

NOTICE OF OFFICE OF MANAGEMENT AND BUDGET ACTION

Date 08/26/2008

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

In accordance with the Paperwork Reduction Act, OMB has taken action on your request received 08/05/2008

ACTION REQUESTED: New collection (Request for a new OMB Control Number)
TYPE OF REVIEW REQUESTED: Regular
ICR REFERENCE NUMBER: 200807-0648-007
AGENCY ICR TRACKING NUMBER:
TITLE: Virginia Modified Pound Net Leader Inspection Program
LIST OF INFORMATION COLLECTIONS: See next page

OMB ACTION: Approved without change
OMB CONTROL NUMBER: 0648-0559

The agency is required to display the OMB Control Number and inform respondents of its legal significance in accordance with 5 CFR 1320.5(b).

EXPIRATION DATE: 08/31/2011

DISCONTINUE DATE:

BURDEN:	RESPONSES	HOURS	COSTS
Previous	0	0	0
New	106	51	76
Difference			
Change due to New Statute	0	0	0
Change due to Agency Discretion	106	51	76
Change due to Agency Adjustment	0	0	0
Change Due to Potential Violation of the PRA	0	0	0

TERMS OF CLEARANCE:

OMB Authorizing Official:

Kevin F. Neyland
Deputy Administrator,
Office Of Information And Regulatory Affairs

List of ICs

IC Title	Form No.	Form Name	CFR Citation
Arrangement for inspection meeting			50 CFR 223.206
Inspection meeting			50 CFR 223.206
Report of lost or destroyed tag			50 CFR 223.206

PAPERWORK REDUCTION ACT SUBMISSION

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

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

19. Certification for Paperwork Reduction Act Submissions

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

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

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

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

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

Signature of Senior Official or designee

Date

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

Signature

Date

Signature of NOAA Clearance Officer

Signature

Date

**SUPPORTING STATEMENT
VIRGINIA MODIFIED POUND NET LEADER INSPECTION PROGRAM
OMB CONTROL NO.: 0648-0559**

A. JUSTIFICATION

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

On June 23, 2006, National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service (NMFS) issued a final rule (71 FR 36024) requiring that, during the period of May 6 through July 15, any offshore pound net leader 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 (referred to as "Pound Net Regulated Area I"), meet the definition of a modified pound net leader. A modified pound net leader is a pound net leader that is affixed to or resting on the sea floor and made of a lower portion of mesh and an upper portion of only vertical lines such that: the mesh size is equal to or less than 8 inches stretched mesh; at any particular point along the leader the height of the mesh from the seafloor to the top of the mesh must be no more than one-third the depth of the water at mean lower low water (average low water point during the lowest of two low tidal cycles) directly above that particular point; the mesh is held in place by vertical lines that extend from the top of the mesh up to a top line, which is a line that forms the uppermost part of the pound net leader; the vertical lines are equal to or greater than 5/16 inch in diameter and strung vertically at a minimum of every 2 feet; and the vertical lines are hard lay lines with a level of stiffness equivalent to the stiffness of a 5/16 inch diameter line composed of polyester wrapped around a blend of polypropylene and polyethylene and containing approximately 42 visible twists of strands per foot of line. Without this final rule, existing regulations would have continued to prohibit all offshore pound net leaders in that area during that time frame. While restrictions promulgated in 2004 on pound net leaders in the Virginia waters of the Chesapeake Bay outside the aforementioned area remain in effect (referred to as "Pound Net Regulated Area II"; May 5, 2004, 69 FR 24997), this final rule created an exception to those restrictions by allowing the use of modified pound net leaders in this area.

After the 2006 final rule was published, NMFS determined that an onshore inspection program that checked a modified leader ready for deployment against the regulatory definition would help ensure the protection of sea turtles, while limiting the difficulties of and potential costs to fishermen associated with post-deployment inspections at sea. For example, most of the pound net leader is typically set under the water, the water clarity in the Chesapeake Bay is generally poor, and there may be debris in the water that could endanger the inspector. In addition, if a fisherman was asked to haul the leader for an inspection once it was deployed, there would be a loss in fishing time. The modified leader configuration was developed to protect sea turtles, and it is important that the leaders deployed in this fishery meet the standards embodied in the regulations. NMFS proposes an inspection program that would: (1) provide fishermen with the assurance that their leaders meet the definition of a modified pound net leader before setting their gear, thereby limiting the costs associated with having to: (a) to haul their gear during the fishing season, (b) fix any parts of the leader determined by an authorized officer during an at-sea inspection to be non-compliant with the regulation, and (c) reset the gear; (2) provide managers

with the knowledge that the offshore leaders in Pound Net Regulated Area I are configured in a “turtle-safe” manner; and (3) aid in enforcement efforts.

If a pound net fisherman is to use a modified pound net leader anywhere in Pound Net Regulated Area I or Pound Net Regulated Area II at any time during the period from May 6 through July 15, he or she must adhere to the following requirements of the inspection program. First, the pound net fisherman, or his/her representative, must call NMFS at 757-414-0128 at least 72 hours before the modified leaders are to be deployed. During this call, the fisherman or representative and NMFS will discuss a meeting date, time, and location, as well as the fisherman’s plans for setting his/her gear. While NMFS realizes that setting pound net gear is dependent upon weather conditions, allotting a window of 72 hours or more enables the fishermen and NMFS to arrange a mutually agreeable meeting time to examine the modified leaders. The second component of the inspection program involves NMFS meeting the fisherman at the dock, or another mutually agreeable place, to examine the gear for compliance with the definition of a modified pound net leader. During the inspection, NMFS will ascertain whether the leader meets the following four criteria taken from the modified leader definition: (1) the lower portion of the leader is mesh and the upper portion consists of only vertical lines; (2) the mesh size is equal to or less than 8 inches stretched mesh; (3) the vertical lines are equal to or greater than 5/16 inch in diameter and strung vertically at least every 2 feet; and (4) the vertical lines are hard lay lines with a level of stiffness equivalent to the stiffness of a 5/16 inch diameter line composed of polyester wrapped around a blend of polypropylene and polyethylene and containing approximately 42 visible twists of strands per foot of line. NMFS will also measure the height of the mesh in relation to the height of the entire leader. During the inspection, the fisherman must provide accurate and specific latitude and longitude coordinates of the location at which the leader will be deployed. If the fisherman does not know his or her modified pound net leader latitude and longitude coordinates prior to the inspection, NMFS will have a detailed nautical chart available during the inspection for the fisherman to ascertain the specific coordinates of the gear. During the inspection, the fisherman must also provide NMFS with information on the low water depth at each end of the modified leader. If the leader meets the four criteria previously described, the measurement of the height of the mesh in relation to the total height of the leader is recorded, and the low water depth and the latitude and longitude coordinates of the specific location at which the leader will be deployed are provided and recorded, the leader will pass inspection. If it passes inspection, NMFS will tag the leader with one or more tamperproof tags (supplied by NMFS), each of which will be marked with a unique identification number. Additionally, the fisherman will receive a letter from NMFS noting that the leader has been inspected, the date of the inspection, the license holder’s name, the tag number(s) of the attached tag(s), information on the modified leader as collected during the inspection, and the low water depth and latitude and longitude coordinates for the specific location at which the inspected leader will be deployed. This letter must be retained on the vessel tending the inspected leader at all times it is deployed. The fisherman may set the inspected leader only after passing the inspection; the tags must remain on the gear. After tagging by NMFS, the tags may not be tampered with or removed. If a tag is damaged, destroyed, or lost due to any cause, the fisherman must call NMFS at 757-414-0128 within 48 hours of discovery to report this incident.

If the onshore inspection indicates that the leader does not meet one or more of the four criteria, NMFS will tell the fisherman how to modify his or her gear in order to meet the criteria. Pound

net fishermen are required to have their modified leaders inspected annually, even if the tags from the preceding year remain on the gear.

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.

The details of the inspection program are included in Question 1. The obtained information will be shared with NMFS staff, including law enforcement agents and protected resources staff, to ensure compliance with the previously established regulations and to ensure sea turtles are being adequately protected. It is estimated that the information will be obtained one time per modified leader per season, likely occurring before May 6 of each year.

As explained in the preceding paragraphs, the information gathered has utility. NMFS will retain control over the information and safeguard it from improper access, modification, and destruction, consistent with NOAA standards for confidentiality, privacy, and electronic information. See response #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, general results on the modified leader configuration may be used in scientific, management, technical or general informational publications. Should NOAA NMFS Northeast Region (NER) 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 the public entity setting up a meeting with NMFS via a telephone call. This method of communication consists of the most effective means to collect the information on a meeting date, time and location. While the meeting specifics could be arranged via electronic mail, it is believed that Virginia pound net fishermen will more easily set up the meeting via a telephone call. Furthermore, it is unknown how many Virginia fishermen have computer access. The second part of the information collection involves a meeting between NMFS and the pound net fisherman, which does not involve any automated, electronic, mechanical or other technological techniques.

There are no plans to disseminate any of this information over the internet.

4. Describe efforts to identify duplication.

NMFS does not believe this information collection represents a duplication of other efforts. While fishermen may know if their modified leaders meet the definition as included in the regulations, no one is specifically collecting this information.

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 (Virginia pound net fishermen), but the impacts are minimized by the relatively infrequent nature of the reporting (i.e., only one time per leader per year, with a possibility of additional reporting if a tag is lost) and type of reporting (e.g., telephone call and meeting at a mutually agreeable location).

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 June 2006 regulations (71 FR 36024) will be compromised. It will be difficult to determine if fishermen are complying with the regulations regarding modified pound net leaders, and the regulations were developed to reduce sea turtle mortality. Without this collection, the effectiveness of sea turtle protection measures in Virginia cannot be established. The NMFS NER and Northeast Fisheries Science Center (NEFSC) have dedicated a significant amount of funding and staff time to evaluate and reduce spring sea turtle mortality in Virginia, and the previously established regulations are essential to protect sea turtles in the Chesapeake Bay. This compliance program is the best way to ensure sea turtles will be protected as intended in the 2006 modified leader rule. Conducting the information collection less frequently would be the same as not conducting it at all, and the same concerns apply. Fishermen are only required to contact NMFS before they set their modified leader (likely one time per year), and it is unknown how reporting less than one time a year would assist in sea turtle recovery efforts. 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 information collection will not be conducted in a manner inconsistent with OMB guidelines.

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

Public comment on the information collection was solicited in the proposed rule, RIN 0648-AU98 (72 FR 9297, March 1, 2007). No comments were specifically received on the information collection portion of the proposed rule.

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

The collection of information involves two parts: 1) the fisherman must call NMFS at least 72 hours before deploying his or her modified pound net leader to set up a meeting time, date and location, and 2) the fisherman must meet NMFS at a mutually agreeable location, so that NMFS may inspect the modified leader.

Based upon information obtained from the Virginia Marine Resources Commission (VMRC) on 2005 pound net license holders, there are 58 licensed pound net fishermen in the Virginia Chesapeake Bay. Additional information obtained from VMRC found that, in 2004, there were 34 fishermen who reported landings with pound net gear, with 27 (79%) reporting at least some landings from pounds in Pound Net Regulated Areas I and II of the Chesapeake Bay. Of these 27 fishermen, 18 reported landings from the upper part of the Bay while 9 reported landings from the lower portion of the Bay. During the time frame of the 2006 regulations (May 6 – July 15), 16 fishermen reported landings in the upper Bay while only 5 reported landings in the lower Bay in 2004. As mentioned, only fishermen in a portion of the lower Bay are required to use modified pound net leaders, if they set a leader, from May 6 to July 15. Fishermen in the upper Bay may use a modified leader if they so choose, but they are not required to do so. While the specific number of fishermen that may be affected by this collection of information is dependent upon whether they switch their leader voluntarily, there is the option for every licensed Virginia pound net fisherman (n=58) to use a modified leader. However, fishermen are required to arrange a meeting with NMFS only if they are planning to set a modified leader during the regulated period (May 6 to July 15). Thus, a total of 21 fishermen (16 in upper and 5 in lower Bay) may be affected by this collection of information.

From May 6 to July 15, 2004, there were five fishermen fishing in the lower Bay, and 16 in the upper Bay. In 2004, during the regulated time period, fishermen in the lower Bay fished an average of 3.4 pound nets, while fishermen in the upper Bay fished an average of 1.8 pound nets. This results in 17 pound nets in the lower Bay (5 fishermen * 3.4 pounds/fisherman) and 29 in the upper Bay (16 fishermen * 1.8 pounds/fisherman). Using the allocation between offshore and nearshore nets as determined from a NMFS NEFSC gear survey, this results in 7 offshore nets and 10 nearshore nets in the lower Bay, and 25 offshore nets and 4 nearshore nets in the upper Bay, during the May 6 to July 15 period. As such, the information collection will apply to

a total of 46-pound net leaders. The actual burden will most likely be on much fewer leaders (and fishermen) as it is unlikely that every Virginia pound net fisherman will switch to a modified leader in each of his or her nets and then be required to call NMFS to arrange an inspection. It is more likely that the information collection requirement will fall upon 7 offshore nets in the lower Bay, and approximately 5 fishermen. However, for the purposes of this analysis, the maximum number of respondents and applicable nets must be considered.

The hourly burden for the first part of the information collection was calculated by assuming a phone call to NMFS to set up an inspection meeting will last for a maximum of 5 minutes. Therefore, if each fisherman makes one call per each net, there would be a total of 46 calls lasting 5 minutes per call. The maximum hourly burden for this portion of the information collection would be 230 minutes, or 3.8 (4) hours, although it is likely to be less than this amount, because fishermen will likely call NMFS to arrange meeting specifics for more than one of their nets at a time, instead of making one call per one net.

The hourly burden for the second part of the information collection was calculated by assuming the gear compliance meeting between NMFS and the pound net fisherman will last for a maximum of 1 hour per net. For 46-pound net leaders, the hourly burden for this portion of the information collection would be 46 hours.

As noted previously, if a tag placed on the leader during inspection is damaged, destroyed or lost by debris, vessel traffic, marine life, or any other cause, the fisherman must call NMFS within 48 hours of discovery to report this incident. As such, fishermen may be required to call NMFS after their inspection, resulting in an additional hourly burden on the fisherman. It is unknown how many tags will be damaged, destroyed or lost in the course of one year; thus, NMFS is estimating 10% of tags will be affected. Of 46 pound net leaders, each leader would have 3 tags, for a maximum total of 138 tags placed on all pound net leaders; 10% of these would be 13.8 (14) tags, necessitating 14 notification calls to NMFS. Assuming each call would last a maximum of 5 minutes, this would result in an additional hourly burden of 70 minutes (or 1.17 (1) hours) for all Virginia pound net fishermen.

For the 21 respondents, total responses would be 106: 46 calls, 46 meetings, and 14 additional notification calls. Total hourly burden would be 51.17 (51) hours, with approximately 2.5 hours per fisherman.

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 initial 46 calls to set up meetings are anticipated to be conducted annually. The cost of a 5 minute call was estimated to be \$1.25 per call (\$0.25 per minute). This cost estimate was determined to be \$57.50 for all Virginia pound net fishermen annually. If a tag placed on the leader during inspection is lost, damaged, or destroyed, the notification to NMFS would result in an additional 14 calls at \$1.25, resulting in an additional \$17.50.

Therefore, a total annual cost estimate was determined to be \$76.00 (\$57.50 (\$58) + \$17.50 (18)).

NMFS does not foresee any cost burden to fishermen from participating in the inspection meeting or the actual tagging of their gear. NMFS will meet the fishermen at their place of choosing so it is very likely that they will not travel for this meeting. NMFS will also purchase the tags for the modified leaders.

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

The estimate cost to the Federal government will be in terms of staff hours, and mileage and gas to travel to the meeting location. An anticipated 46 calls will take place, and each call is expected to last a maximum of 5 minutes. NMFS staff will be able to compile any notes during this phone call. As such, the hourly burden on NMFS for this portion of the information collection would be 230 minutes, or 4 hours. For the second portion of the information collection, the inspection meeting, each gear check would last approximately 1 hour. For 46-pound net leaders, the hourly burden for this portion of the information collection would be 46 hours. It may take an additional 15 minutes per net to prepare a summary of the inspection meeting, resulting in an additional 11 ½ (12) hours of NMFS staff time. If a tag placed on the leader during inspection is lost, damaged, or destroyed, the notification to NMFS would result in an additional 14 calls. Assuming each call would last a maximum of 5 minutes, this would result in an additional hourly burden of 70 minutes (or 1.17 (1) hours) of NMFS staff time. The total hourly burden would be 62.67 (63) hours for NMFS staff (4 + 46 + 12 + 1).

The financial burden would depend upon the pay band level of the party answering the phone call and participating in the inspection meeting. As the staff fielding these calls likely will be pay band level III (with an approximate of \$31.37 per hour), approximately 63 hours of work (about 1 ½ weeks) would cost the Federal government approximately \$1976. 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).

NMFS will purchase the tamperproof tags to be placed on each modified pound net leader that passes the inspection. The tags that will be used are tamperproof plastic truck seal tags, as those have been found to be successfully deployed in other fisheries. NMFS estimates that 3 tags will be placed on each modified leader (resulting in a maximum of 138 tags needed (46 leaders * 3 tags)). Tags come in multiples of 1000, with 1000 being the minimum order, and each tag is \$0.16. Therefore, the cost for 1000 tags would be \$160. This is not anticipated to be an annual cost, and it is likely that tags will need to be reordered every approximately 5 years, with an estimated annualized cost of \$32.

NMFS staff must travel to the meeting location. The meeting location has not yet been determined, and could vary with each fisherman. However, it is 28 miles from the NMFS inspector's home to Cape Charles (where most of the pound net fishermen are located). Assuming an average of \$2.15/gallon, a round trip mileage of 56 miles, and use of 4 gallons of gas per round trip, the cost of gas would be \$8.60 for each trip down to Cape Charles. While it is highly unlikely that NMFS would make a separate trip for each pound net leader inspection, there is no way of estimating the exact number of trips to be completed each year. Thus, this analysis considers the maximum number of trips that NMFS may take (n=46). For 46

inspections and 46 separate round trips, the total amount for gas would be \$395.60. The total annualized cost to the Federal government would be \$32 + \$395.60, or \$427.60.

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 new requirement.

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.

(c) *Incorporation by reference.* The Director of the Federal Register approves, in accordance with 5 U.S.C. 552(a) and 1 CFR part 51, the incorporation by reference of the National Council for Prescription Drug Programs SCRIPT Standard, Implementation Guide, Version 5, Release 0, May 12, 2004, excluding the Prescription Fill Status Notification Transaction (and its three business cases; Prescription Fill Status Notification Transaction—Filled, Prescription Fill Status Notification Transaction—Not Filled, and Prescription Fill Status Notification Transaction—Partial Fill), Prescriber/Pharmacist Interface SCRIPT Standard, Implementation Guide, Version 8, Release 1, October 2005, excluding the Prescription Fill Status Notification Transaction (and its three business cases; Prescription Fill Status Notification Transaction—Filled, Prescription Fill Status Notification Transaction—Not Filled, and Prescription Fill Status Notification Transaction—Partial Fill); the Accredited Standards Committee X12N 270/271—Health Care Eligibility Benefit Inquiry and Response, Version 4010, May 2000, 004010X092 and Addenda to Health Care Eligibility Benefit Inquiry and Response, Version 4010, October 2002, Washington Publishing Company, 004010X092A1, and the National Council for Prescription Drug Programs Telecommunication Standard Specification, Version 5, Release 1 (Version 5.1), September 1999, and equivalent NCPDP Batch Standard Batch Implementation Guide, Version 1, Release 1 (Version 1.1), January 2000 supporting Telecommunications Standard Implementation Guide, Version 5, Release 1 (Version 5.1), September 1999, for the NCPDP Data Record in the Detail Data Record. You may inspect copies of these materials at the headquarters of the Centers for Medicare & Medicaid Services (CMS), 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday from 8:30 a.m. to 4 p.m. or at the National Archives and Records Administration (NARA). For information on the availability of this material at CMS, call 410-786-0273. For information on the availability of this material at NARA, call 202-741-6030, or go to http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html. You may obtain a copy of the National Council for Prescription Drug Programs SCRIPT Standard, Version 5, Release 0, May 12, 2004 or the Prescriber/Pharmacist

Interface SCRIPT Standard, Implementation Guide, Version 8, Release 1, October 2005, from the National Council for Prescription Drug Programs, Incorporated, 9240 E. Raintree Drive, Scottsdale, AZ 85260-7518; Telephone (480) 477-1000; and fax (480) 767-1042 or <http://www.ncdp.org>. You may obtain a copy of the Accredited Standards Committee X12N 270/271—Health Care Eligibility Benefit Inquiry and Response, Version 4010, May 2000, Washington Publishing Company, 004010X092 and Addenda to Health Care Eligibility Benefit Inquiry and Response, Version 4010, 004010X092A1, October 2002, from the Washington Publishing Company, 301 West North Bend Way, Suite 107, P.O. Box 15388, North Bend, WA 98045; Telephone (425) 831-4999; and fax (425) 831-3233 or <http://www.wpc-ed.com/>. You may obtain a copy of the National Council for Prescription Drug Programs Telecommunication Standard Specification, Version 5, Release 1 (Version 5.1), September 1999, and equivalent NCPDP Batch Standard Batch Implementation Guide, Version 1, Release 1 (Version 1.1), January 2000 supporting Telecommunications Standard Implementation Guide, Version 5, Release 1 (Version 5.1), September 1999, for the NCPDP Data Record in the Detail Data Record, from the National Council for Prescription Drug Programs, Incorporated, 9240 E. Raintree Drive, Scottsdale, AZ 85260-7518; Telephone (480) 477-1000; and FAX (480) 767-1042 or <http://www.ncdp.org>.

Authority: Section 1860D-4(e) of the Social Security Act (42 U.S.C. 1395w-104(e)) (Catalog of Federal Domestic Assistance Program No. 93.773 Medicare—Hospital Insurance Program; and No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: March 30, 2006.

Mark B. McClellan,

Administrator, Centers for Medicare & Medicaid Services.

Approved: May 22, 2006.

Michael O. Leavitt,

Secretary.

[FR Doc. E6-9521 Filed 6-22-06; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 222 and 223

[Docket No. 060405097-6161-02; I.D. 033006E]

RIN 0648-AU10

Sea Turtle Conservation; Modification to Fishing Activities

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

ACTION: Final rule.

SUMMARY: NMFS is requiring that any offshore pound net leader 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, during the period of May 6 through July 15, meet the definition of a modified pound net leader. Without this final rule, existing regulations would continue to prohibit all offshore pound net leaders in that area during that time frame. 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. While restrictions promulgated in 2004 on pound net leaders in the Virginia waters of the Chesapeake Bay outside the aforementioned area remain in effect, this final rule creates an exception to those restrictions by allowing the use of modified pound net leaders in this area. This action, taken under the Endangered Species Act of 1973 (ESA), responds to new information generated by gear research. It is intended to conserve sea turtles listed as threatened under the ESA and to help enforce the provisions of the ESA, including the provisions against takes of endangered species, while enabling fishermen to use leaders, an important component of pound net gear, during the regulated period.

DATES: Effective June 23, 2006.

FOR FURTHER INFORMATION CONTACT: Pasquale Scida (ph. 978-281-9208, fax 978-281-9394), or Therese Conant (ph. 301-713-2322, fax 301-427-2522).

SUPPLEMENTARY INFORMATION:

Background

NMFS issued a final rule on May 5, 2004 (69 FR 24997), which prohibited the use of offshore pound net leaders in

a portion of the Virginia Chesapeake Bay, which is renamed in this final rule "Pound Net Regulated Area I", from May 6 through July 15 each year. 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. The 2004 rule also prohibited the use of 12 inches (30.5 cm) and greater stretched mesh and stringers in nearshore pound net leaders in Pound Net Regulated Area I and all pound net leaders employed in the remainder of the Virginia Chesapeake Bay, which is renamed in this final rule "Pound Net Regulated Area II", from May 6 through July 15. The 2004 rule contained other provisions that are not relevant to this action. For complete details and justification for the 2004 rule, see 69 FR 24997.

In 2004 and 2005, NMFS implemented a coordinated research program with pound net industry participants and other interested parties to develop and test a modified pound net leader design with the goal of eliminating or reducing sea turtle interactions while retaining an acceptable level of fish catch. The modified pound net leader design used in the experiment consisted of a combination of mesh and stiff vertical lines. The mesh size was equal to or less than 8 inches (20.3 cm) and positioned at a depth that was no more than one-third the depth of the water. The vertical lines were $\frac{5}{16}$ inch (0.8 cm) in diameter strung vertically at a minimum of every 2 feet (61 cm) and attached to a top line. The vertical lines rose from the top of the mesh up to a top line to which they were attached. In 2005, hard lay line was used for the vertical lines in order to make them more stiff. The hard lay lines used in 2005 were made of $\frac{5}{16}$ inch (0.8 cm) sinking line, and were polyester-wrapped around Polysteel, which is a blend of polypropylene and polyethylene.

During the 2-year study, the modified leader was found effective in reducing sea turtle interactions as compared to the unmodified leader. The final results of the 2004 study found that out of eight turtles impinged on or entangled in pound net leaders, seven were in an unmodified leader. One leatherback turtle was found entangled in the vertical lines of a modified leader. In response to the leatherback entanglement, the gear was further modified by increasing the stiffness of the vertical lines for the 2005 experiment. In 2005, 15 turtles entangled in or impinged on the leaders of unmodified leaders, and no turtles were found entangled in or impinged on modified leaders. Furthermore, results

of the finfish catch comparison suggest that the modified leader caught similar quantities and size compositions as the unmodified leader. Although, in 2005 the portion of the experiment with both modified and unmodified leaders was of shorter duration than the portion of the experiment with modified leaders, NMFS believes that the results provide sufficient new information and justification to require the use of the modified leader in certain areas. Specifically, the experiment supports requiring modified leaders in a part of the Virginia Chesapeake Bay where pound net leaders pose a greater risk to sea turtles while allowing their use in an area of the Virginia Chesapeake Bay where pound net leaders seem to pose less risk.

This action provides for the conservation of threatened sea turtles and helps enforce the provisions of the ESA, including the prohibition on takes of endangered species, by reducing incidental take in the Virginia pound net fishery during the spring, while enabling fishermen to use leaders during the regulated period. Additional details concerning sea turtle and pound net interactions, the potential impact of pound net leaders on sea turtles, the modified pound net leader experiment, and justification for pound net leader regulations may be found in the preamble to the 2004 proposed rule (69 FR 5810, February 6, 2004) and the 2006 proposed rule (71 FR 19675, April 17, 2006).

Approved Measures

NMFS changes the titles of the regulated areas defined in the 2004 rule, while retaining the previously established boundaries.

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

Pound Net Regulated Area II means Virginia waters of the Chesapeake Bay outside of Regulated Area I defined above, extending to the Maryland-Virginia State line (approximately 37°55' N. lat., 75°55' W. long.), the Great Wicomico River downstream of the

Jessie Dupont Memorial Highway Bridge (Route 200; approximately 37°50.84' N. lat, 76°22.09' W. long.), the Rappahannock River downstream of the Robert Opie Norris Jr. Bridge (Route 3; approximately 37°37.44' N. lat, 76°25.40' W. long.), and the Piankatank River downstream of the Route 3 Bridge (approximately 37°30.62' N. lat, 76°25.19' W. long.) to the COLREGS line at the mouth of the Chesapeake Bay.

NMFS requires that from 12:01 a.m. local time on May 6 through 11:59 p.m. local time on July 15 each year, any offshore pound net leader set in Pound Net Regulated Area I meets the definition of a modified pound net leader. Offshore pound nets are defined as those nets set with the inland end of the leader greater than 10 horizontal feet (3 m) from the mean low water line. A modified pound net leader is defined as a pound net leader that is affixed to or resting on the sea floor and made of a lower portion of mesh and an upper portion of only vertical lines such that—(a) the mesh size is equal to or less than 8 inches (20.3 cm) stretched mesh; (b) at any particular point along the leader the height of the mesh from the seafloor to the top of the mesh must be no more than one-third the depth of the water at mean lower low water directly above that particular point; (c) the mesh is held in place by vertical lines that extend from the top of the mesh up to a top line, which is a line that forms the uppermost part of the pound net leader; (d) the vertical lines are equal to or greater than $\frac{5}{16}$ inch (0.8 cm) in diameter and strung vertically at a minimum of every 2 feet (61 cm); and (e) the vertical lines are hard lay lines with a level of stiffness equivalent to the stiffness of a $\frac{5}{16}$ inch (0.8 cm) diameter line composed of polyester wrapped around a blend of polypropylene and polyethylene and containing approximately 42 visible twists of strands per foot of line.

Due to the variations in manufacturing hard lay line in the cordage industry, NMFS cannot provide a specific definition of hard lay line at this time. Hard lay is a technical term used by the cordage industry to describe line that is purposefully made to be stiff. Hard lay line is made stiff by twisting the line material. Similar materials may be used in soft lay line, but the tightness of the twists provides the rigidity. These twists are added during three processes in the construction of the line. They are added to the fibers, which are twisted into yarns; to the yarns, which are twisted into strands; and to strands, which are twisted into line. NMFS acknowledges that there may be some variation in what is characterized as

hard lay lines, depending on how the manufacturer makes the line, but the characteristics of hard lay line in the water should be similar. The lines used in the 2005 experiment met the characteristics of hard lay lines. The vertical hard lay lines used in the experiment were made of polyester wrapped around Polysteel, which is a blend of polypropylene and polyethylene, and were coated with copper paint to prevent fouling, which also added a small amount of stiffness to the lines. The diameter of the lines was $\frac{5}{16}$ inch (0.8 cm) and contained approximately 42 twists of the strands per foot of line. As explained above, twists can be added to fibers, yarns, and strands during the manufacturing process, so a different number of twists at different stages in the process may achieve an equivalent stiffness to the 42 twists of the strands per foot of line used in the 2005 experiment. The vertical lines used in the 2005 experiment were not easily bent and remained stiff in the water regardless of the submergence duration. It is important that the hard lay lines used in the modified leaders perform the same way as those used in the 2005 experiment, in order to reduce the risk of sea turtle entanglement in pound net leaders. Fishermen are afforded the flexibility to use other types of hard lay line as long as it performs the same way as the line in the 2005 experiment and is inflexible and remains stiff regardless of soak time.

Existing mesh size and stringer restrictions on nearshore pound net leaders in Pound Net Regulated Area I and all pound net leaders in Pound Net Regulated Area II remain in place for the period from 12:01 a.m. local time on May 6 through 11:59 p.m. on July 15 each year. However, this rule creates an exception to those restrictions by allowing the use of modified pound net leaders during that period in nearshore pound net leaders in Pound Net Regulated Area I and all pound net leaders in Pound Net Regulated Area II. The year-round reporting and monitoring requirements for this fishery and the framework mechanism under the existing regulations also remain in effect.

Comments and Responses

On April 17, 2006, NMFS published a proposed rule (71 FR 19675) that would require that all offshore pound net leaders set in Pound Net Regulated Area I use a modified pound net leader. Comments on this proposed action were requested through May 2, 2006. Eight comment letters from seven different individuals or organizations were

received during the public comment period for the proposed rule. Six comment letters supported the action, while no letters opposed the modified leader requirement. Two comment letters were neither in favor nor against the proposed action. A public hearing was also held in Virginia Beach, Virginia on April 26, 2006, at which five individuals provided oral comments. None of the oral 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 stated that NMFS does not recognize the impact of strong tidal currents on the risk of sea turtle impingements in pound net leaders set Pound Net Regulated Area I and in nearshore pound net leaders. The commenter recommended that the importance of water current be addressed by refining the definition of "nearshore" and "offshore" pound nets to "shoal water" and "deep water" pound nets, respectively. The commenter suggested that the effect of water depth on current strength is what drives the risk of sea turtle impingements, not just distance from shore, and recommended that the following text be added to the definition of a nearshore pound net: "or the pound net trap head be located in a low water depth of 18 feet or less."

Response: NMFS has monitored pound nets since 2002 and observed sea turtles impinged on nets with varying current strengths. NMFS has found that there are differences between nearshore and offshore nets with respect to the risk to turtles based upon the location of observed impingements and entanglements. However, NMFS recognizes distance from shore is not the only factor that is associated with the risk of sea turtle impingements. In the environmental assessment (EA) prepared for this action, NMFS acknowledges that pound net location is used as a proxy for environmental factors, including current, water depth, temperature, tides, and sea turtle migration patterns, that may also influence the risk of sea turtle interactions with pound net leaders. Generally, areas close to shore are often shallower and have less current than those areas farther from shore, but exceptions may occur because environmental conditions vary locally. Recognizing that geographic location,

which may be a proxy for other environmental factors, plays an important role in the risk of sea turtle entanglement in and impingement on pound net leaders, NMFS does not believe that sufficient evidence is available at this time to redefine nearshore and offshore nets based upon only depth characteristics as a proxy for current strength, generally, or upon a pound net trap head depth of 18 feet, specifically. Distance from the mean low water line was used as a common characteristic of those nets considered nearshore, and, therefore, less of a threat of sea turtle entanglement and impingement. The geographic area of the required leader modification in offshore nets in Pound Net Regulated Area I is designed not only to encompass the total area with the most documented takes of sea turtles to prevent turtle entanglements and impingements in pound net leaders, but also to reflect the area in which entanglements and impingements are expected to occur even if a sea turtle interaction has not been observed at particular pound net sites.

Comment 2: One commenter reminded NMFS that the framework provision in the regulations remains intact and that he has challenged this provision in court.

Response: NMFS is aware that the commenter is currently challenging the July 2003 application of the framework provision in the regulations that was part of the 2002 final rule. The existing framework provision, which was established by the 2004 pound net rule, has not been challenged. This rule does not affect the existing framework provision. NMFS has responded to the commenter's argument in the context of the litigation and awaits the court's decision.

Comment 3: One commenter noted that the cause and effect of sea turtle impingements on pound net leaders remain largely unknown, and that sea turtle impingements may occur in other fishing gear.

Response: Impingement on a pound net leader refers to a sea turtle being held against the leader by the current, apparently unable to release itself under its own ability. It is possible that a sea turtle in a weakened state may become impinged on a leader by a slower current than that which may impinge a strong, healthy sea turtle. While NMFS does not have data that identifies how strong a current must be to impinge a turtle of a given condition, NMFS does know that currents lead to impingements of sea turtles against pound net leaders. For instance, since 2002, 18 sea turtles (including 2 dead) have been found impinged on pound

net leaders with varying current strength.

NMFS believes an impingement may compromise a sea turtle and result in mortality. Based on the observations of impinged sea turtles on pound net leaders during NMFS monitoring efforts and the modified leader experiment, if an animal was impinged on a leader by the current with its flippers inactive, 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 observed live impingements occurred near the surface, but seven turtles were found underwater, unable to reach the surface to breathe. Based on information on forcibly submerged sea turtles, 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, even if it were a healthy turtle before becoming impinged (Henwood and Stuntz, 1987; Lutcavage and Lutz, 1997).

If fishing gear of any kind is fixed in the water column and a sea turtle comes in contact with the gear, has one or both of its flippers pinned against the net, and is unable to swim parallel to or off the gear, it is possible that a sea turtle may become impinged on the fishing gear. Impingement may occur on other types of fishing gear besides pound net leaders. However, NMFS has no data, observations, or anecdotal reports in other fisheries to suggest this occurs. Even if NMFS had information indicating that sea turtles become impinged on other types of gears, NMFS has the authority to regulate pound net gear as one source of impingement.

Comments in Support of Alternatives Other Than the Proposed Alternative

Comment 4: Two commenters supported Non-Preferred Alternative 2 (NPA 2; *e.g.*, required use of the modified leaders in both Pound Net Regulated Areas I and II) because if a pound net leader is located in an area where the risk of take exists, it seems reasonable to conclude that the modified leader design would reduce the takes, regardless of the location of the pound net leader (that is, relative to Pound Net Regulated Areas I and II). One commenter suggested that pound net catch and turtle interactions should be monitored to determine the level of take by unmodified leaders in Pound Net Regulated Area II. One commenter noted that the lack of observed takes

and strandings in parts of Pound Net Regulated Area II may be a function of lack of observer effort, not actual lack of sea turtle mortality, and that stranding surveys should be implemented in this area.

Response: In the proposed rule, NMFS put forward for consideration the use of modified leaders in offshore nets in Pound Net Regulated Area I because that was where the gear was tested, where the most observed instances of sea turtle entanglements and impingements occurred, and where NMFS believes the risk of entanglement and impingement of sea turtles is greater based on observer data and on using geographic location as a proxy for the environmental conditions that contribute to entanglements and impingements. The modified leader was designed to provide a benefit to sea turtles over traditional pound net leaders. NMFS agrees that the modified leader should provide a benefit to sea turtles outside the tested area because the modified leader design reduces the amount of mesh in the water column, the vertical lines are spaced to allow sea turtles to pass through more easily, and the vertical lines are stiff to reduce the risk of entanglement. In this final rule, NMFS has included a change from the proposed rule, in that modified leaders are allowed to be fished in nearshore pound net leaders in Pound Net Regulated Area I and in both nearshore and offshore leaders in Pound Net Regulated Area II. NMFS is not requiring the use of modified leaders in those areas, as sea turtle impingements on and entanglements in pound net leaders have been observed to be minimal and mesh size and stringer restrictions remain in place. See section *Changes From Proposed Rule* for more information on allowing the use of modified leaders in nearshore leaders and in leaders in Pound Net Regulated Area II.

Since 2002, NMFS has observed pound net leaders in Pound Net Regulated Area II and maintained a dedicated survey effort in this area during 2004 and 2005. In Pound Net Regulated Area II, one sea turtle interaction was observed in an offshore pound net leader in 2004 (offshore Lynnhaven, Virginia). NMFS acknowledges that after several sea turtle takes were observed in a particular area (*e.g.*, the southern portion of the Eastern shore and Western Bay), more observer effort was concentrated in that area. NMFS does not have any additional plans to monitor the pound net catch and potential sea turtle interactions in Pound Net Regulated Area II at this

time. Furthermore, the Sea Turtle Stranding and Salvage Network (STSSN) does collect data from Pound Net Regulated Area II, and documented sea turtle strandings in this area are historically lower than in the southern Chesapeake Bay. NMFS has funded dedicated sea turtle stranding surveys along the southern tip of the Eastern shore in previous years, in response to the historical high levels of documented sea turtle strandings. It is true that more observer effort and sea turtle stranding coverage has been allocated to the Eastern shore in recent years, but NMFS has adequately monitored other pound nets in other areas of the Chesapeake Bay, and the STSSN continues to operate and respond to strandings in all areas of the Chesapeake Bay.

Comment 5: One commenter supported NPA 3 (*i.e.*, required use of the modified leader for all offshore pound net leaders in Pound Net Regulated Areas I and II) based on the historically high levels of sea turtle take attributed to the pound net fishery. Because the proposed action would re-open an area to the use of a modified pound net leader that currently is closed to fishing with pound net leaders, the increase in fishing effort should be offset by additional protection in other geographic areas of the fishery to protect sea turtles.

Response: Despite previous monitoring efforts, only one turtle has been observed entangled in a pound net leader in Pound Net Regulated Area II. NMFS has sufficient evidence to conclude that there is a localized interaction between sea turtles and pound nets along the Eastern shore of Virginia and in the Western Chesapeake Bay. The boundaries of the regulated areas were determined based on a combination of the locations of observed sea turtle entanglements in or impingements on pound net leaders and the area in which sea turtles may face a greater risk of entanglement in or impingement on pound net leaders due to environmental conditions (*e.g.*, current). Given the low number of observations of sea turtles in pound net gear outside Pound Net Regulated Area I and in nearshore nets, NMFS is not requiring the use of the modified pound net leaders in Pound Net Regulated Area II, but instead will allow its use should fishermen choose to switch their gear. The pound net leader mesh size and stringer restrictions promulgated in the 2004 rule remain in effect for Pound Net Regulated Area II.

Given the results of the modified leader experiment, NMFS believes that requiring the use of the modified leader design in the offshore areas of Pound

Net Regulated Area I will afford approximately the same protection to sea turtles as the existing regulations. It is possible that sea turtles may interact with the lower leader mesh because sea turtles in the lower Chesapeake Bay commonly make dives of over 40 minutes during the day (Byles, 1988; Mansfield and Musick, 2003b, 2004) and dive depths range from approximately 13.1 ft (4 m) to 41 ft (12.5 m) (Mansfield and Musick, 2003). However, all interactions during the 2004 and 2005 modified leader experiment were recorded in the top portion of unmodified leaders (at depths within the top two-thirds of the depth of mean lower low water). One turtle was found entangled in the vertical lines of a modified leader during the 2004 experiment; no interactions were observed in the 2005 modified leader during the experiment. As described below, NMFS continues to believe that sea turtle interactions with the bottom mesh are possible, but, as shown by the experiment, are infrequent and are minimized by the leader design. As such, despite the increase in fishing effort, allowing the modified pound net leaders in an area previously closed to leaders is expected to provide a level of protection to sea turtles similar to that of the current closure and restrictions.

Comments Regarding the Modified Pound Net Leader Design

Comment 6: One commenter that participated in the modified pound net leader experiment in 2004 and 2005 stated that he would not switch back and forth between traditional and modified leaders, as he found the modified leader just as effective as the traditional leader at maintaining an acceptable level of fish catch.

Response: NMFS does not object if pound net fishermen choose to fish with the modified pound net leader outside of the regulated time period. There are currently no Federal pound net restrictions in place outside of the time period of May 6 through July 15 that would prevent the modified pound net leader from being used from July 16 through May 5. NMFS recognizes that this may alleviate some costs associated with switching from an unmodified pound net leader to a modified pound net leader to comply with the regulations included in this final rule.

Comment 7: One commenter noted that it is not possible for the modified pound net leader to be one-third the depth of the water at mean lower low water directly above that particular point because the sea floor is contoured, and therefore creating a tapered leader would not be possible. Furthermore, a

map displaying the contour of the sea floor is not available. The commenter also stated that if the bottom line of the leader must traverse over an uneven sea bed, then the bottom line, to meet the proposed requirements of a modified leader, must be longer than the top line. This would mean that the ties on the bottom line would have to be farther apart than the top line for the net to be suspended perpendicular to the seafloor. This commenter recommended that the specification of the modified pound net leader be exactly the same as the modified pound net leader specifications used in the 2005 experiment, as the modified leader was effective at preventing entanglement and impingement.

Response: The modified pound net leader was designed cooperatively with pound net fishermen, NMFS, the Virginia Institute of Marine Science, the Virginia Marine Resources Commission, and the Virginia Aquarium and Marine Science Center staff. It is NMFS' intent that the properties of the modified pound net leader in the final regulations be the same as the specifications of the leader that were tested during the experiment. The fishermen that participated in the experiment reported that the modified pound net leaders were tapered (wedge-shaped) such that the depth of the mesh at any point along the leader was never more than one-third the depth of mean low water directly above that particular point. Note that this final rule does not require that the mesh be exactly one-third the depth of the water, but rather that the mesh be *no more* than one-third the depth of the water. In order to achieve this, fishermen may decrease the depth of the mesh as the water becomes shallower by either lacing it into the middle line or cutting it. A contour map of the seafloor is not necessary to achieve this specification. A fisherman may determine the depth of the water along their pound net leader using a marked, weighted line as a measuring tool. Alternatively, a simple fish finder or inexpensive acoustic depth recorder both report bottom depth. The bottom line of the leader may traverse over an uneven sea bed and could, therefore, be longer than the top line. The length of the bottom line would not be affected by the type of leader (modified versus unmodified) being fished.

Comment 8: One commenter, while acknowledging the effectiveness of the modified pound net leader demonstrated through the experiment, noted that it is possible that small turtles that feed on the benthos, such as Kemp's ridleys and loggerheads, may become entangled in or impinged on the

mesh of the modified pound net leader in the lower third of the water column in areas where the lower third of the leader is of substantial size.

Response: NMFS agrees that there is some small, unquantifiable risk of entanglement or impingement of sea turtles in the lower third of the modified leader, and this risk is discussed in the EA prepared for this action. The design of the modified leader, including the vertical lines spaced 2 feet (0.61 m) apart, was proposed to allow sea turtles to pass through the upper two-thirds of the leader, through the vertical lines, without entangling in or impinging on the leader. NMFS is aware that some turtles are known to forage on the benthos and around pound nets, and therefore may interact with the lower leader mesh. Further, turtles have been observed to dive to the bottom regardless of water temperature, and loggerheads in the Chesapeake Bay have been observed to spend up to 90 percent of time beneath the surface of the water (Mansfield *et al.*, 2005). Despite this information indicating that turtles could interact with the mesh in the lower third of the modified pound net leader, all interactions during the 2004 and 2005 experiment were recorded in the top portion of the unmodified leaders (at depths within the top two-thirds of the depth of mean lower low water). At this time, data are not available to determine if turtles are likely to become impinged or entangled upon their first contact with the pound net leader or if, once a non-entangling interaction occurs, they attempt to move away (in any direction) from the interaction site and eventually become impinged or entangled after several interactions. If the second scenario occurs, it is possible that a turtle could interact with the bottom mesh of a modified leader in the lower water column without becoming entangled and then move up the leader and through the vertical lines.

NMFS recognizes that it is possible that interactions could have occurred in the bottom one-third of leaders and were not observed during monitoring. In 2001 and 2002, side scan sonar was used to attempt to detect sub-surface sea turtle entanglements, but no verified sea turtle acoustical signatures were observed during these surveys (Mansfield *et al.*, 2002a; Mansfield *et al.*, 2002b). A number of factors are thought to influence the use of side scan sonar, including weather, sea conditions, water turbidity, the size and condition of the animal, and the orientation of the turtle in the net. During the 2004 and 2005 experiment, side scan sonar was again used to detect subsurface sea turtle interactions along

the Eastern shore. The nets were monitored twice each day, both visually (up to the top ten feet of the net) and with sonar, using a diver to visually inspect each suspected sonar contact (DeAlteris *et al.*, 2004). In 2004, two sea turtles were identified through sonar monitoring, and five were found via visual inspection (the visually identified sea turtles had not yet been scanned via sonar). In 2005, sonar monitoring identified four sea turtle interactions independent of leader removal. Because sonar was shown to be a successful method of sea turtle detection during the experiment, NMFS believes it is unlikely that unobserved interactions occurred in the dropped mesh portion of the modified leaders. However, it is possible that an interaction that did not result in a turtle being impinged or entangled occurred as described above (i.e., the turtle interacted with bottom mesh and then moved up the leader and through the vertical lines). If this occurred, the relatively short duration of the interaction would have decreased the probability of the interaction being detected by sonar monitoring.

Comment 9: One commenter noted that the vertical lines used in the modified leader are not without problems as demonstrated by the drowning of one leatherback turtle during the experiment.

Response: In 2004, a dead leatherback sea turtle was found entangled in the vertical line of the experimental leader. The necropsy report indicated that the turtle appeared to be in good health and that the cause of death was entanglement in the pound net leader and drowning. Subsequent histological analysis revealed that the leatherback suffered from ependymoma (brain tumor with possible neurological dysfunction), pneumonia, and hepatitis (Swingle *et al.*, 2005). As a result of the leatherback's entanglement, a different type of line was used for the vertical lines in the modified leader in 2005. In 2004, the vertical line did not have a hard lay and was not painted. In 2005, hard lay line was used, and no sea turtle interactions were documented in the modified leaders. The line used in 2004 was flexible enough to wrap around part of the turtle. Therefore, in 2005, the participants in the experiment used stiffer line so that the line was less likely to wrap around a sea turtle's head or flipper. NMFS believes that the requirement to use hard lay line will prevent sea turtle entanglements in the modified pound net leaders' vertical lines.

Comments on the Definition of Hard Lay Line

Comment 10: One commenter noted that Virginia watermen know what "hard lay" line means, implying that additional specifications in the regulation regarding the type of vertical lines that must be used are unnecessary.

Response: Hard lay is a technical term used by the cordage industry to describe line that is purposefully made to be stiff. As described previously in this final rule, hard lay refers to the tightness of the fibers that are twisted together. Similar materials may be used in soft lay line, but the tightness of the twists provides the rigidity. While industry participants may be familiar with the term hard lay, it is important to ensure the modified leader lines retain the same properties as those used in the experiment in order to protect sea turtles from entanglement. In a previous section, a description of the hard lay line used in the experiment is provided.

Comment 11: One commenter stated that lines made from nylon become soft over time, while lines constructed out of plastics will remain rigid over time. Furthermore, every time the line is painted it becomes stiffer.

Response: NMFS appreciates this comment in order to better understand line characteristics.

Comments Related to Stranding Levels

Comment 12: One commenter stated that the proposed pound net restrictions will not solve the high spring sea turtle stranding problem in Virginia waters. Several commenters indicated that NMFS should provide adequate observer coverage to ascertain other sources of sea turtle mortality (particularly recreational and commercial boating activities and fishing activities).

Response: NMFS agrees with the commenter that pound net restrictions will not solve the high spring sea turtle problem in Virginia waters, given that pound net leaders are not the sole source of spring mortalities. NMFS does believe that pound nets play a role in the annual spring stranding event, based upon observations of entangled and impinged sea turtles on pound net leaders and the location of the majority of sea turtle strandings. Regulating pound net leaders, a gear type known to kill sea turtles by entangling and impinging them, is expected to minimize the effects of one source of mortality that leads to strandings.

Since 2001, several fisheries have been observed in Virginia with few observed turtle takes. However, NMFS recognizes that variations in fishery-

turtle interactions may occur in any given year, and is committed to continue monitoring the active fisheries in and around Virginia. The NMFS 2006 monitoring program is anticipated to include observer coverage in the Virginia/Chesapeake Bay gillnet and trawl fisheries. At least 69 days of observer coverage are allocated for gillnet fisheries in the Virginia Chesapeake Bay during May and June 2006. Further, NMFS scientists are evaluating the use of sonar to detect and ascertain the extent of sea turtle interactions in Chesapeake Bay pot gear. NMFS has developed a brochure titled "Marine Mammal and Sea Turtle Protection: Guidelines for Recreational Fishermen," which provides information to minimize sea turtle injuries in recreational fishing gear. NMFS also has plans to work with Virginia organizations to institute an educational campaign aimed at reducing sea turtle interactions with recreational fishermen and boaters.

In 2004 and 2005, NMFS funded professional necropsies and associated lab costs on fresh dead animals in Virginia to determine the health of a subset of stranded animals. Of the 20 sea turtles examined, documented mortality sources included human interactions, such as fisheries entanglements, hook ingestions, and vessel strikes, as well as disease pathologies, pneumonia, and parasites. NMFS will continue to fund these fresh dead professional necropsies in 2006.

NMFS will also 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 and the U.S. Fish and Wildlife Service (USFWS) are working to minimize the impacts to sea turtles from other activities in addition to fishing (e.g., habitat degradation, marine debris, dredging, water quality, power plant impingement). Fishing activities, however, have been recognized as one of the most significant threats to sea turtle survival (Magnuson *et al.*, 1990, Turtle Expert Working Group 2000).

Comment 13: One commenter noted that as sea turtle populations recover, the number of sea turtle interactions with fishing gear will also increase. The commenter seemed to be asking what NMFS sea turtle program goals are.

Response: All sea turtles are listed as either endangered or threatened under the ESA. The goals of the NMFS sea turtle program include reducing impacts to sea turtles in order to achieve recovery of the species. NMFS evaluates the status of sea turtles through various

avenues (e.g., species status reviews, ESA section 7 consultation process) and is aware of the latest research and survey efforts that monitor population trends. NMFS and USFWS recovery plans are available for each sea turtle species. These recovery plans outline a number of recovery criteria, and associated actions to achieve these criteria, that must be met before delisting. It is possible that an increase in sea turtle abundance would lead to more documented interactions in fishing gear, which, in turn, may lead to additional or different restrictions to help protect the populations. Sea turtles have not recovered and remain in need of protection under the ESA. In the future, NMFS will continue to evaluate sea turtle mortality sources and consider management measures to minimize those threats.

Comment 14: One commenter stated that new information, presented at the 26th Annual Symposium on Sea Turtle Biology and Conservation in April of 2006, indicates that the southern subpopulation of loggerheads has declined 29 percent over the last 17 years. The northern subpopulation of loggerheads also appears to be declining. The commenter provides an opinion that fisheries in the western and eastern Atlantic may be negatively affecting loggerhead populations.

Response: Previously, the status of the northern subpopulation, based on number of loggerhead nests, has been classified as stable or declining (TEWG 2000). Preliminary new analysis of nesting data for 11 beaches in North Carolina, South Carolina, and Georgia shows a declining trend of 2 percent annually over a 23-year period (1982–2005) for the northern loggerhead subpopulation (B. Schroeder, NMFS, pers. comm.). The status of the southern subpopulation is a bit more unclear as the nesting data are currently under review. The southern subpopulation of loggerheads appeared to be stable or increasing based upon annual nesting totals from all beaches from 1989 to 1998 (TEWG 2000). NMFS is aware that a presentation at the 26th Annual Symposium on Sea Turtle Biology and Conservation indicated that, based on an analysis of nesting data, the southern subpopulation of loggerheads has declined 29 percent over the last 17 years (1989–2005; A. Meylan, Florida Fish and Wildlife Conservation Commission, pers. comm.). NMFS continues to evaluate nesting data for loggerheads, and the Loggerhead Recovery Plan (currently under revision) will also contain updated population trend information.

NMFS continues to consider the impacts to listed sea turtles, including loggerheads, and to reduce threats from known sources. NMFS and USFWS are working to minimize the impacts to sea turtles from activities such as nesting habitat degradation, marine debris, dredging, and power plant impingement, but 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 adversely affect sea turtles. NMFS will continue to monitor fishing activities in Virginia, as well as other potential sea turtle mortality sources.

Comments Related to Economic and Social Impact Assessment

Comment 15: Several commenters expressed concern with the delay in publishing the proposed regulations and requested emergency action to get the regulations in place as soon as possible.

Response: NMFS has been committed to enacting regulations to require modified leaders in a portion of 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 regulated period begins on May 6. However, the new regulations contained in this final rule were not enacted before the start of the fishing season this year. NMFS recognizes that the industry begins planning for the next fishing season in approximately December or January and is sensitive to the industry's time constraints required to outfit their gear in compliance with the regulations.

Changes From the Proposed Rule

Based upon public comments received and further assessment, NMFS has determined that a modification to the measures included in the proposed rule is warranted. Specifically, the proposed rule stated that the existing mesh size and stringer restrictions on nearshore pound net leaders in Pound Net Regulated Area I and on all pound net leaders in Pound Net Regulated Area II would remain in place and are not affected by the proposed rule. In this final rule, the mesh size and stringer restrictions applicable to those leaders

continue to remain in effect. However, NMFS has decided to allow fishermen with nearshore leaders in Pound Net Regulated Area I and any type of leader in Pound Net Regulated Area II to use leaders meeting the definition of modified pound net leaders should they so choose. Allowing the use of the modified leader design in these leaders may benefit sea turtles as described in the response to *Comment 4*. However, because specific gear requirements are already in place for nearshore leaders in Pound Net Regulated Area I and all leaders in Pound Net Regulated Area II, and leaders in those locations are less likely to result in sea turtle entanglements and impingements based on existing information, NMFS decided not to require fishermen in those areas to purchase and install a new type of leader. Allowing the use of modified pound net leaders to nearshore nets in Pound Net Regulated Area I and all pound net leaders in Pound Net Regulated Area II falls within the range of alternatives described and analyzed in the draft EA, between the measures included in the proposed rule and NPA 2 (required use of the modified leader in all pound nets set within Pound Net Regulated Areas I and II during the regulated period).

Classification

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

The Assistant Administrator for Fisheries (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. To determine the appropriate properties for the modified pound net leader in this rulemaking, NMFS needed the results of the 2005 modified pound net leader experiment. The final report for the experiment was not available to NMFS until January 2006. NMFS then reviewed and analyzed the report and integrated the new information into the rulemaking documents.

NMFS has identified a modified leader design that will conserve sea turtles while enabling fishermen to use pound net leaders, and pound net fishermen are not able to fish with their leaders under existing regulations. The existing regulations prohibit the use of offshore pound net leaders, an integral component of pound net gear, in a part of the southern Chesapeake Bay from May 6 to July 15 each year. There is good cause to waive the 30-day delay in the effective date of this final rule as it would enable fishermen to set their leaders immediately and salvage a portion of the spring/summer fishing season, while ensuring that threatened

and endangered sea turtles continue to be protected from fishing mortalities. This final rule also allows fishermen in a different part of the Virginia Chesapeake Bay to use the modified leader if they so choose. The modified leader is expected to benefit sea turtles in that area as well, it provides fishermen with another option for allowable gear and, because this portion of the rule is voluntary, fishermen do not need time to comply.

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

A statement of the need for, and objectives of, this rulemaking are presented in the preamble and not repeated here.

The small entities affected by this action are the commercial fishing operations forming the Virginia pound net fishery in the Chesapeake Bay. This action requires any offshore pound net leader set in Pound Net Regulated Area I from May 6 through July 15 each year to meet the definition of a modified pound net leader. This requirement will affect approximately five fishermen (the number that fish offshore leaders in the lower Chesapeake Bay). This action also allows the use of modified pound net leaders in nearshore pound net leaders in Pound Net Regulated Area I and in all leaders set in Pound Net Regulated Area II during this same time frame. This authorization will affect approximately 16 fishermen (the number that fish in the upper bay, who may choose to use the modified leader design). A total of 21 fishermen will be affected by the rule.

NMFS has minimized economic impacts by selecting the alternative adopted in the final rule. That alternative was chosen because it will enable a group of fishermen to use leaders—a key component of pound net gear—during a peak fishing season, thereby enabling them to earn revenues while also reducing impacts of pound net gear on sea turtles. The revenues earned by the group of fishermen required to use modified pound net leaders would be larger than the costs incurred to modify the leaders. The net change in revenues is positive 16.9 to 33.7 percent for the 5 lower bay fishermen. For the 16 upper bay fishermen, there will not be a net change in revenues due to compliance with the rule. This alternative was also selected because it allows, but does not require, fishermen to use modified leaders in a part of the Chesapeake Bay where risks to sea turtles from pound net gear appear to be lower.

Non-preferred alternative 1 (NPA 1) would maintain the current regulations, including a prohibition on the use of offshore pound net leaders in Pound Net Regulated Area I, and would prohibit 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 during the period of May 6 through July 15 each year. NPA 1 would not have changed the economic status quo. NPA 1 was rejected because it would not take advantage of the modified leader design developed to enable fishermen to generate revenues by fishing while also protecting sea turtles.

Non-preferred alternative 2 (NPA 2) would require any pound net leader used during the period of May 6 through July 15 in either Pound Net Regulated Area I or Pound Net Regulated Area II to be a modified pound net leader. NPA 2 would have imposed economic costs on all pound net fishermen in the Virginia Chesapeake Bay. NPA 2 was rejected because at this time requiring all pound net fishermen in the Virginia Chesapeake Bay to use modified leaders seems overbroad. While lower bay fishermen who are currently prohibited from using offshore leaders will be able to recoup costs through increased fishing opportunity, upper bay fishermen, who are required to use the modified leader under NPA 2, would incur extra costs for minimal benefit to sea turtles given that those fishermen can already fish with leaders subject to mesh size and stringer restrictions designed to protect sea turtles and, at this time, offshore leaders in Pound Net Regulated Area II are not known to present as much of a risk to sea turtles as those in Pound Net Regulated Area I. For the 5 lower bay fishermen, the net change in revenues is positive 12.0 to 28.9 percent while the net change in revenues for the 16 upper bay fishermen is negative by 3.6 to 7.2 percent. NMFS believes tailoring the requirement to the area that presents the greatest risk to sea turtles and allowing (but not requiring) the use of modified leaders in other areas is more appropriate given existing information.

Non-preferred alternative 3 (NPA 3) is similar to the proposed action, but would require the modified pound net leader design to be used in any offshore leader, while any nearshore leader would still be required to use stretched mesh less than 12 inches (30.5 cm) and stringers would be prohibited. NPA 3 would have greater economic effects than the final rule and was rejected because at this time offshore leaders in Pound Net Regulated Area II are not known to present the same risks to sea

turtles as those in Pound Net Regulated Area I. In addition, based on existing information, NPA 3 would have been overbroad. While lower bay fishermen using offshore leaders will be able to recoup costs through increased fishing opportunity, upper bay fishermen with offshore leaders in Pound Net Regulated Area II would have incurred extra costs for not much benefit to sea turtles, because those fishermen can already use pound net leaders with mesh size and stringer restrictions designed to protect sea turtles and because of the lesser risk to sea turtles from offshore leaders in Pound Net Regulated Area II. For the 5 lower bay fishermen, the net change in revenues is positive 16.9 to 33.7 percent, while for the 16 fishermen in the upper bay the net change in revenues is negative by 3.6 to 7.2 percent.

This action does not contain new reporting or recordkeeping requirements.

No comments were received specifically on the initial regulatory flexibility analysis. Comments on economic impacts of the proposed rule and response to them appear in the preamble to this final rule and are incorporated herein.

A formal consultation pursuant to section 7 of the ESA was conducted on the previous 2004 rule (69 FR 24997, May 5, 2004). The April 16, 2004 Biological Opinion 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. NMFS has determined that this action does not trigger reinitiation of formal consultation.

This final rule contains policies with federalism implications that were sufficient to warrant preparation of the following federalism assessment under Executive Order 13132. The Acting Assistant Secretary for Legislative and Intergovernmental Affairs provided notice of the proposed action to the Governor of Virginia on April 17, 2006. The Secretary of Natural Resources in Virginia responded on behalf of the Governor of Virginia on April 26, 2006. In this letter, he expressed his support of the proposed action, but noted concerns with the delay in publishing the proposed rule and recommended shortening the time frame to implement the final rule. NMFS' position supporting the need to issue the regulations is explained in the preamble to this rule and incorporated herein. NMFS has endeavored to address the

concerns of elected officials by continuing to expedite issuance of the rule. NMFS did find good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effective date of this final rule, given that such a delay would be contrary to the public interest. The federalism official certifies that NMFS has complied with the requirements of Executive Order 13132 for this final rule.

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List of Subjects

50 CFR Part 222

Endangered and threatened species, Exports, Reporting and recordkeeping requirements.

50 CFR Part 223

Endangered and threatened species, Exports, Transportation.

Dated: June 16, 2006.

James W. Balsiger,

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

■ For reasons stated 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 definitions of “Modified pound net leader” and “Pound Net Regulated Area I” and “Pound Net Regulated Area II” are added in alphabetical order to read as follows:

§ 222.102 Definitions.

* * * * *

Modified pound net leader means a pound net leader that is affixed to or resting on the sea floor and made of a lower portion of mesh and an upper

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

* * * * *

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

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

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PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

■ 3. The authority citation for part 223 continues to read as follows:

Authority: 16 U.S.C. 1531–1543; subpart B, § 223.201–202 also issued under 16 U.S.C. 1361 *et seq.*; 16 U.S.C. 5503(d) for § 223.206(d)(9).

■ 4. In § 223.206, paragraph (d)(10) is revised to read as follows:

§ 223.206 Exceptions to prohibitions relating to sea turtles.

* * * * *

(d) * * *

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

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

measures only if it meets the definition of a modified pound net leader.

(iii) *Protocol for measuring mesh size.* This protocol applies to measuring mesh size in leaders described in 50 CFR 223.206(d)(10)(i) and 223.206(d)(10)(ii). Mesh sizes are measured by a wedge-shaped gauge having a taper of 0.79 in. (2 cm) in 3.15 in. (8 cm) and a thickness of 0.09 in. (2.3 mm) inserted into the meshes under a pressure or pull of 11.02 lb. (5 kg). The mesh size is the average of the measurement of any series of 20 consecutive meshes. The mesh in the leader is measured at or near the horizontal and vertical center of a leader panel.

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

(v) *Monitoring.* Owners or operators of pound net fishing operations must allow

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

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

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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]

BILLING CODE 6712–01–P

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.uptite@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 Sundstrom, 1961). Based upon field observations in Virginia however, NMFS agrees with the comment that pound net leaders in Virginia do not reach one mile (1,609 m) long. In fact, Section 28.2-307 of the Code of Virginia restricts the total length of a single fixed fishing device to 1,200 feet (365.8 m) or less. The reference to the leader length of one mile (1,609 m) was deleted in the final EA.

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

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

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

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

Comments Related to Stranding Levels

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comments Related to Economic and Social Impact Assessment:

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

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

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

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

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

Comment 22: Thirteen commenters expressed their concern with the high

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

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

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

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

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

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

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

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

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

temperatures were too cold for sea turtles.

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

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

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

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

Changes From the Proposed Rule

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

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

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

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

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

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

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

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

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

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

Classification

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Assessment) on the initial regulatory flexibility analysis.

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

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

Dated: April 29, 2004.

Rebecca Lent,

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

List of Subjects

50 CFR Part 222

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

50 CFR Part 223

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

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

PART 222—GENERAL ENDANGERED AND THREATENED MARINE SPECIES

■ 1. The authority citation for 50 CFR part 222 continues to read as follows:

Authority: 16 U.S.C. 1631 *et seq.*

■ 2. In § 222.102, the definition of "Pound net leader" is revised to read as follows:

§ 222.102 Definitions.

* * * * *

Pound net leader means a long straight net that directs the fish offshore towards the pound, an enclosure that captures the fish. Some pound net

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

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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

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■ 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.

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(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.

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(2) *Gear requirements for trawlers—**

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(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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