Total annual hours requested 102
d. Current OMB inventory 74
e. Difference 28
f. Explanation of difference
1. Program change
2. Adjustment 28

14. Annual reporting and recordkeeping cost burden *(in thousands of dollars)*
a. Total annualized capital/startup costs 0
b. Total annual costs (O&M) 2
c. Total annualized cost requested 2
d. Current OMB inventory 1
e. Difference 1
f. Explanation of difference
1. Program change
2. Adjustment 1

15. Purpose of information collection (*Mark primary with "P" and all others that apply with "X"*)
a. ___ Application for benefits e. ___ Program planning or management
b. x Program evaluation f. ___ Research
c. ___ General purpose statistics g. P Regulatory or compliance
d. ___ Audit

16. Frequency of recordkeeping or reporting *(check all that apply)*
a. [ ] Recordkeeping b. [ ] Third party disclosure
c. [✔] Reporting
1. [✔] On occasion 2. [ ] Weekly 3. [ ] Monthly
4. [ ] Quarterly 5. [ ] Semi-annually 6. [ ] Annually
7. [ ] Biennially 8. [ ] Other (describe) ____

17. Statistical methods
Does this information collection employ statistical methods
[ ] Yes [✔] No

18. Agency Contact (person who can best answer questions regarding the content of this submission)
Name: Pasquale Scida
Phone: (978) 281-9208

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 signed by James H. Lecky	Date 01/13/2006
Signature of NOAA Clearance Officer	
Signature signed by Sarah Brabson	Date 01/18/2006

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.

Since 2002, NOAA's 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. The 2004 rule retained the reporting requirement from the 2002 rule. 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 ESA – 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 of live or dead sea turtles taken in pound net operations to NMFS.

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 Endangered Species Act of 1973, as amended. 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 this information will then be distributed to the NMFS Northeast Fisheries Science Center and the Office of Protected Resources. Information will only be collected by NMFS 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. 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).

As explained in the preceding paragraphs, the information gathered has utility. NOAA Fisheries 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 #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 NOAA Fisheries Service 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 most 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.

The state sea turtle stranding and salvage networks (STSSN) collect information on sea turtle strandings and, when reported, incidental take. However, based upon anecdotal information,

fishermen do not report incidental takes of sea turtles caught in their gear, and Virginia pound net fishermen would not likely report interactions unless the condition is mandatory. If information is submitted to the STSSN, NMFS is not always aware of this information until a few weeks or months later. This reporting requirement enables NMFS to ensure that takes are being reported and responded to immediately and to collect data on sea turtle takes on a real time basis. Until the approval of this information collection, this specific type of reporting had 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 608 reports) 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 and Science Center 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 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 a copy of 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 copy of the PRA Federal Register notice is attached (70 FR 61254, October 21, 2005). After the interim final rule was published in 2002, a small entity compliance guide was sent out to all Virginia pound net fishermen. That letter further informed them about the reporting requirement and how to comply with this measure, which would be in effect after PRA clearance was obtained. The letter further requested that they contact the NMFS NER if they have any questions. On August 7, 2002, another letter was sent to all Virginia pound net fishermen informing them of the published PRA notice and requesting their comments. The Virginia Marine Resources Commission (VMRC) was also informed about the proposed information collection in 2002, and their comments were requested. A copy of the reporting requirement was also posted on the NER Protected Resources Division web page.

After the 2004 final rule was published, another letter was sent to all Virginia pound net fishermen informing them of the new rule and of the continued reporting requirements. No comments were received on the small entity compliance guide or the letters to fishermen. NMFS did receive one public comment on the PRA Federal Register notice, but it was not applicable to the collection.

NMFS staff will continue to meet with VA pound net fishermen to discuss this reporting requirement with them and how they can comply with it. NMFS will utilize the VMRC and their contacts with the pound net industry to continue to remind the industry of the reporting requirement.

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.

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. <u>Provide an estimate in hours of the burden of the collection of information</u>.

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 averages of 6 nets were 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 (Mansfield and Musick in press), with an approximate 5 loggerhead turtles taken per net. 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 VA waters of the Chesapeake Bay, even with the current regulations in effect. This entanglement is expected to result in mortality.

As a result, 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 pound net fishermen in the Virginia Chesapeake Bay. While there are an estimated 101 pound nets in the area, the best available data from the VA Marine Resources Commission indicates that 53 pound net fishermen operated pound nets in 2003. As such, that number (53) was used as the potential number of respondents.

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 (or 102) hours. There will not be any additional information gathered besides what is conveyed verbally to NMFS or the stranding/rehabilitation facility.

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 #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. Therefore, a total cost estimate was determined to be $1,827 for all Virginia pound net fishermen annually. This estimate would be for each year for which information is to be collected.

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

The estimate 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 reported in Items 13 or 14 of the OMB 83-I.

This information collection is a renewal of a requirement first required in 2002. The burden estimate has been revised up (609 reports from 438, 102 hours from 74) due to better information on the number of pound nets in the area. The burden per report is the same.

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.

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 pounds 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.

* * * * *

[FR Doc. 02–15182 Filed 6–12–02; 3:30 pm]

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 (=[0 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 Assisstant 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.

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BILLING CODE 3510–22–S

(10) The term "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 customs laws of the United States.

[(11) Repealed by section 4(b) of P.L. 97–304, 96 Stat. 1420.]

(12) The term "permit or license applicant" means, when used with respect to an action of a Federal agency for which exemption is sought under section 7, any person whose application to such agency for a permit or license has been denied primarily because of the application of section 7(a) to such agency action.

(13) The term "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, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.

(14) The term "plant" means any member of the plant kingdom, including seeds, roots and other parts thereof.

(15) The term "Secretary" means, except as otherwise herein provided, the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970; except that with respect to the enforcement of the provisions of this Act and the Convention which pertain to the importation or exportation of terrestrial plants, the term also means the Secretary of Agriculture.

(16) The term "species" includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species or vertebrate fish or wildlife which interbreeds when mature.

(17) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.

(18) The term "State agency" means any State agency, department, board, commission, or other governmental entity which is responsible for the management and conservation of fish, plant, or wildlife resources within a State.

(19) The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

(20) The term "threatened species" means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

(21) The term "United States," when used in a geographical context, includes all States.

(16 U.S.C. 1532)

DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES

SEC. 4. (a) GENERAL.—(1) The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

(2) With respect to any species over which program responsibilities have been vested in the Secretary of Commerce pursuant to Reorganization Plan Numbered 4 of 1970—

(A) in any case in which the Secretary of Commerce determines that such species should—

(i) be listed as an endangered species or a threatened species, or

(ii) be changed in status from a threatened species to an endangered species, he shall so inform the Secretary of the Interior, who shall list such species in accordance with this section;

(B) in any case in which the Secretary of Commerce determines that such species should—

(i) be removed from any list published pursuant to subsection (c) of this section, or

(ii) be changed in status from an endangered species to a threatened species, he shall recommend such action to the Secretary of the Interior, and the Secretary of the Interior, if he concurs in the recommendation, shall implement such action; and

(C) the Secretary of the Interior may not list or remove from any list any such species, and may not change the status of any such species which are listed, without a prior favorable determination made pursuant to this section by the Secretary of Commerce.

(3) The Secretary, by regulation promulgated in accordance with subsection (b) and to the maximum extent prudent and determinable—

(A) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(B) may, from time-to-time thereafter as appropriate, revise such designation.

(b) BASIS FOR DETERMINATIONS.—(1)(A) The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

(B) In carrying out this section, the Secretary shall give consideration to species which have been—

(i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or

(ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweight the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

(3)(A) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, United States Code, to add a species to, or to remove a species from, either of the lists published under subsection (c), the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promptly publish each finding made under this subparagraph in the Federal Register.

(B) Within 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings:

(i) The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the Federal Register.

(ii) The petitioned action is warranted in which case the Secretary shall promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement such action in accordance with paragraph (5).

(iii) The petitioned action is warranted but that—

(I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action in accordance with paragraphs (5) and (6) is precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and

(II) expeditious progress is being made to add qualified species to either of the lists published under subsection (c) and to remove from such lists species for which the protections of the Act are no longer necessary.

in which case the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.

(C)(i) A petition with respect to which a finding is made under subparagraph (B)(iii) shall be treated as a petition that is resubmitted to the Secretary under subparagraph (A) on the date of such finding and that presents substantial scientific or commercial information that the petitioned action may be warranted.

(ii) Any negative finding described in subparagraph (A) and any finding described in subparagraph (B)(i) or (iii) shall be subject to judicial review.

(iii) The Secretary shall implement a system to monitor effectively the status of all species with respect to which a finding is made under subparagraph (B)(iii) and shall make prompt use of the authority under paragraph 7 [1] to prevent a significant risk to the well being of any such species.

(D)(i) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, United States Code, to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted. The Secretary shall promptly publish such finding in the Federal Register.

(ii) Within 12 months after receiving a petition that is found under clause (i) to present substantial information indicating that the requested revision may be warranted, the Secretary shall determine how he intends to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register.

(4) Except as provided in paragraphs (5) and (6) of this subsection, the provisions of section 553 of title 5, United States Code (relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this Act.

(5) With respect to any regulation proposed by the Secretary to implement a determination, designation, or revision referred to in subsection (a)(1) or (3), the Secretary shall—

(A) not less than 90 days before the effective date of the regulation—

(i) publish a general notice and the complete text of the proposed regulation in the Federal Register, and

(ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction, thereon;

(B) insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon;

(C) give notice of the proposed regulation to such professional scientific organizations as he deems appropriate;

[1] So in original. Probably should be paragraph "(7)".

(D) publish a summary of the proposed regulation in a newspaper of general circulation in each area of the United States in which the species is believed to occur; and

(E) promptly hold one public hearing on the proposed regulation if any person files a request for such a hearing within 45 days after the date of publication of general notice.

(6)(A) Within the one-year period beginning on the date on which general notice is published in accordance with paragraph (5)(A)(i) regarding a proposed regulation, the Secretary shall publish in the Federal Register—

(i) if a determination as to whether a species is an endangered species or a threatened species, or a revision of critical habitat, is involved, either—

(I) a final regulation to implement such determination,

(II) a final regulation to implement such revision or a finding that such revision should not be made,

(III) notice that such one-year period is being extended under subparagraph (B)(i), or

(IV) notice that the proposed regulation is being withdrawn under subparagraph (B)(ii), together with the finding on which such withdrawal is based; or

(ii) subject to subparagraph (C), if a designation of critical habitat is involved, either—

(I) a final regulation to implement such designation, or

(II) notice that such one-year period is being extended under such subparagraph.

(ii) If a proposed regulation referred to in subparagraph (A)(i) is not promulgated as a final regulation within such one-year period (or longer period if extension under clause (i) applies) because the Secretary finds that there is not sufficient evidence to justify the action proposed by the regulation, the Secretary shall immediately withdraw the regulation. The finding on which a withdrawal is based shall be subject to judicial review. The Secretary may not propose a regulation that has previously been withdrawn under this clause unless he determines that sufficient new information is available to warrant such proposal.

(B)(i) If the Secretary finds with respect to a proposed regulation referred to in subparagraph (A)(i) that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned, the Secretary may extend the one-year period specified in subparagraph (A) for not more than six months for purposes of soliciting additional data.

(iii) If the one-year period specified in subparagraph (A) is extended under clause (i) with respect to a proposed regulation, then before the close of such extended period the Secretary shall publish in the Federal Register either a final regulation to implement the determination or revision concerned, a finding that the revision should not be made, or a notice of withdrawal of the regulation under clause (ii), together with the finding on which the withdrawal is based.

(C) A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination

that such species is endangered or threatened, unless the Secretary deems that—

(i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or

(ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than one additional year, but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

(7) Neither paragraph (4), (5), or (6) of this subsection nor section 553 of title 5, United States Code, shall apply to any regulation issued by the Secretary in regard to any emergency posing a significant risk to the well-being of any species of fish and wildlife or plants, but only if—

(A) at the time of publication of the regulation in the Federal Register the Secretary publishes therein detailed reasons why such regulation is necessary; and

(B) in the case such regulation applies to resident species of fish or wildlife, or plants, the Secretary gives actual notice of such regulation to the State agency in each State in which such species is believed to occur.

Such regulation shall, at the discretion of the Secretary, take effect immediately upon the publication of the regulation in the Federal Register. Any regulation promulgated under the authority of this paragraph shall cease to have force and effect at the close of the 240-day period following the date of publication unless, during such 240-day period, the rulemaking procedures which would apply to such regulation without regard to this paragraph are complied with. If at any time after issuing an emergency regulation the Secretary determines, on the basis of the best appropriate data available to him, that substantial evidence does not exist to warrant such regulation, he shall withdraw it.

(8) The publication in the Federal Register of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this Act shall include a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulation; and if such regulation designates or revises critical habitat, such summary shall, to the maximum extent practicable, also include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be affected by such designation.

(c) LISTS.—(1) The Secretary of the Interior shall publish in the Federal Register a list of all species determined by him or the Secretary of Commerce to be endangered species and a list of all species determined by him or the Secretary of Commerce to be threatened species. Each list shall refer to the species contained therein by scientific and common name or names, if any, specify with respect to such species over what portion of its range it is endangered or threatened, and specify any critical habitat within such range.

The Secretary shall from time to time revise each list published under the authority of this subsection to reflect recent determinations, designations, and revisions made in accordance with subsections (a) and (b).

(2) The Secretary shall—

(A) conduct, at least once every five years, a review of all species included in a list which is published pursuant to paragraph (1) and which is in effect at the time of such review; and

(B) determine on the basis of such review whether any such species should—

(i) be removed from such list;

(ii) be changed in status from an endangered species to a threatened species; or

(iii) be changed in status from a threatened species to an endangered species.

Each determination under subparagraph (B) shall be made in accordance with the provisions of subsection (a) and (b).

(d) PROTECTIVE REGULATIONS.—Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or section 9(a)(2) in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such, regulations shall apply in any State which has entered into a cooperative agreement pursuant to section 6(c) of this Act only to the extent that such regulations have also been adopted by such State.

(e) SIMILARITY OF APPEARANCE CASES.—The Secretary may, by regulation of commerce or taking, and to the extent he deems advisable, treat any species as an endangered species or threatened species even through it is not listed pursuant to section 4 of this Act if he finds that—

(A) such species so closely resembles in appearance, at the point in question, a species which has been listed pursuant to such section that enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species;

(B) the effect of this substantial difficulty is an additional threat to an endangered or threatened species; and

(C) such treatment of an unlisted species will substantially facilitate the enforcement and further the policy of this Act.

(f)(1) RECOVERY PLANS.—The Secretary shall develop and implement plans (hereinafter in this subsection referred to as ''recovery plans'') for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in development and implementing recovery plans, shall, to the maximum extent practicable—

(A) give priority to those endangered species or threatened species, without regard to taxonomic classification, that are most likely to benefit from such plans, particularly those spe-

cies that are, or may be, in conflict with construction or other development projects or other forms of economic activity;

(B) incorporate in each plan—

(i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;

(ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and

(iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

(2) The Secretary, in developing and implementing recovery plans, may procure the services of appropriate public and private agencies and institutions and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to the Federal Advisory Committee Act.

(3) The Secretary shall report every two years to the Committee on Environment and Public Works of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives on the status of efforts to develop and implement recovery plans for all species listed pursuant to this section and on the status of all species for which such plans have been developed.

(4) The Secretary shall, prior to final approval of a new or revised recovery plan, provide public notice and an opportunity for public review and comment on such plan. The Secretary shall consider all information presented during the public comment period prior to approval of the plan.

(5) Each Federal agency shall, prior to implementation of a new or revised recovery plan, consider all information presented during the public comment period under paragraph (4).

(g) MONITORING.—(1) The Secretary shall implement a system in cooperation with the States to monitor effectively for not less than five years the status of all species which have recovered to the point at which the measures provided pursuant to this Act are no longer necessary and which, in accordance with the provisions of this section, have been removed from either of the lists published under subsection (c).

(2) The Secretary shall make prompt use of the authority under paragraph 7[1] of subsection (b) of this section to prevent a significant risk to the well being of any such recovered species.

(h) AGENCY GUIDELINES.—The Secretary shall establish, and publish in the Federal Register, agency guidelines to insure that the purposes of this section are achieved efficiently and effectively. Such guidelines shall include, but are not limited to—

(1) procedures for recording the receipt and the disposition of petitions submitted under subsection (b)(3) of this section;

(2) criteria for making the findings required under such subsection with respect to petitions;

[1] So in original. Probably should be paragraph "(7)".

(3) a ranking system to assist in the identification of species that should receive priority review under subsection (a)(1) of the section; and

(4) a system for developing and implementing, on a priority basis, recovery plans under subsection (f) of this section. The Secretary shall provide to the public notice of, and opportunity to submit written comments on, any guideline (including any amendment thereto) proposed to be established under this subsection.

(i) If, in the case of any regulation proposed by the Secretary under the authority of this section, a State agency to which notice thereof was given in accordance with subsection (b)(5)(A)(ii) files comments disagreeing with all or part of the proposed regulation, and the Secretary issues a final regulation which is in conflict with such comments, or if the Secretary fails to adopt a regulation pursuant to an action petitioned by a State agency under subsection (b)(3), the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition.

(16 U.S.C. 1533)

LAND ACQUISITION

SEC. 5. (a) PROGRAM.—The Secretary, and the Secretary of Agriculture with respect to the National Forest System, shall establish and implement a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species pursuant to section 4 of this Act. To carry out such a program, the appropriate Secretary—

(1) shall utilize the land acquisition and other authority under the Fish and Wildlife Act of 1956, as amended, the Fish and Wildlife Coordination Act, as amended, and the Migratory Bird Conservation Act, as appropriate; and

(2) is authorized to acquire by purchase, donation, or otherwise, lands, waters, or interest therein, and such authority shall be in addition to any other land acquisition vested in him.

(b) ACQUISITIONS.—Funds made available pursuant to the Land and Water Conservation Fund Act of 1965, as amended, may be used for the purpose of acquiring lands, waters, or interests therein under subsection (a) of this section.

(16 U.S.C. 1534)

COOPERATION WITH THE STATES

SEC. 6. (a) GENERAL.—In carrying out the program authorized by this Act, the Secretary shall cooperate to the maximum extent practicable with the States. Such cooperation shall include consultation with the States concerned before acquiring any land or water, or interest therein, for the purpose of conserving any endangered species or threatened species.

(b) MANAGEMENT AGREEMENTS.—The Secretary may enter into agreements with any State for the administration and management of any area established for the conservation of endangered species or threatened species. Any revenues derived from the administra-

The merchandise subject to this order is currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) at subheading 2844.20.0020. Subject merchandise may also enter under 2844.20.0030, 2844.20.0050, and 2844.40.00. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise is dispositive.

Allegations of Ministerial Errors

On September 14, 2005, Eurodif/COGEMA and the petitioner each timely filed, pursuant to 19 CFR 351.224(c)(2), an allegation that the Department made one ministerial error in its final results of review. Respondent alleges that the Department made a ministerial error in the calculation of the constructed value (CV) profit. Petitioner alleges that the Department made a ministerial error in its application of the R&D adjustment factor to cost of manufacture (COM).

We have fully considered the parties' allegations and rebuttal comments. Our full analysis is contained in the Memorandum to Joseph A. Spetrini, Acting Assistant Secretary, from Gary Taverman, Acting Deputy Assistant Secretary, concerning the Amended Final Results of the Administrative Review of the Antidumping Duty Order on Low Enriched Uranium from France (2003–2004), Ministerial Error Allegations (October 14, 2005) which is on file in the Central Records Unit (CRU), room B–099 of the main Department building, and can be accessed directly on the Web at *http://ia..ita.doc.gov*. As a result of our analysis, we have corrected our calculations of CV profit.

Amended Final Results of Review

In accordance with 19 CFR 351.224(e), we have amended the final results of this administrative review to correct for the ministerial error. As a result of this correction, Eurodif/COGEMA's weighted–average margin has been amended as stated below.

Producer	Weighted–Average Margin (Percentage)
COGEMA/Eurodif	9.75

Assessment

The Department will determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries, pursuant to 19 CFR 351.212(b). The Department calculated importer–specific duty assessment rates on the basis of the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of the examined sales for that importer. Where the assessment rate is above *de minimis*, we will instruct CBP to assess duties on all entries of subject merchandise by that importer. The Department will not issue liquidation instructions for any entries of Eurodif/COGEMA merchandise until such time as the July 1, 2002, injunction issued by the Court of International Trade is lifted.

Cash Deposits

Furthermore, the following deposit requirements will be effective upon publication of these amended final results of this administrative review for all shipments of LEU from France entered, or withdrawn from warehouse, for consumption on or after the publication date of these amended final results, as provided by section 751(a) of the Tariff Act of 1930, as amended: (1) for companies covered by this review, the cash deposit rate will be the rate listed above; (2) for merchandise exported by producers or exporters not covered in this review but covered in a previous segment of this proceeding, the cash deposit rate will continue to be the company–specific rate published in the most recent final results in which that producer or exporter participated; (3) if the exporter is not a firm covered in this review or in any previous segment of this proceeding, but the producer is, the cash deposit rate will be that established for the producer of the merchandise in these final results of review or in the most recent final results that covered that producer; and (4) if neither the exporter nor the producer is a firm covered in this review or in any previous segment of this proceeding, the cash deposit rate will be 19.95 percent, the ''All Others'' rate established in the less–than-fair–value investigation. These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

Reimbursement

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred, and in the subsequent assessment of double antidumping duties.

These amended final results are issued and published in accordance with sections 751(a) and (h) of the Act and 19 CFR 351.224.

Dated: October 14, 2005.

Joseph A. Spetrini,

Acting Assistant Secretaryfor Import Administration.

[FR Doc. E5–5820 Filed 10–20–05; 8:45 am]

BILLING CODE 3510–DS–S

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).

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 December 20, 2005.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 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, Assistant Regional Administrator for Protected Resources, National Marine Fisheries Service (NMFS), One Blackburn Drive, Gloucester, MA 01930 (ph. 978–281–9116, fax 978–281–9394).

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 Virginia pound net fisherman are required to report the incidental take to NMFS 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. Based on the number of sea turtle takes anticipated in the Virginia pound net fishery, the number of responses anticipated on an annual basis has increased from 441 to 611, and the number of burden hours has increased from 74 to 102.

II. Method of Collection

Reports may be made either by telephone or fax.

III. Data

OMB Number: 0648–0470.

Form Number: None.

Type of Review: Regular submission.

Affected Public: Individuals or households.

Estimated Number of Respondents: 53.

Estimated Time Per Response: 10 minutes.

Estimated Total Annual Burden Hours: 102.

Estimated Total Annual Cost to Public: $1,833.

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: October 17, 2005.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 05–21084 Filed 10–20–05; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 030602141–5264–27]

Availability of Grant Funds for Fiscal Year 2006

AGENCY: National Ocean Service (NOS), National Oceanic and AtmosphericAdministration (NOAA), Department of Commerce.

ACTION: Notice; extension of solicitation period.

SUMMARY: The National Oceanic and Atmospheric Administration, National Ocean Service, publishes this notice to amend the competitive solicitation for the Ecological Forecasting (ECOFORE) program to provide an opportunity for commercial entities to submit proposals and to extend the solicitation period to provide the public more time to submit proposals.

DATES: The new deadline for the receipt of proposals is November 18, 2005, for both electronic and paper applications.

ADDRESSES: The address for submitting Proposals electronically is: *http://www.grants.gov/* (Electronic submission is strongly encouraged). Paper submissions should be sent to the attention of ECOFORE 2006, Center for Sponsored Coastal Ocean Research (N/SCI2), National Oceanic and Atmospheric Administration, 1305 East-West Highway, SSMC4, 8th Floor Station 8243, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Dr. Elizabeth Turner, 603–862–4680, *elizabeth.turner@noaa.gov*

SUPPLEMENTARY INFORMATION: This program was originally solicited in the **Federal Register** on June 30, 2005, as part of the June 2005 NOAA Omnibus solicitation (70 FR 37766). The ECOFORE component of that Omnibus solicitation did not include commercial organizations as eligible applicants. NOAA has determined that expanding the pool of potential applicants to include commercial organizations would enhance the program's ability to make financial assistance awards to recipients with the highest level of expertise in atmospheric forecasting. The original deadline for receipt of proposals was 3 p.m. EST, on October 25, 2005. In order to allow the expanded pool of potential applicants to submit proposals, NOAA is extending the deadline for the receipt of applications to 3 p.m. EST on November 18, 2005, for both electronic and paper applications. All other requirements for this solicitation remain the same.

Limitation of Liability

Funding for this program is contingent upon the availability of Fiscal Year 2006 appropriations. Applicants are hereby given notice that funds have not yet been appropriated for the programs listed in this notice. In no event will NOAA or the Department of Commerce be responsible for proposal preparation costs if these programs fail to receive funding or are cancelled because of other agency priorities. Publication of this announcement does not oblige NOAA to award any specific project or to obligate any available funds.

Universal Identifier

Applicants should be aware that they are required to provide a Dun and Bradstreet Data Universal Numbering System (DUNS) number during the application process. See 67 FR 66177 (October 30, 2002) for additional information. Organizations can receive a DUNS number at no cost by calling the dedicated toll-free DUNS Number request line at 1–866–705–5711 or via the internet (*http://www.dunandbradstreet.com*).

National Environmental Policy Act (NEPA)

NOAA must analyze the potential environmental impacts, as required by the National Environmental Policy Act (NEPA), for applicant projects or proposals which are seeking NOAA Federal funding opportunities. Detailed information on NOAA compliance with NEPA can be found at the following NOAA NEPA website: *http://www.nepa.noaa.gov/*, including our NOAA Administrative Order 216–6 for NEPA, *http://www.nepa.noaa.gov/NAO216__6__TOC.pdf*, and the Council on Environmental Quality implementation regulations, *http://ceq.eh.doe.gov/nepa/regs/ceq/toc__ceq.htm*. Consequently, as part of an applicant's package, and under their description of their program activities, applicants are required to provide detailed information on the activities to be conducted, locations, sites, species and habitat to be affected, possible construction activities, and any environmental concerns that may exist (e.g., the use and disposal of hazardous or toxic chemicals, introduction of non-indigenous species, impacts to endangered and threatened species, aquaculture projects, and impacts to coral reef systems). In addition to providing specific information that will serve as the basis for any required impact analyses, applicants may also be requested to assist NOAA in drafting of