

Automobile Manufacturers (Alliance) suggested that FMVSS No. 124 should include a direct measurement of powertrain output to the drive wheels.<sup>1,2</sup> The Alliance stated that this would be a “technology-neutral” test and, thus, would be similar to NHTSA’s proposed engine RPM test but with the advantage of being more easily applicable to hybrid powertrains in which engine RPM might not indicate drive torque. Subsequently, the Alliance suggested that the powertrain output test should measure vehicle driving speed, *i.e.*, “creep speed,” rather than output horsepower or torque.<sup>3</sup> Toyota suggested a similar approach, but requested that the agency consider a somewhat different creep speed test procedure.<sup>4</sup>

While the agency regards these suggestions merely as variations on the dynamometer-based engine rpm test as proposed in the NPRM, we believe that additional research on the exact procedures for the suggested test is desirable. In particular, the agency wants to conduct its own tests to provide additional support for the use of a dynamometer for measurement of powertrain output (or possibly creep speed measurements), and demonstrate the feasibility of conducting compliance tests for all suggested approaches.

In addition, the Alliance suggested that the agency include air flow rate measurement as another optional test procedure in FMVSS No. 124. Many vehicles already have mass air flow sensors that can monitor air flow rate. For vehicles with sensors, the test would measure the air flow rate during the failsafe response for comparisons to the baseline idle condition. NHTSA plans to conduct research on the suggested air flow rate test procedure and decide on the appropriateness of including it in FMVSS No. 124.

Given the time it will take to conduct research on some of the issues involved, NHTSA has decided not to continue an active rulemaking on this issue during that research. Therefore, NHTSA is withdrawing the rulemaking to update FMVSS No. 124.

**Authority:** 49 U.S.C. 322, 30111, 30115, 30117, and 30166; delegation of authority at 49 CFR 1.50.

Issued: November 4, 2004.

**Stephen R. Kratzke,**

*Associate Administrator for Rulemaking.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Parts 223 and 229

[Docket No. 040903253–4253–01; I.D. 081104H]

RIN 0648–AR39

#### Taking of Marine Mammals Incidental to Commercial Fishing Operations; Bottlenose Dolphin Take Reduction Plan; Sea Turtle Conservation; Restrictions to Fishing Activities

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

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

**SUMMARY:** NMFS is proposing to implement management measures to reduce the incidental mortality and serious injury (bycatch) of the western North Atlantic coastal bottlenose dolphin stock (dolphins) (*Tursiops truncatus*) in the mid-Atlantic coastal gillnet fishery and eight other coastal fisheries operating within the dolphin’s distributional range and to amend current, seasonal restrictions on large mesh gillnet fisheries operating in the mid-Atlantic region to reduce the incidental take of sea turtles in North Carolina and Virginia state waters. This rule proposes to use effort reduction measures, gear proximity rules, gear or gear deployment modifications, fishermen training, and outreach and education measures to reduce dolphin bycatch below the marine mammal stock’s potential biological removal level (PBR); and time/area closures and size restrictions on large mesh fisheries to reduce incidental takes of endangered and threatened sea turtles as well as to reduce dolphin bycatch below the stock’s PBR.

**DATES:** Written comments on the proposed rule must be received no later than 5 p.m. eastern time, on February 8, 2005.

**ADDRESSES:** You may submit comments, identified by the RIN 0648–AR39, by any of the following methods:

- E-mail: 0648–AR39.proposed@noaa.gov. Include Docket Number RIN 0648–AR39 in the subject line of the message.
- Mail: Chief, Protected Resources Division, NMFS, 9721 Executive Center Drive North, St. Petersburg, FL 33702–2432.
- Facsimile (fax) to: 727–570–5517. Chief, Protected Resources Division,

NMFS, 9721 Executive Center Drive North, St. Petersburg, FL 33702–2432.

• Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the “Public Participation” heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Copies of the Environmental Assessment (EA), an Initial Regulatory Flexibility Analysis (IRFA), the Bottlenose Dolphin Take Reduction Team (BDTRT) meeting summaries and progress reports and complete citations for all references used in this rulemaking may be obtained from the persons listed under **FOR FURTHER INFORMATION CONTACT**.

Comments regarding the collection of information requirements contained in this proposed rule should be submitted in writing to the Chief, Marine Mammal Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910 and to David Rostker, OMB, by e-mail at [David\\_Rostker@omb.eop.gov](mailto:David_Rostker@omb.eop.gov) or by fax to 202–395–7285.

**FOR FURTHER INFORMATION CONTACT:**

Stacey Carlson, NMFS, Southeast Region, 727–570–5312, Kristy Long, NMFS, 301–713–2322, or Brian Hopper, NMFS, Northeast Region, 978–281–9328. Individuals who use telecommunications devices for the deaf (TDD) may call the Federal Information Relay Service at 1–800–877–8339 between 8 a.m. and 4 p.m. eastern time, Monday through Friday, excluding Federal holidays.

**SUPPLEMENTARY INFORMATION:** NMFS intends to conduct two public hearings on this proposed rule. One hearing will be in conjunction with the next BDTRT meeting, which has not yet been scheduled but will occur during the comment period; and another in a location chosen to maximize participation of affected fishermen. NMFS will publish a separate notice detailing the time and location of the public hearings.

**Electronic Access**

For additional information on western North Atlantic coastal bottlenose dolphins, refer to the final 2002 Atlantic and Gulf of Mexico Marine Mammal Stock Assessment Reports (SARs). The SARs can be accessed via the Internet at [http://www.nmfs.noaa.gov/prot\\_res/](http://www.nmfs.noaa.gov/prot_res/)

<sup>1</sup> Docket NHTSA–2002–12845–10.

<sup>2</sup> Docket NHTSA–2002–12845–13.

<sup>3</sup> Docket NHTSA–2002–12845–15.

<sup>4</sup> Docket NHTSA–2002–12845–14.

*PR2/Stock\_Assessment\_Program/sars.html.*

## Background

### *Bycatch Reduction Requirements in the MMPA*

Section 118 (f)(1) of the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1387(f)(1)) requires the preparation and implementation of Take Reduction Plans (TRPs) for strategic marine mammal stocks that interact with Category I or II fisheries. The MMPA defines a strategic stock as a marine mammal stock: (1) for which the level of direct human-caused mortality exceeds the PBR level; (2) which, based on the best available scientific information, is declining and is likely to be listed as a threatened species under the Endangered Species Act (ESA) within the foreseeable future; or (3) which is listed as a threatened or endangered species under the ESA, or as depleted under the MMPA (16 U.S.C. 1362(19)). PBR, as defined by the MMPA, means the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (16 U.S.C. 1362(20)). NMFS regulations at 50 CFR 229.2 define a Category I fishery as a fishery that has frequent incidental mortality and serious injury of marine mammals; a Category II fishery as a fishery that has occasional incidental mortality and serious injury of marine mammals; and a Category III fishery as a fishery that has a remote likelihood of, or no known incidental mortality and serious injury of marine mammals. The western North Atlantic coastal bottlenose dolphin is a strategic stock because fishery-related incidental mortality and serious injury exceeds the stock's PBR and because it is currently designated as depleted under the MMPA (see 50 CFR 216.15). Because it is a strategic stock that interacts with Category I and II fisheries, a TRP is required to address dolphin bycatch.

This rule proposes to implement the Bottlenose Dolphin Take Reduction Plan (BDTRP), which is based on consensus recommendations of the BDTRT, for multiple management units (MUs) within the western North Atlantic coastal bottlenose dolphin stock. The BDTRP affects the following Category I and II fisheries (see 2003 List of Fisheries, 68 FR 41725, July 15, 2003): the mid-Atlantic coastal gillnet fishery, Virginia pound net fishery, mid-Atlantic haul/beach seine fishery, Atlantic blue crab trap/pot fishery, North Carolina inshore gillnet fishery,

North Carolina roe mullet stop net fishery, North Carolina long haul seine fishery, Southeast Atlantic gillnet fishery, and Southeastern U.S. Atlantic shark gillnet fishery.

According to the MMPA (16 U.S.C. 1387(f)(2)), the short-term goal of a TRP is to reduce, within 6 months of its implementation, the incidental mortality or serious injury of marine mammals incidentally taken in the course of commercial fishing operations to levels less than the PBR established for that stock. The long-term goal of a TRP is to reduce, within 5 years of its implementation, the incidental mortality or serious injury of marine mammals incidentally taken in the course of commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate, taking into account the economics of the fishery, the availability of existing technology, and existing state or regional fishery management plans. Implementation of this proposed rule for the BDTRP is intended to accomplish the short-term goal of reducing dolphin bycatch to levels below the stock's PBR. In order to determine if this goal is met, NMFS would continue to monitor bycatch of bottlenose dolphins through observer programs, stranded animal reports, abundance and distribution surveys, and other means. Ultimately, the effectiveness of the TRP would be assessed via monitoring the serious injury and mortality rates for the bottlenose dolphins relative to the short- and long-term goals of the TRP.

### *History of the BDTRT*

NMFS convened a Mid-Atlantic Take Reduction Team (TRT) in February 1997, to address the bycatch of both harbor porpoise and bottlenose dolphins in a suite of mid-Atlantic gillnet fisheries (from New York through North Carolina). However, members of the Mid-Atlantic TRT determined that there were insufficient data on dolphin abundance and bycatch to propose management measures for this stock at that time, and deferred the discussion until such time that more data were available on the abundance and stock structure of mid-Atlantic bottlenose dolphins. On October 24, 2001, NMFS published a notice announcing the convening of a newly formed BDTRT (66 FR 53782).

The BDTRT met five times (November 6–8, 2001; January 23–25, 2002; February 27–March 1, 2002; March 27–28, 2002; and April 23–25, 2002), and on May 17, 2002, submitted to NMFS a set of consensus recommendations to reduce bycatch of the coastal stock of

bottlenose dolphins in nine coastal fisheries (based on data available at that time). New bottlenose dolphin abundance estimates became available to the BDTRT subsequent to the submission of these recommendations. In addition, NMFS determined that the original recommendations would not meet the short-term goal for TRPs under the MMPA. Therefore, NMFS convened an additional meeting of the BDTRT on April 1–3, 2003. The BDTRT, as detailed in its May 3, 2003 report, then reached consensus on updated measures to reduce bycatch based on the more recent information. The BDTRT meetings were open to the public and public comments were invited on each day of the meetings. NMFS also held three public meetings on May 15–16, 2001; July 11–12, 2001; and November 6, 2001 to provide background information prior to convening the BDTRT.

NMFS published a Notice of Intent (NOI) to Prepare an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA) (67 FR 47772; July 22, 2002) to review the environmental effects of implementing the recommendations of the BDTRT. The comment period was reopened on September 19, 2002, to ensure that the public had ample opportunity to provide comments (67 FR 59051).

After publication of the NOI, NMFS determined that proceeding with an EIS was not necessary based on additional information on the abundance and status of the dolphin stock made available to the BDTRT and that an EA was a more appropriate initial level of analysis under NEPA. The new abundance estimates were greater than previous estimates of the dolphin stock for five of the stock's seven MUs. Given this new information, the recommendations by the BDTRT would not significantly impact the human environment. NMFS published a notice to proceed with the preparation of an EA on July 31, 2003 (68 FR 44925).

NMFS received five sets of comments during the public scoping period and the NOI comment period. The comments were considered during the development of this proposed rule and its supplemental analyses. These comments and NMFS' responses are available as an appendix to the EA (see **ADDRESSES**).

### *Stock Structure, Abundance, and Bycatch of the Western North Atlantic Coastal Bottlenose Dolphin*

The following section provides a summary from NMFS Stock Assessment Reports and the latest scientific

information of stock structure, abundance, and estimated bycatch information for the western North Atlantic coastal bottlenose dolphin. Please consult the EA (see ADDRESSES) for more detailed information or specific studies related to stock structure, abundance, or bycatch.

The western North Atlantic coastal bottlenose dolphin stock is designated as a single stock in NMFS' Stock Assessment Reports. Recent research, however, demonstrated that the stock was more structurally complex than originally believed (NMFS 2002). To reflect this complexity and for management purposes, this stock was separated into seven discrete MUs, which have spatial and temporal components (see Figure 1). The PBR for the stock was determined and assigned according to each MU. Therefore, proposed management measures were established per MU, which serves

management purposes well because fisheries interacting with this stock also have spatial and temporal components. The separate MUs include:

1. Northern Migratory MU, which ranges from northern New Jersey to southern Virginia in the summer, and from southern Virginia to southern North Carolina in the winter;
2. Northern North Carolina MU, which ranges from northern North Carolina to central North Carolina in the summer and from southern Virginia to southern North Carolina in the winter;
3. Southern North Carolina MU, which ranges from central North Carolina to southern North Carolina in the summer and winter (In the winter, the geographic distributions of the Northern Migratory, Northern North Carolina, and Southern North Carolina MUs overlap along the coast of North Carolina and southern Virginia. During the winter, these overlapping units are referred to as the "Winter Mixed" MU.);

4. South Carolina MU, which ranges from the North Carolina/South Carolina border to the South Carolina/Georgia border in the summer and winter;

5. Georgia MU, which ranges from northern coastal Georgia to southern Georgia in the summer and winter;

6. Northern Florida MU, which ranges from northern Florida to central Florida in the summer and winter; and

7. Central Florida MU, which ranges from central Florida to southern Florida in the summer and winter (NMFS 2002).

Abundance estimates are the basis for determining PBR for marine mammal stocks. Table 1 summarizes the stock assessment information for the seven coastal bottlenose dolphin MUs. Abundance estimates are derived from surveys conducted in 2002 unless otherwise specified. The BDTRT used these estimates to aid in developing take reduction recommendations.

TABLE 1.—2002 ABUNDANCE ESTIMATES AND THE ASSOCIATED COEFFICIENT OF VARIATION (CV) AND MINIMUM POPULATION ESTIMATE (NMIN) FOR EACH MANAGEMENT UNIT OF COASTAL BOTTLENOSE DOLPHINS (GARRISON *et al.*, 2003).

Management Unit	Abundance	CV (%)	Nmin
SUMMER (May - October)			
Northern Migratory	17,466	19.1	14,621
Northern North Carolina			
Oceanic	6,160	51.9	3,255
Estuary	919	12.5	828
BOTH	7,079	45.2	4,083
Southern North Carolina			
Oceanic	3,646	11.0	1,863
Estuary	141	15.2	124
BOTH	3,787	106.9	1,987
WINTER (November - April)			
Winter Mixed (Northern Migratory, Northern North Carolina, Southern North Carolina)	16,913	23.0	13,558
ALL YEAR			
South Carolina	2,325	20.3	1,963
Georgia	2,195	29.9	1,716
Northern Florida*	448	38.4	328
Central Florida*	10,652	45.8	7,377

\*Northern Florida estimates are derived from the winter 1995 survey and the summer 2002 survey. Central Florida MU estimates are from the winter 1995 survey.

From the abundance estimates, NMFS provided the BDTRT with bycatch estimates and PBRs for each management unit. Table 2 provides a summary of these bycatch estimates and current PBRs per MU, which indicates that estimated bycatch exceeds PBR for the Summer Northern North Carolina Management Unit and the Winter Mixed Management Unit.

Management Unit	Estimated Bycatch	Current PBR
Northern Migratory	30	73.1

Management Unit	Estimated Bycatch	Current PBR
Summer Northern North Carolina	29	20.4
Summer Southern North Carolina	0 <sup>1</sup>	9.9
Winter Mixed (Northern Migratory, Northern North Carolina, and Southern North Carolina)	151	67.8

Management Unit	Estimated Bycatch	Current PBR
South Carolina	Unknown	20
Georgia	Unknown	17
Northern Florida	0	3.3
Central Florida	4	74 <sup>2</sup>

<sup>1</sup> No bycatch was recorded in the NMFS observer program, but stranding data indicate dolphin bycatch occurs.

<sup>2</sup> The PBR for the Central Florida MU is based on the 1995 abundance estimate as no 2002 estimate is available.

Please note that bycatch estimates are derived from observed fisheries only.

For a discussion of bycatch information from stranding events and unofficially observed events, please consult the EA (see ADDRESSES). Because observed fishery bycatch data demonstrate that PBR was exceeded for the western North Atlantic coastal bottlenose dolphin

stock and because this stock is strategic, take reduction measures are warranted.

*Components of the Bottlenose Dolphin Take Reduction Plan (BDTRP)*

The take reduction measures in this proposed rule have spatial and seasonal

components that reflect measures needed at different times of the year and in different areas for each of the seven distinct MUs. The seasonal and geographic distributions of these MUs are shown in Figure 1.

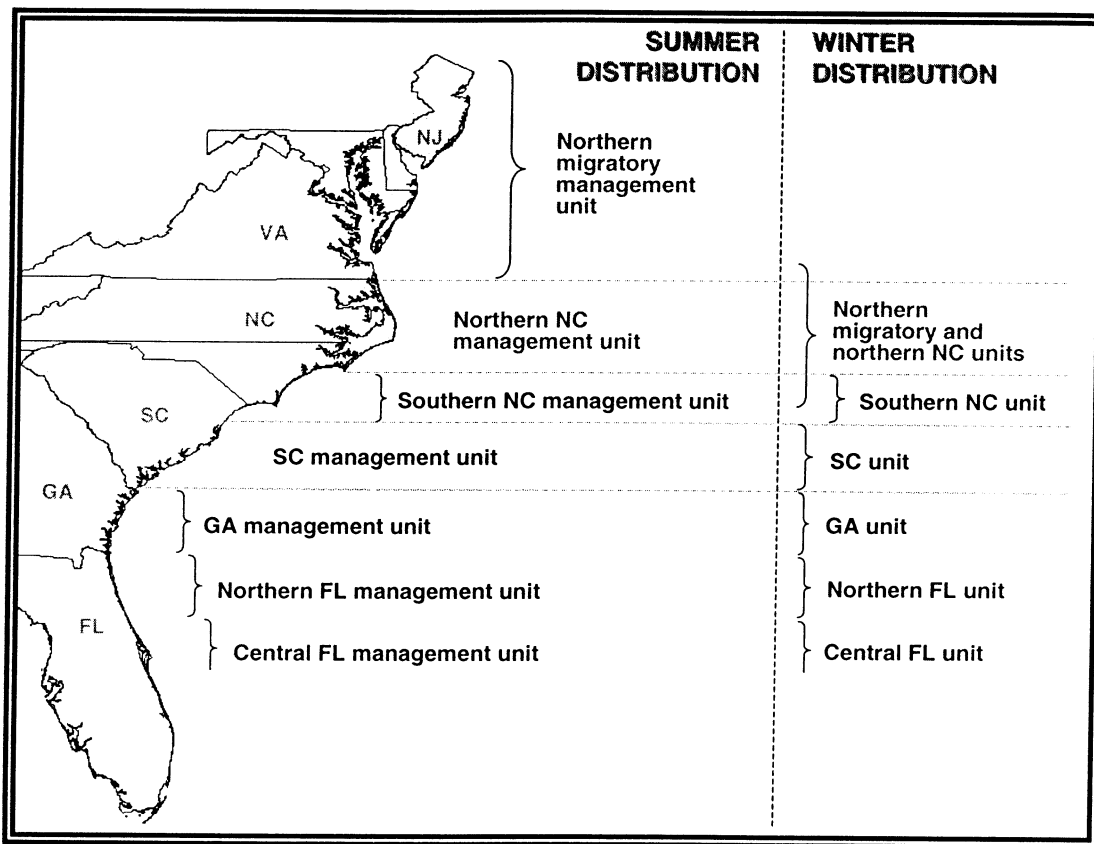


Figure 1. Seasonal and geographic distributions of the MUs within the western North Atlantic coastal bottlenose dolphin stock, *Tursiops truncatus*.

The BDTRT reviewed gear characteristics that may influence bycatch levels. Analysis by Palka and Rossman (2001) concluded that distance from shore and gillnet mesh size were the two factors exhibiting the strongest relationship to bycatch estimates. The authors found that the highest bycatch rates of coastal bottlenose dolphins in mid-Atlantic gillnet fisheries occurred in large mesh gear (greater than or equal to 7-inch or 17.8 cm stretch mesh) and in hauls that occurred within state waters (3 nmi or 4.8 km). Palka and Rossman (2001) also found that the highest bycatch occurred in the winter

with most of the bycatch occurring in North Carolina and Virginia state waters. The authors inferred that changes in the fisheries that utilize this gear size in this region may have a considerable effect on reducing dolphin bycatch.

The BDTRT's consensus recommendations included two principal types of actions to achieve required bycatch reduction goals: (1) specific regulatory fishing gear restrictions organized by bottlenose dolphin MU, and (2) broad-based, non-regulatory measures, such as education, outreach, and research. For those

dolphin MUs where bycatch is low, or where bycatch estimates are unavailable, the BDTRT offered non-regulatory recommendations. This proposed rulemaking addresses both the regulatory and non-regulatory measures recommended by the BDTRT.

*Proposed Regulatory BDTRP Measures*

Applied primarily to gillnet fisheries, the proposed regulations result in a reduction in soak times and in the amount of gear in the water or otherwise change practices to reduce bycatch of dolphins. In developing this proposed rule, NMFS evaluated the recommendations provided by the

BDTRT to ensure that: the recommended measures would meet the goals of the MMPA, no unnecessary requirements would be imposed on the fishing industry, and the recommended measures were compatible with existing state and Federal management plans. NMFS expects these measures to reduce dolphin bycatch below the stock's PBR within six months of implementation because, based on modeling efforts and broad expertise of the BDTRT, the measures are expected to reduce the number of interactions between dolphins and fisheries below that level.

NMFS proposes to implement all of the BDTRT's recommendations except the following: (1) the requirement for mandatory bycatch certification training (training would be conducted, but would not be mandatory); and (2) a requirement to haul gear once every 24 hours in the small mesh gillnet fisheries in the North Carolina portion of the Winter Mixed MU and the Summer Northern North Carolina MU.

The BDTRT recommended that vessel operators and persons in non-vessel fisheries complete a mandatory bycatch certification training program. However, a mandatory certification program is unnecessary at this time, and the potential costs of holding and ensuring participation at the workshops would outweigh the bycatch reduction benefits. Alternatively, NMFS proposes to provide outreach and education to the fishing industry through: (1) voluntary workshops conducted at major ports from New Jersey through Florida by NMFS outreach personnel; (2) dockside visits with the fishing industry carried out by fishery liaisons; (3) a pilot web-based training program accessible through the existing BDTRP web site to provide training to remaining fishermen who may not be able to attend dockside visits or workshops; and (4) educational materials (i.e., brochures, placards, decals, and possibly videos) provided through an annual mailing to all Category I and II fisheries affected by this proposed rule.

NMFS does not support implementing the requirement to haul gear once every 24 hours in the small mesh gillnet fisheries in the ranges of the Winter Mixed MU and the Summer Northern North Carolina MU. NMFS analyzed fishery data and found that 98 percent of the observed hauls soaked for less than 24 hours. Additionally, this requirement would be difficult to enforce because it would be difficult to accurately ascertain the length of time that gear remains in the water, unless enforcement agents monitor the gear for a 24 hour period. NMFS instead plans

to highlight gear-tending practices during workshop training and in outreach materials.

#### *Definitions Used in BDTRP Proposed Rule*

Definitions of some of the terms used in this proposed rule differ from definitions of terms currently in 50 CFR 229.2 that apply to the Harbor Porpoise Take Reduction Plan. These different definitions would be placed within 50 CFR 229.35, which is the section for regulatory requirements of the Bottlenose Dolphin Take Reduction Plan, to avoid conflicting with definitions applicable to other take reduction plans. Also, new definitions were added where appropriate. Definition changes and additions were necessary in some cases for effective implementation of the BDTRT's recommended regulatory measures.

The proposed rule contains different definitions of the terms "night," "small mesh gillnet," and "large mesh gillnet." NMFS proposes a different definition of "night" in this proposed rule to give fishermen more time to remove their gear from the water prior to certain night-time gear restrictions taking effect. Different definitions of "small mesh gillnet" and "large mesh gillnet" were proposed, and a definition of "medium mesh gillnet" was added, to tailor gear restrictions most appropriately given the conduct of gillnet fisheries and the nature of interactions between gillnet fisheries and bottlenose dolphins. For instance, bottlenose dolphin bycatch occurs in very small mesh gillnets, and harbor porpoise bycatch does not. Thus, there was a need to add a different definition of "small mesh gillnet" under this proposed rule to address dolphin bycatch in gillnets with 5-inch (12.7 cm) stretched mesh or smaller. There was also a need to add a definition of "medium mesh gillnet" because a medium mesh gillnet category interacts with bottlenose dolphins. The definition of "large mesh gillnet" is slightly different from the one in 50 CFR 229.2 in that it does not include an upper bound of 18 inches (45.72 cm). It includes all gillnets with a mesh size greater than or equal to 7-inches (17.8 cm) stretched mesh and would, thus, address mesh sizes larger than 18 inches (45.72 cm) where necessary.

The proposed rule also contains new definitions not currently contained in 50 CFR 229.2. For instance, "fishing or to fish" was added to be consistent with regulations under the Magnuson-Stevens Fishery Conservation and Management Act and to aid in enforcement of the regulations under the BDTRP. Various areas of water (e.g.,

"Northern North Carolina state waters") were defined to indicate the locations in which certain regulations would apply. Definitions of "sunrise" and "sunset" were added to indicate precise times at which certain night-time restrictions would apply. Definitions of "beach" and "beach/water interface" were added to indicate in which part of the nearshore zone certain gear restrictions would apply.

#### *Proposed Regulated Waters*

North of Cape Hatteras, North Carolina, western North Atlantic coastal bottlenose dolphins occur primarily in nearshore waters out to about 6.5 nautical miles (12 km) from shore (Garrison 2001). Garrison (2001) found that the coastal bottlenose dolphin stock occurs out to 14.6 nautical miles (27 km) from shore in the southeastern U.S. Thus, NMFS proposes to implement portions of the BDTRT recommendations in all U.S. waters within 6.5 nautical miles (12 km) of shore from the New York-New Jersey border southward to Cape Hatteras, North Carolina, and within 14.6 nautical miles (27 km) of shore from Cape Hatteras southward to, and including, the east coast of Florida down to the demarcation line between the Atlantic Ocean and the Gulf of Mexico (50 CFR 600.105), with the exception of exempted waters.

Exempted waters include all waters landward of the first bridge over any embayment, harbor, or inlet. In those instances where there is not a bridge over the embayment or harbor close to the mouth of the embayment or harbor, as in the case of Delaware Bay, exempted waters include all waters landward of the lines of demarcation delineating those waters upon which mariners shall comply with the International Regulations for Preventing Collisions at Sea, 1972, and those waters upon which mariners must comply with the Inland Navigation Rules as described in 33 CFR part 80 (COLREGS line). The decision was made to use the bridges, where possible, to mark the boundaries in part because the bridges are farther inshore than the COLREGS line and would, therefore, include more area under the proposed regulations.

#### *Gear-area Measures*

NMFS proposes to implement the following recommendations of the BDTRT (also found in Table 3), which are organized by bottlenose dolphin MU and specific location (persons fishing with large mesh gillnets must also adhere to pertinent conservation measures as amended by the large mesh mid-Atlantic gillnet rule; see Table 4).

*Summer Northern Migratory MU (New Jersey through Virginia)* From June 1–October 31 of each year, the proposed regulations require persons fishing with medium mesh (greater than 5–inch (12.7 cm) to less than 7–inch (17.8 cm) stretch mesh) and large mesh (greater than or equal to 7–inch (17.8 cm) stretch mesh) anchored gillnets at night in state waters to remain within 0.5 nautical miles (0.93 km) of the closest portion of each gear, and to remove all such gear and stow it on board the vessel before the vessel returns to port.

*Summer Northern North Carolina MU (Virginia/North Carolina border to Cape Lookout)* From May 1–October 31 of each year, the proposed regulations require persons fishing with small mesh (less than or equal to 5–inch (12.7 cm) stretch mesh) gillnets to use a net length of less than or equal to 1,000 feet (304.8 m); and from April 15–December 15, prohibit fishing with large mesh (greater than or equal to 7–inch (17.8 cm) stretch mesh) gillnets in state waters (this latter provision will codify existing North Carolina state prohibitions on gillnet fishing). (Note: The 2002 consensus recommendations contained a misprint indicating this restriction would begin on April 16.)

*Summer Southern North Carolina MU (Cape Lookout to North Carolina/South Carolina border)* From April 15–December 15, the proposed regulations prohibit persons fishing with large mesh (greater than or equal to 7–inch (17.8 cm) stretch mesh) gillnet gear from fishing in state waters (this latter provision will codify existing North Carolina state prohibitions on gillnet fishing). (Note: The 2002 consensus recommendations contained a misprint indicating this restriction would begin on April 16. In addition, when combined with the BDTRT recommendation for the Winter Mixed MU Southern North Carolina, the proposed regulations prohibit fishing with large mesh gillnets at night in state waters from November 1–April 30, this provision results in prohibiting fishing with large mesh gillnets at night in state waters year-round.)

*Winter Mixed MU – Virginia (Cape Charles Light to Virginia/North Carolina border)* From November 1–December 31, the proposed regulations prohibit persons fishing with large mesh (greater than or equal to 7–inch (17.8 cm) stretch mesh) gillnets at night in state waters and require that, at night, gear be removed from the water and stowed on board the vessel before the vessel returns to port.

*Winter Mixed MU – Northern North Carolina (Virginia/North Carolina border to Cape Lookout)* From

November 1–April 30, the proposed regulations prohibit persons fishing with medium mesh (greater than 5–inch (12.7 cm) to less than 7–inch (17.8 cm) stretch mesh) gillnets at night in state waters. This restriction has a sunset clause of three years from the effective date of the final rule. The sunset clause is intended to ensure that NMFS and the BDTRT reconvene no later than three years after the effective date of this measure to evaluate whether it is effective at reducing dolphin bycatch and whether it should stay in effect. From December 16–April 14, the proposed regulations prohibit persons fishing with large mesh (greater than or equal to 7–inch (17.8 cm) stretch mesh) gillnets at night in state waters without tie-downs. (Note: The BDTRT recommended this provision apply from November 1–April 30, but this period overlaps with a provision the BDTRT recommended for prohibiting large mesh gillnets (regardless of using tie-downs) in state waters from April 15–December 15. See proposed Gear-area Measures for Summer Northern North Carolina MU and Summer Southern North Carolina MU.)

*Winter Mixed MU – Southern North Carolina (Cape Lookout to North Carolina/South Carolina border)* From November 1–April 30, the proposed regulations prohibit persons fishing with medium mesh (greater than 5–inch (12.7 cm) to less than 7–inch (17.8 cm) stretch mesh) gillnets at night in state waters. This restriction has a sunset clause of three years from the effective date of the final rule. The sunset clause is intended to ensure that NMFS and the BDTRT reconvene no later than three years after the effective date of this measure to evaluate whether it is effective at reducing dolphin bycatch and whether it should stay in effect. From November 1–April 30, prohibit persons fishing with large mesh (greater than or equal to 7–inch (17.8 cm) stretch mesh) gillnets at night in state waters and require that, at night, gear be removed from the water and stowed on board the vessel before the vessel returns to port. (Note: When combined with the BDTRT recommendation for the Summer Southern North Carolina MU, to prohibit fishing with large mesh gillnets in state waters from April 15–December 15, this provision results in prohibiting fishing with large mesh gillnets at night in state waters year-round.)

*Summer Northern North Carolina, Summer Southern North Carolina, and Winter Mixed MUs (North Carolina coast-wide)* No person fishing in a Category I or II fishery may fish with a net within 300 feet (91.4 m) of the

beach/water interface unless it consists of multi-fiber nylon (no type of monofilament material) that is 4 inches (10.2 cm) or less stretched mesh. NMFS proposes the 300–feet (91.4 m) distance requirement as an expansion of the BDTRT's recommendation to address the problem of bottlenose dolphin - fisheries interactions within the surf zone, evidenced by observer and stranding data. While the BDTRT recognized the need to prohibit certain nets deployed from the beach, NMFS expanded this prohibition to include the use of certain nets within 300 feet of the beach/water interface to address bottlenose dolphin bycatch throughout this area.

*South Carolina, Georgia, Northern Florida, and Central Florida MUs (South Carolina, Georgia, and Florida)* Except in instances where state or federal regulations require a closer proximity to gear, the proposed regulations require persons fishing with all types of gillnet gear to remain within 0.25 nmi (0.46 km) of the closest portion of their gear at all times in state and Federal waters within 14.6 nmi (27 km) from shore. In addition, the proposed regulations require that gear be removed from the water and stowed on board the vessel before the vessel returns to port.

*Proposed gear marking requirements (apply to all regulated and exempted waters, as defined in § 229.35 (c)(1) and (c)(2) in the regulatory text of this proposed rule)* All fishermen participating in Category I or II fisheries affected by this proposed rule (except the Atlantic blue crab trap/pot fishery and Virginia pound net fishery, which already have gear marking requirements) must permanently mark their gear with identification tags containing the last name and first and middle initials of the owner, gear mesh size, and one of the following: state vessel registration number, U.S. Coast Guard documentation number, or state commercial fishing license number. For gillnet gear, in addition to identification tags, gear must be marked on one end of the net with a square flag and the opposite end with another square flag or ball buoy (see Table 3 or regulatory text at 229.35(d)(1) and (d)(2) for specific requirements).

NMFS is proposing gear marking requirements to assist in monitoring the performance of the proposed components of this rule to better ascertain which fisheries are interacting with dolphins and sea turtles and to assist with enforcement efforts. Some marking of gillnets and associated surface gear (e.g., buoys or flags) is currently required or being considered under Federal or state fishery

management plans for each of the nine fisheries covered by this plan. Most fishery-related strandings of bottlenose dolphins and sea turtles involve gear that cannot be definitively traced back to a particular fishery or geographical area. Any additional information obtained from gear marking will be important for assessing fishery interactions with protected species. This measure will not directly reduce bycatch, but it is expected to facilitate monitoring of bycatch rates and assist in designing future bycatch reduction measures.

NMFS evaluated other possible gear marking requirements in the Atlantic

blue crab trap/pot fishery and Virginia pound net fishery and determined that no additional gear marking requirements are currently needed. Atlantic blue crab trap/pot fishermen are currently required to mark the surface buoy, which is at least 5-inches (12.7 cm) in diameter, with an identification number contrasting in color to the buoy. Requiring additional tagging with the unique identification tags discussed above would cause an undue economic burden on the mid-Atlantic crab trap/pot fishermen (please refer to the Environmental Assessment for further details), especially given

their current gear marking requirements. Virginia pound net fishermen are also currently required to mark the holding stake or pole with a unique identification tag. Because there are already other state and Federal gear marking requirements in place for these fisheries, significant additional information is not likely to be obtained, in the event of the serious injury or mortality of a dolphin, from further gear marking requirements. Therefore, no additional gear marking requirements are currently proposed for the mid-Atlantic crab trap/pot and Virginia pound net fisheries.

TABLE 3. SUMMARY OF PROPOSED BOTTLENOSE DOLPHIN REGULATORY MEASURES.

Management Unit	Fishing Area	Time Period	Gillnet Mesh Size Requirements (Stretch Mesh)		
			Small (≤5 inch )	Medium (>5 in to <7 inch)	Large (≥7 inch)
Summer Northern Migratory	NJ - VA .....	Unless otherwise specified, the following proposed measures apply during Summer (May 1- October 31).	None .....	Jun. 1–October 31: Anchored gillnets- fishermen must remain within 0.5 nmi (0.93 km) of the closest portion of each gear fished at night in state waters, and any gear fished at night must be brought back to port with vessel..	Jun. 1–October 31: Anchored gillnets- fishermen must remain within 0.5 nmi (0.93 km) of the closest portion of each gear fished at night in state waters, and any gear fished at night must be brought back to port with vessel. <sup>1</sup>
Summer Northern North Carolina	VA/NC border to Cape Lookout.	Unless otherwise specified, the following proposed measures apply during Summer (May 1- October 31).	Net length must be less than or equal to 1,000 feet (304.8 m)..	None .....	April 15–December 15: No fishing in state waters. <sup>1</sup>
Summer Southern North Carolina	Cape Lookout to NC/SC border.	Unless otherwise specified, the following proposed measures apply during Summer (May 1- October 31).	None .....	None .....	April 15–December 15: No fishing in state waters. <sup>1,2</sup>
Winter Mixed - Virginia	Cape Charles Light to VA/NC border.	Unless otherwise specified, the following proposed measures apply during Winter (November 1- April 30).	None .....	None .....	November 1–December 31: No fishing at night in state waters, and, at night, gear must be removed from the water and stowed on board the vessel before the vessel returns to port. <sup>1</sup>
Winter Mixed - Northern North Carolina	VA/NC border to Cape Lookout.	Unless otherwise specified, the following proposed measures apply during Winter (November 1- April 30).	None .....	No fishing at night in state waters; sunset clause of 3 years for this restriction..	From December 16–April 14: No fishing at night in state waters without tie-downs. <sup>1,3</sup>
Winter Mixed - Southern North Carolina	Cape Lookout to NC/SC border.	Unless otherwise specified, the following proposed measures apply during Winter (November 1- April 30).	None .....	No fishing at night in state waters; sunset clause of 3 years for this restriction..	No fishing at night in state waters, and, at night, gear must be removed from the water and stowed on board the vessel before the vessel returns to port. <sup>1,4</sup>

<sup>1</sup>Large mesh gillnets have additional restrictions for sea turtle and bottlenose dolphin protection under the amendments for the mid-Atlantic large mesh gillnet rule. Please cross-reference with Table 4.

<sup>2</sup>When combined with the BDTRT recommendation for the Winter Mixed MU Southern North Carolina, to prohibit fishing with large mesh gillnets at night in state waters from November 1–April 30, this provision results in prohibiting fishing with large mesh gillnets at night in state waters year-round.

<sup>3</sup>The BDTRT recommended this provision apply from November 1–April 30, but this period overlaps with a provision the BDTRT recommended for prohibiting large mesh gillnets (regardless of using tie-downs) in state waters from April 15–December 15. See proposed Gear-area Measures for Summer Northern North Carolina MU and Summer Southern North Carolina MU.

<sup>4</sup>When combined with the BDTRT recommendation for the Summer Southern North Carolina MU, to prohibit fishing with large mesh gillnets in state waters from April 15–December 15, this provision results in prohibiting fishing with large mesh gillnets at night in state waters year-round.)

Management Unit	Fishing Area	Time Period	Gear Operating Requirements
Summer Northern and Southern North Carolina; Winter Mixed	NC coast-wide	Year-round .....	No person fishing in a Category I or II fishery may fish with a net within 300 feet (91.4 m) of the beach/water interface unless it consists of multi-fiber nylon (no type of monofilament material) that is 4 inches (10.2 cm) or less stretched mesh.
South Carolina, Georgia, Northern Florida, and Central Florida	SC, GA, and FL.	Year-round .....	All gillnet gear: Fishermen must remain within 0.25 nmi (0.46 km) of the closest portion of their gear at all times in state and Federal waters within 14.6 nmi (27 km) from shore. Gear must be removed from the water and stowed on board the vessel before the vessel returns to port.

Management Unit	Fishing Area	Time Period	Gear Marking Requirements for All Fisheries (excluding Virginia Pound Net and Atlantic Blue Crab Trap/Pot Fisheries)
All	NJ - central FL	Year-round .....	Gear marking requirements apply to all regulated and exempted waters, as defined in § 229.35(c)(1) and (c)(2) in the regulatory text of this proposed rule. All fishermen participating in Category I or II fisheries affected by this rule (except Atlantic blue crab trap/pot and Virginia pound net fisheries, which already have gear marking requirements) must permanently mark their gear with identification tags containing the last name and first and middle initials of the owner, gear mesh size, and one of the following: state vessel registration number, U.S. Coast Guard documentation number, or state commercial fishing license number. These identification tags, made of plastic or metal, must be attached along the float line, as close to the float line as operationally feasible, at least once every 300 feet (91.4 m). For gillnet gear, in addition to the identification tags, gear must be marked on the end flag or ball by using engraved flag(s) or ball buoy(s), or by attaching engraved metal or plastic tags to the flag(s) and ball buoy(s). One end of the net must be marked by a square flag not less than 144 square inches (929.03 square cm) and at least 3 feet (0.91 m) above the water. The opposite end of the net must also be marked by a square flag or an 8–inch (20.32 cm) minimum diameter ball buoy with the gear mesh size. Both flag(s) and ball buoy(s) must be marked with at least two stripes of reflective material that are not less than 2 inches (5.08 cm) in width and that are visible for 360 degrees.

*Proposed Non-regulatory BDTRP Measures*

The BDTRT noted that effective application of the BDTRP requires cooperation among researchers, regulators, and fishermen and, therefore, included non-regulatory recommendations considered important in achieving the long-term goals of the BDTRP. The following are non-regulatory recommendations from the May 7, 2002, Consensus Recommendations, which include research initiatives, outreach, training, and cooperative efforts (Please see the EA for additional information on non-regulatory recommendations).

The BDTRT made the following general research and monitoring recommendations: (1) continue research on bottlenose dolphin stock structure; (2) design and conduct rigorous scientific surveys to provide reliable abundance estimates of the bottlenose dolphin stock; (3) conduct research on the bottlenose dolphin stock to

determine if it is depleted under the MMPA; (4) improve assessment of bottlenose dolphin bycatch by expanding monitoring coverage under the observer program, expanding stranding networks to enhance data collection efforts, assessing the factors contributing to bottlenose dolphin bycatch, providing better assessment of fishery effort, and exploring alternative bycatch monitoring methods; and (5) complete various ongoing gear-modification-related research projects (e.g., comparing behavior of captive and wild dolphins around gillnets with and without acoustically reflective webbing, and investigating the effects of twine stiffness on dolphin bycatch).

NMFS will continue to conduct annual mortality and abundance estimates for the western North Atlantic coastal stock of bottlenose dolphins, as well as update the distribution of the stock. NMFS is also partnering with state agencies in conducting gear modification research and identifying

bottlenose dolphin behavior around deployed gear.

The BDTRT recommended the following gear modification research projects to evaluate their effectiveness in reducing dolphin bycatch: (1) investigate bridle alterations to prevent collapsing of the net and eliminate bridles on anchored gillnet gear; (2) investigate effectiveness of preventing slack netting on anchored gillnet gear when net panels are/are not laced together; (3) investigate various string designs (e.g., shallower net depth, hang in different parts of the water column) to determine if the amount of webbing can be reduced without decreasing landings; (4) determine if and how dolphins interact with gillnet gear in North Carolina waters, identify these dolphins, and investigate their associated behavior and bycatch rates; (5) investigate the importance of day and set times with respect to when dolphins are caught in gear, based on carcass temperatures and soak times; (6)



investigate the effectiveness of using inverted bait wells in crab traps/pots to prevent dolphins from removing bait from traps/pots and becoming caught in trap/pot lines; and (7) investigate effects of reducing the slack in pound net leaders.

NMFS and the BDTRT recognize the difficulties in quantifying the performance of gear modifications and recognize the importance of such research to ensuring appropriate and effective conservation measures are established and fishermen are not unnecessarily burdened without sufficient bycatch reduction. Therefore, NMFS would continue to develop funding opportunities for cooperative work with the fishing industry, researchers, and state wildlife agencies to implement recommended gear research projects. NMFS would develop, test and analyze the effects of gear modifications and "best management practices" through the agency's gear specialists and fishery liaison personnel. Results from these projects would be presented to the BDTRT at future meetings and to the fishing community via outreach efforts.

The BDTRT also recommended outreach and education workshops be conducted to: (1) inform fishermen of new and existing regulations to reduce bycatch in their fisheries; (2) supply contact information and protocols for responding to dolphin/fishery interactions or strandings; and (3) encourage best fishing practices (e.g., reduce dolphin attraction to fish) to reduce bycatch. NMFS proposes to address these recommendations by conducting workshops led by the fishery liaison in major ports from New Jersey through Florida and dockside visits, by establishing web-based educational training, and by providing educational materials via annual mail-outs to all Category I and II fisheries affected by this proposed rule.

The BDTRT further advised NMFS to educate state and local fishery enforcement agents on the significance of reporting strandings. Training should: (1) discuss the agent's role in stranding response and in educating fishermen and the public; (2) include similar training materials as provided to the fishermen; (3) be conducted at regional law enforcement meetings; and (4) be incorporated into state/NMFS Joint Enforcement Agreements.

To address these recommendations, special agents from the NMFS Enforcement Division would attend future BDTRT meetings and NMFS staff will provide on-site training to Federal, state, and local enforcement/marine patrols. NMFS would educate

enforcement agents on all aspects of this proposed plan and on how to respond to and assist in marine mammal strandings.

The BDTRT also provided the following non-regulatory recommendations for the National Observer Program and Marine Mammal Health and Stranding Network: (1) develop observer programs that provide statistically viable sample sizes throughout all fisheries and sub-fisheries interacting with dolphins; (2) improve observer training and provide observers with adequate equipment; (3) implement a rotational schedule to achieve observer coverage or alternative monitoring programs for all Category II fisheries; (4) establish dedicated beach surveys in geographic areas and time frames during which observer coverage is lacking; (5) increase stranding coverage and improve training for network participants; (6) improve post-mortem assessments; and (7) provide funding to organize and conduct a workshop/training session to assemble the information and staff necessary to accomplish this objective.

NMFS plans to, within the constraints of available funding, address the BDTRT's concerns in future budget cycles. NMFS is currently developing a sampling design to implement a rotational schedule to increase observer coverage and plans to provide additional training to stranding network participants, especially in conducting post-mortem assessments, by funding, developing, and organizing workshops and certification programs. NMFS is continuing to improve observer training via application of recommendations from the National Observer Program Advisory Team, which is an advisory team comprised of NMFS observer program coordinators.

Other non-regulatory recommendations were that NMFS: (1) provide funding for a toll-free hotline for reporting strandings of marine mammals; (2) formally request that Federal, state, and local marine patrols monitor inside waters for dolphin bycatch and fishery interactions and assist the Stranding Network in response to stranded animals; (3) provide funding for seasonal and geographic aerial or platform surveys; and (4) improve communication between the Marine Mammal Health and Stranding Network and National Observer Program.

Presently, NMFS will not fund a centralized toll-free hotline because all states under the jurisdiction of the BDTRP already maintain individual hotlines, and NMFS determined that instituting a new hotline may cause

additional reporting delay. NMFS supports the recommendation to solicit state and local marine patrol aid in supporting the Stranding Network and intends to develop workshops to aid in this endeavor. Further, NMFS intends to foster communication between the Stranding Network and Observer Program by developing such workshops/training and improving gear repository (two sites located at NMFS Pascagoula and Narragansett Laboratories) procedures for obtaining gear from the Stranding Network, interacting with enforcement, and standardizing retention time of retained gears.

The final non-regulatory recommendation by the BDTRT was for NMFS to encourage states to develop, implement, and enforce a program for the removal of derelict blue crab traps/pots and associated lines, as a large blue crab fishery exists along the coastal bottlenose dolphin's distributional range. Additionally, NMFS supports and will conduct an outreach program to encourage the following BDTRT-recommended voluntary gear modifications: (1) using sinking or negatively buoyant line; (2) limiting the line to the minimum length necessary; and (3) using inverted or modified bait wells for those areas where dolphins are tipping traps and stealing bait. NMFS also plans to fund a pilot project to examine the use of inverted or modified bait wells and has developed a proposed experimental design with industry assistance.

#### *Proposed Measures to Reduce Bycatch of Endangered Species Act (ESA) Listed Sea Turtles - Background*

The purposes of the ESA as stated in section 2(b) are to provide a means whereby the ecosystems, upon which endangered or threatened species depend, may be conserved; to provide a program for the conservation of such endangered or threatened species; and to take such steps as may be appropriate to achieve the treaties and conventions set forth in ESA subsection (a). All sea turtles found in U.S. waters are listed as either endangered or threatened under the ESA. The Kemp's ridley (*Lepidochelys kempii*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*) are listed as endangered. Loggerhead (*Caretta caretta*), green (*Chelonia mydas*), and olive ridley (*Lepidochelys olivacea*) turtles are listed as threatened, except for breeding populations of green turtles in Florida and on the Pacific Coast of Mexico and olive ridleys from the Pacific Coast of Mexico, which are listed as endangered.

Under the ESA and its implementing regulations, taking sea turtles, even incidentally, is prohibited, with exceptions for threatened species identified in 50 CFR 223.206. The incidental take of endangered species may be authorized only by an incidental take statement provided, or an incidental take permit issued, pursuant to section 7 or 10 of the ESA, respectively.

#### *Sea Turtle/Fishery Interactions*

Sea turtle strandings along the coast of North Carolina dramatically increased during April and May of 1995, and the pattern has continued in subsequent years. The increase in stranding events coincided with an increase in effort in the monkfish gillnet fishery, which first began off North Carolina in 1995. In the spring of 2000, 280 sea turtles stranded in two short time periods, coincident with the monkfish and dogfish gillnet fisheries operating offshore. Large-mesh gillnets are known to be highly effective at catching sea turtles. Four of the carcasses were carrying gillnet gear measuring 10–12 inches (25.4–30.5 cm) stretched mesh, which is consistent with the gear used in the monkfish fishery. The majority of turtles that stranded in the 2000 event were loggerhead turtles, but Kemp's ridleys were also documented. According to the Turtle Expert Working Group (TEWG), a team of population biologists, sea turtle scientists, and life history specialists that compiles and examines information on the status of sea turtle species, the northern subpopulation of loggerhead turtles is declining, or is stable at best, and is not showing evidence of recovery. The northern subpopulation of loggerheads is disproportionately represented in the mid-Atlantic waters off North Carolina and Virginia and continued mortality as a result of large mesh gillnet fisheries is likely to impede recovery efforts of this subpopulation (TEWG 2000). Because of the documented strandings and the TEWG's findings, NMFS enacted the mid-Atlantic large mesh gillnet rule in waters of the exclusive economic zone (EEZ) (67 FR 71895, December 3, 2002).

NMFS recently compared previously unavailable data on North Carolina monkfish gillnet landings in state and Federal waters. From 1995 to 2000, state waters only accounted for one to ten percent of monkfish landings. However, in 2002, with gear restrictions in place, landings in state waters accounted for 92 percent of monkfish landings. In 2002, North Carolina state water monkfish landings were five times higher than the average state water

landings for 1995 to 2000. NMFS did not anticipate this large shift in fishing effort to North Carolina state waters, which could pose a substantial risk to sea turtles in state waters. Similarly, from 1999–2002, between four and ten boats have targeted monkfish with large mesh gillnets each year in Virginia state waters, also posing a risk to sea turtles in the area. Sea turtles are known to regularly occur in the state waters of North Carolina and Virginia; therefore, large mesh gillnet fisheries in those areas pose a threat, especially during times when the water is warmer and sea turtles are most abundant and active.

#### *History of Sea Turtle Conservation Measures*

Various temporary protections to reduce sea turtle interactions and mortality in large mesh gillnets have been enacted by NMFS since the 2000 stranding event (65 FR 31500, May 18, 2000; 66 FR 28842, May 25, 2001; and 67 FR 13098, March 21, 2002). Detailed background information on the events leading to these restrictions may be found in the **Federal Register** documents referenced in this paragraph and is not repeated in this proposed rule. NMFS enacted an interim final rule effective from March 15 to November 10, 2002, which implemented a series of seasonally-adjusted closures to protect sea turtles in Federal waters off North Carolina and Virginia waters when turtles were expected to occur in those areas (67 FR 13098, March 21, 2002). In the interim final rule, NMFS stated that it was considering adopting those restrictions as a final rule and received comments on that proposal through June 19, 2002.

The provisions of the interim final rule established seasonally-adjusted gear restrictions to protect migrating sea turtles by closing portions of the mid-Atlantic EEZ to fishing with gillnets with a mesh size larger than 8-inch (20.3 cm) stretched mesh. The areas and times closed to fishing with gillnets larger than 8-inch (20.3 cm) stretched mesh were as follows: waters north of 33°51.0' N. (North Carolina/South Carolina border at the coast) and south of 35°46.0' N. (Oregon Inlet, North Carolina) - at all times; waters north of 35°46.0' N. (Oregon Inlet) and south of 36°22.5' N. (Currituck Beach Light, North Carolina) - from March 16 through January 14; waters north of 36°22.5' N. (Currituck Beach Light, North Carolina) and south of 37°34.6' N. (Wachapreague Inlet, Virginia) - from April 1 through January 14; waters north of 37°34.6' N. (Wachapreague Inlet, Virginia) and south of 37°56.0' N. (Chincoteague, Virginia) - from April 16

through January 14. Waters north of 37°56.0' N. (Chincoteague, Virginia) were not affected by the interim final rule.

The timing of the restrictions was based upon an analysis of sea surface temperatures for the above areas. Sea turtles are known to migrate into and through these waters when the sea surface temperature is 11 degrees Celsius or greater (Epperly and Braun-McNeill 2002). The January 15 date for reopening the areas north of Oregon Inlet (35°46.0' N.) to large mesh gillnet fisheries was also based upon the 11 degree Celsius threshold and is consistent with the seasonal boundary established for the summer flounder fishery/sea turtle protection area (50 CFR 223.206(d)(2)(iii)(A)).

Gillnets with 10- and 12-inch (25.4 and 30.5 cm) mesh were associated with the 2000 mass stranding in that four of the carcasses were carrying gillnet gear measuring 10 to 12 inches (25.4–30.5 cm) stretched mesh, which was consistent with the gear used in the monkfish fishery. The potential existed, however, for other fisheries in the area to utilize large mesh gillnets with mesh sizes smaller than the 10–12 inch (25.4 to 30.5 cm) mesh found on the turtles, which could still pose a serious risk of entanglement to sea turtles. The 8-inch (20.3 cm) size restriction was enacted even though gillnets with mesh sizes smaller than 8-inches (20.3 cm) were historically known to capture and kill sea turtles. NMFS selected an 8-inch (20.3 cm) size restriction for the interim final rule (67 FR 13098, March 21, 2002) and considered banning smaller mesh sizes, but the size range chosen was thought to include fisheries in the area that are known to interact with turtles, without affecting other fisheries unintentionally. Therefore, the interim final rule stated that if any new information showed otherwise, NMFS will consider amending the rule to include smaller mesh sizes.

NMFS promulgated the interim final rule (67 FR 13098, March 21, 2002) to prevent further mortalities and other takes of listed species in large mesh gillnet fisheries, of which the federally-managed monkfish fishery was the most likely to be affected. NMFS limited the interim final rule to Federal waters primarily because, at the time, the monkfish fishery was not thought to operate in state waters, and secondarily to avoid unintentionally affecting the black drum gillnet fishery that occurs in the nearshore waters of the eastern shore of Virginia, and which was, at the time, involved in a cooperative agreement with NMFS observers to document sea turtle interactions.

On December 3, 2002, NMFS published a final rule (67 FR 71895) establishing seasonally-adjusted gear restrictions by closing portions of the mid-Atlantic EEZ to fishing with gillnets with a mesh size larger than 8-inch (20.3 cm) stretched mesh to protect migrating sea turtles. This final rule was unchanged from the interim final rule published March 21, 2002 (67 FR 13098). Comments on the interim final rule advocated that the restrictions be extended to North Carolina state waters to prevent gillnet fishermen from relocating effort and contributing substantially to the mortality of sea turtles in those waters, but NMFS did not have sufficient evidence prior to publishing the final rule to predict such a relocation would occur. Following the implementation of the interim final rule, NMFS received comments that several fishermen had shifted monkfish gillnet effort from Federal waters to North Carolina state waters. This preliminary information was received shortly before the final rule was enacted, and, therefore, NMFS was unable to further investigate and act upon the information prior to promulgating the final rule. Subsequent evaluation revealed that a shift in effort did in fact occur, leading NMFS to propose the rule revisions described herein.

#### *Proposed Sea Turtle Regulations*

NMFS is proposing to amend the existing mid-Atlantic large-mesh seasonal closures to include state waters, seaward of the COLREGS lines. Modifying the existing seasonal closures should reduce the overall serious injury and mortality of sea turtles incidentally caught in large-mesh gillnet fisheries. Further, these changes would not only positively affect sea turtle recovery, but would also benefit the western North Atlantic coastal bottlenose dolphin stock. Since gillnet gear is the primary threat to the bottlenose dolphin stock, management measures proposed in this rule that are specifically designed for sea turtle conservation would also reduce overall serious injury and mortality of the Winter Mixed MU (Northern Migratory, Northern North Carolina, and Southern North Carolina MUs) within the bottlenose dolphin stock.

In response to a comment by the North Carolina Division of Marine Fisheries (NCDMF) on the interim final rule (67 FR 71895, December 3, 2002), NMFS is also proposing to change the large gear mesh size limitation. Other state and Federal regulations affecting the area refer to large mesh gillnets as 7-inch (17.8 cm) or greater stretched

mesh and regulate based upon that dimension. Three regulations currently define large mesh gillnets as 7-inch (17.8 cm) or greater stretched mesh: (1) the large mesh gillnet management measures of the Harbor Porpoise Take Reduction Plan in the mid-Atlantic (50 CFR 229.34); (2) NCDMF regulation [15A NCAC 03J.0202(7)] states that "it is unlawful to use gillnets in the Atlantic Ocean with a mesh length greater than seven inches from April 15 through December 15;" and (3) the proposed BDTRP measures under this rule, which include gillnets with mesh size of 7 inches (17.8 cm) and greater. Therefore, NMFS is proposing to amend the previous rule to include gillnets with a stretched mesh of 7-inches (17.8 cm) or greater, instead of the current limitation of greater than 8-inches stretched mesh, in response to information received during the public comment period on the interim final rule, to maintain consistency with current state and Federal regulations and management efforts, and to avoid confusion of terminology.

Another fishery that will fall under the provisions of this proposed rule is a portion of the black drum gillnet fishery off Virginia. The fishery utilizes large mesh gillnets and long, often overnight, sets in areas where sea turtles are known to occur and, therefore, can reasonably be expected to pose a significant risk to sea turtles. Black drum gillnetting primarily occurs inside COLREGS lines, but a small number of boats (five or fewer) sometimes move their operation just outside of the COLREGS lines into the ocean. Virginia Marine Resources Commission (VMRC) data for 2002 obtained during times that would have been affected by this rule indicate that the black drum gillnet fishery consisted of 21 vessels. Further, only 4–5 vessels target oceanic black drum during part of the year. Revising this rule will, therefore, only impact a small fraction of the total black drum fishery, and those boats will still have the option of fishing inside COLREGS lines. According to the VMRC, this fishery will not likely benefit from the exemption detailed below because of the characteristics of the fishery (i.e., the fishery typically uses large-mesh gillnets longer than 1,000 feet (304.8 m) and long, overnight sets). Additionally, there are a small number of vessels targeting oceanic black drum.

#### *Striped Bass Exemption*

The large mesh striped bass gillnet fishery is prosecuted in state waters off both North Carolina and Virginia. NMFS is proposing to conditionally exempt the striped bass fishery in state waters from

the expanded seasonal closures. In North Carolina state waters, the characteristics of this fishery, which typically opens January 1, and the small quotas granted to fishermen may limit the potential for interactions with sea turtles. Striped bass fishermen typically use single, short, large-mesh gillnets under 1,000 feet (304.8 m) in length and soak their gear for a few hours or less. The fishery is prosecuted in a different manner in Virginia state waters, where multiple nets and long soak times with overnight sets are common. According to information from VMRC, the fishery is officially open from February 1–December 31 (unless the quota is reached earlier) and the majority of the fishing occurs in February/March and November/December. The February/March time frame falls outside of the seasonal closures, therefore, only one of the primary fishing periods will be impacted by the amended regulation. Additionally, with the implementation of VMRC's new quota tag system (differentiating between bay/river caught fish and ocean fish) and a quota reduction, it is expected that the total ocean catch will be significantly reduced when compared to data from previous years, but it is uncertain if temporal effort will be affected. NMFS proposes to specify the applicability of the exemption to ensure that it is only used by striped bass fishermen who fish their gear in a manner that limits the potential risk to sea turtles, as described below.

Under these conditions, NMFS is proposing an exemption to the closure provisions of this rule for the large mesh gillnet striped bass fishery. To qualify, fishermen targeting striped bass with large mesh gillnets (as defined above) in state waters, delineated in this rule, must tend the nets (within 0.25 nautical mile) throughout the soak time and no vessel may set more than 1,000 feet (304.8 m) of net per trip. The exemption for the striped bass fishery will only apply within the context of the state-regulated fishery. Therefore, the striped bass exemption of seasonal restrictions will be effective in state waters only in the following cases: (1) in North Carolina waters, the exemption only applies during the North Carolina large mesh gillnet striped bass open season (not applicable to the trawl or beach seine season), which is variable in length and is opened and closed by proclamation of NCDMF; and (2) in Virginia waters, the exemption only applies for those fishermen targeting striped bass and possessing valid ocean (not bay) striped bass quota tags on board during the Virginia striped bass

open season. It is important to note that NMFS does not necessarily consider tending requirements, limited soak time, and restrictions on net length sufficient by themselves to warrant exemption of

a fishery from using conservation measures to protect sea turtles. Rather, it is the combination of these fishing practices, in conjunction with limited effort and stringent state regulations,

that make the exemption possible. NMFS will continue to monitor and evaluate the exemption to ensure that sea turtles and bottlenose dolphins are adequately protected.

TABLE 4. SUMMARY OF NMFS SEA TURTLE CONSERVATION REGULATORY MEASURES.

Nearshore and Offshore Waters	Large Mesh Gillnet (≥7 inch Stretched Mesh)	Corresponding BDTRP Management Unit
North of 37°34.6' N (Wachapreague Inlet, Virginia) and south of 37°56.0' N (Chincoteague, Virginia) .....	No Fishing from April 16–January 14.	Northern Virginia portion of Summer Northern Migratory and Winter Mixed.
North of 36°22.5' N (Currituck Beach Light, North Carolina) and south of 37°34.6' N (Wachapreague Inlet, Virginia) .....	No Fishing from April 1–January 14.	Southern Virginia portion of the Summer Northern Migratory and Winter Mixed.
North of 35°46.0' N (Oregon Inlet, North Carolina) and south of 36°22.5' N (Currituck Beach Light, North Carolina) .....	No fishing from March 16–January 14.	Northern North Carolina.
North of 33°51.0' N (North Carolina/South Carolina border at the coast) and south of 35°46.0' N (Oregon Inlet) at any time .....	No fishing at any time .....	Southern North Carolina and Southern half of Northern North Carolina.

Conditions: For the above nearshore and offshore waters, during the above-specified time periods: no person may fish with (including, but not limited to, setting, hauling back, or leaving in the ocean), or possess on board a vessel, any gillnet with a stretched mesh size of 7-inches (17.8 cm) or larger, unless all gillnets are covered with canvas or other similar material and lashed or otherwise securely fastened to the deck or the rail, and all buoys larger than 6-inches (15.24 cm) in diameter, high flyers, and anchors are disconnected.

Exemptions: Fishermen are exempt from these conditions when targeting striped bass with large mesh gillnets in state waters if: gillnet gear is less than or equal to 1,000 feet (304.8 m) in length; and the vessel remains within 0.25 nautical miles (0.46 km) of the net at all times.

In North Carolina waters, the exemption only applies during the North Carolina large mesh gillnet striped bass open season as specified by proclamation of the director of the North Carolina Division of Marine Fisheries.

In Virginia waters, the exemption only applies to those fishermen targeting striped bass and possessing valid ocean striped bass quota tags, issued by the Virginia Marine Resources Commission, aboard the vessel during the Virginia striped bass open season.

**Classification**

This proposed rule was determined significant for purposes of Executive Order 12866.

NMFS prepared an Initial Regulatory Flexibility Analysis (IRFA) that describes the impact this proposed rule, if adopted, will have on small entities. The analysis is summarized as follows.

NMFS must reduce the incidental mortality and serious injury of marine mammals and the takings of sea turtles associated with commercial fisheries, as mandated by the MMPA and subject to the ESA. Western North Atlantic coastal bottlenose dolphins and sea turtles continue to experience serious injury and mortality incidental to commercial fishing activities at levels that are not sustainable. The specific objective of this proposed rule is to reduce the incidental mortality and serious injury by commercial fishing gear of bottlenose dolphins in waters off the states of Florida through New Jersey and reduce the potential take of sea turtles from large mesh gillnet fisheries in North Carolina and Virginia state waters. This objective will be accomplished through restrictions on the seine/gillnet fisheries in Florida through New Jersey, and gear marking requirements for these same fisheries, plus stop net and long haul seine fisheries. Both the MMPA and ESA provide the legal basis for the proposed rule.

The proposed rule will not impose additional reporting, recordkeeping, or compliance requirements other than gear marking requirements. The gear marking requirements, however, are standard methods to enhance visibility and gear identification and no special skills will be required for compliance.

A total of 3,079 entities were identified as having recorded landings in the 2001 fishing season using gillnet gear in Florida through New Jersey and will be affected by the fishing restrictions and gear marking requirements contained in the proposed rule. Total harvests from all fisheries by these entities are estimated to have an ex-vessel value of \$98 million, or an average of approximately \$32,000 per entity. Eighty unique participants, some of whom are also included among the 3,079 gillnet entities, were identified as having participated in the North Carolina beach haul seine fishery and produced \$2.55 million in ex-vessel value (all fisheries included), for an average of approximately \$32,000 per entity.

All commercial fishing operations in the respective seine/gillnet fisheries that operate in the manner and location encompassed by the proposed rule will be affected by the proposed rule. The benchmark for a fish-harvesting business to be considered a small entity is if the entity is independently owned and operated, not dominant in its field

of operation, and has annual receipts not in excess of \$3.5 million. Given the average revenue information provided above, all operations in the seine/gillnet fisheries are assumed to be small entities.

Information on the profit profile of participants in the respective seine/gillnet fisheries covered by the proposed rule is not available. Inferences on the effects of the proposed rule on profitability of the impacted entities, however, may be drawn from examining the expected impacts on ex-vessel revenues. Total costs associated with harvest reductions (lost ex-vessel revenue) and gear marking devices (purchase costs) across all seine/gillnet fisheries are estimated at \$1.62-\$1.73 million. This represents less than 2 percent of total ex-vessel revenues for the entities involved in all these fisheries. However, certain sub-sectors or fisheries are expected to be more severely impacted. Impacts range from no expected impacts on participants in the large mesh gillnet fishery in North Carolina state waters due to the night fishing restrictions, to an estimated 14 percent reduction in ex-vessel revenues for participants in the large mesh gillnet fishery in the range of the Winter Mixed MU due to similar night fishing restrictions. A second example is an estimated 11 percent reduction in ex-vessel revenues for participants in the Delaware-Maryland-New Jersey Summer

Northern oceanic medium and large mesh gillnet fishery due to the gear proximity and return-to-shore provisions of the proposed rule. In total, these two sub-sectors encompass approximately 12.82 percent of identified entities that will be affected by the entire proposed rule.

These results indicate that over 12 percent of identified entities in the seine/gillnet fisheries are estimated to experience greater than 10 percent reductions in ex-vessel revenues in addition to further gear marking expenses that amount to approximately 1 percent of average annual ex-vessel revenues.

Five alternatives to the proposed rule were considered. One alternative would allow status quo operation of the fisheries, thereby eliminating all adverse economic impacts. This alternative would not, however, achieve the required reduction in the incidental mortality and serious injury of bottlenose dolphin and takings of sea turtles by commercial fishing gear and would not meet the objectives of the MMPA or ESA. The other four alternatives would achieve the objectives of the MMPA and the ESA.

One alternative will add a daily hauling requirement and mandatory bycatch certification training to the measures in the proposed rule. Although it was concluded that the hauling provision is unenforceable, in theory, this requirement would constitute an even more restrictive action and will not reduce the adverse impacts of the proposed rule. This alternative would also impose additional, but unquantifiable, costs on the fishery participants as a result of the mandatory bycatch certification training. These costs will be associated with direct costs for participation in the training, potential time taken away from fishing or other revenue generating activities in order to receive the training, and potential lost fishing revenues if fishing activities are restricted due to failure to receive the certification. This alternative would also impose additional gear marking requirements, notably on participants in the Atlantic blue crab trap/pot fishery, that would substantially increase costs over those included in the proposed rule.

Three alternatives were considered that prohibit all ocean gillnet fishing within 3 km (1.62 nautical miles) from shore, limit all ocean gillnet fishing to at most 12 consecutive hours, or prohibit all ocean gillnet fishing in state waters. Each of these alternatives is projected to result in greater direct adverse economic impacts on small

entities than the proposed rule. For example, the proposed rule harvest reductions across all areas and fisheries are estimated at 855,000 pounds (387,821.48 kg) with an ex-vessel value of \$1.009 million; whereas, the above mentioned three alternatives reduce the average annual harvest by 7.79 million pounds (3.533 million kg) with an ex-vessel revenues at \$4.04 million, 5.62 million pounds (2.549 million kg) with \$3.18 million in ex-vessel revenues, and 16.63 million pounds (7.543 million kg) with \$9.71 million in ex-vessel revenues, respectively. These three alternatives would also impose additional gear marking requirements, notably on participants in the Atlantic blue crab trap/pot fishery, that would substantially increase costs over those included in the proposed rule.

Compared to the other alternatives considered that achieve the required reduction in the mortality and serious injury of bottlenose dolphins and sea turtles incidental to commercial fishing, the proposed rule presents the least potential for negative economic impacts.

No duplicative, overlapping, or conflicting Federal rules have been identified.

A copy of this analysis is available from NMFS (see **ADDRESSES**).

This proposed rule contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA) because of the proposed requirement to include gear marking requirements. This requirement was submitted to the Office of Management and Budget (OMB) for approval. Public comment is sought regarding whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; the opportunities to enhance the quality, utility, and clarity of the information to be collected; and the ways to minimize the burden of the collection of information, including the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to the OMB [see **ADDRESSES**].

Most vessels engaged in the Category I and II fisheries affected by this proposed rule are currently required to adhere to some of the gear marking requirements based upon other fishery regulations. Therefore, these fisheries should not experience significant and adverse economic impacts as a result of this rule. The following are approximate cost and time burden estimates per fishery (except the Virginia pound net

and Atlantic blue crab trap/pot fisheries, which are not required by this proposed rule to mark gear) to comply with proposed gear marking requirement:

1. North Carolina inshore gillnet fishery annual estimate for gear marking is \$16.30 per vessel, with a cumulative fishery estimate of \$65,037.00. The burden time to implement gear marking is 3–6 hours per vessel and 11,970–23,940 hours for the entire fishery.

2. Southeast Atlantic gillnet fishery annual estimate for gear marking is \$17.40 per vessel, with a cumulative fishery estimate of \$278,400.00. The burden time to implement gear marking is 3–6 hours per vessel and 48,000–96,000 hours for the entire fishery.

3. Southeastern U.S. Atlantic shark gillnet fishery annual estimate for gear marking is \$24.00 per vessel, with a cumulative fishery estimate of \$576.00. The burden time to implement gear marking is 1–2 hours per net and 72–144 hours for the entire fishery.

4. U.S. mid-Atlantic coastal gillnet fishery annual estimate for gear marking is \$17.40 per vessel, with a cumulative fishery estimate of \$227,940.00. The burden time to implement gear marking is 3–6 hours per vessel and 39,300–117,900 hours for the entire fishery.

5. Mid-Atlantic haul/beach seine fishery annual estimate for gear marking is \$8.80 per net, with a cumulative fishery estimate of \$893.75. The burden time to implement gear marking is 1 hour per net and 125 hours for the entire fishery.

6. North Carolina long haul seine fishery annual estimate for gear marking is \$4.40 per net, with a cumulative fishery estimate of \$1,452.00. The burden time to implement gear marking is 1 hour per net and 330 hours for the entire fishery.

7. North Carolina roe mullet stop net fishery annual estimate for gear marking is \$4.40 per net, with a cumulative fishery estimate of \$114.40. The burden time to implement gear marking is 1–2 hours per net and 78–156 hours for the entire fishery.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

#### References

Garrison, L. 2001. Seeking a hiatus in sightings for bottlenose dolphin during summer and winter aerial surveys. NMFS/SEFSC report prepared and reviewed for the Bottlenose Dolphin Take Reduction Team. Available from:

NMFS-Southeast Fisheries Science Center, 75 Virginia Beach Dr., Miami, FL 33149.

Garrison, L., P.E. Rosel, A. Hohn, R. Baird, and W. Hoggard. 2003. Abundance estimates of the coastal morphotype of bottlenose dolphin, *Tursiops truncatus*, in U.S. continental shelf waters between New Jersey and Florida during winter and summer 2002. NOAA Fisheries, Southeast Fisheries Science Center. Bottlenose Dolphin Take Reduction Process Document Inventory Number: 4-1-03 h. NMFS. 2002. U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessments 2002. U.S. Department of Commerce. NOAA Technical Memorandum NMFS-NE-169.

Palka D. and M. Rossman. 2001. Bycatch estimates of coastal bottlenose dolphin (*Tursiops truncatus*) in U.S. mid- Atlantic gillnet fisheries for 1996-2000. NOAA-NMFS-NEFSC Ref. Doc. 01-15; p. 77.

TEWG. 2000. Assessment Update for the Kemp's ridley and loggerhead sea turtle populations in the western North Atlantic. U.S. Department of Commerce. NOAA Technical Memorandum NMFS-SEFSC-444.

List of Subjects

50 CFR Part 223

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

50 CFR Part 229

Administrative practice and procedure, Confidential business information, Fisheries, Marine mammals, Reporting and recordkeeping requirements.

Dated: November 2, 2004.

William T. Hogarth,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 223 and 50 CFR part 229 are proposed to be amended as follows:

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 § 223.206, paragraph (d)(8) is revised to read as follows:

§ 223.206 Exceptions to prohibitions relating to sea turtles.

\* \* \* \* \*

(d) \* \* \*

(8) Restrictions applicable to large-mesh gillnet fisheries in the mid-Atlantic region. (i) No person may fish

with or possess on board a boat, any gillnet with a stretched mesh size 7-inches (17.8 cm) or larger, unless gillnet is covered with canvas or other similar material and lashed or otherwise securely fastened to the deck or the rail, and all buoys larger than 6-inches (15.24 cm) in diameter, high flyers, and anchors are disconnected. This restriction applies to all offshore waters during the following time periods and in the following areas with the exception of the striped bass fishery in state waters (as detailed below):

(A) Waters north of 33° 51.0' N. (North Carolina/South Carolina border at the coast) and south of 35° 46.0' N. (Oregon Inlet, North Carolina) at any time;

(B) Waters north of 35°46.0' N. (Oregon Inlet, North Carolina) and south of 36°22.5' N. (Currituck Beach Light, North Carolina) from March 16 through January 14;

(C) Waters north of 36°22.5' N. (Currituck Beach Light, North Carolina) and south of 37°34.6' N. (Wachapreague Inlet, Virginia) from April 1 through January 14; and

(D) Waters north of 37°34.6' N. (Wachapreague Inlet, Virginia) and south of 37°56.0' N. (Chincoteague, Virginia) from April 16 through January 14.

(ii) A fisherman targeting striped bass with large-mesh gillnets in state waters is exempt from the restrictions of paragraph (d)(8)(i) of this section if the fisherman complies with the following restrictions: no more than 1,000 feet (308.4 m) of net may be set; and the vessel must remain within 0.25 nautical miles (0.46 kilometers) of the net at all times. Additionally, in North Carolina state waters, this exemption only applies during the North Carolina large-mesh gillnet striped bass open season as specified by proclamation of the Director of the North Carolina Division of Marine Fisheries; and in Virginia waters, this exemption only applies for those fishermen targeting striped bass and possessing valid ocean striped bass quota tags, issued by the Virginia Marine Resources Commission, aboard the vessel during the Virginia striped bass open season.

\* \* \* \* \*

PART 229—AUTHORIZATION FOR COMMERCIAL FISHERIES UNDER THE MARINE MAMMAL PROTECTION ACT OF 1972

1. The authority citation for part 229 continues to read as follows:

Authority: 16 U.S.C. 1361 et seq.

2. In § 229.2, add the definitions "Fishing or to fish," "New Jersey, Delaware, and Maryland state waters,"

"Northern North Carolina state waters," "Northern Virginia state waters," South Carolina, Georgia, and Florida," "Southern North Carolina state waters," and "Southern Virginia state waters" in alphabetical order to read as follows:

§ 229.2 Definitions.

\* \* \* \* \*

Fishing or to fish means any commercial fishing operation activity that involves:

(1) The catching, taking, or harvesting of fish;

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

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

(4) Any operations at sea in support of, or in preparation for, any activity described in paragraphs (1), (2), or (3) of this definition.

\* \* \* \* \*

New Jersey, Delaware, and Maryland state waters means the area consisting of all regulated waters bounded on the north by a line extending eastward from the New York/New Jersey border, on the east within 3 nautical miles (5.56 km) of shore, and on the south by a line extending eastward from the Maryland/Virginia border.

\* \* \* \* \*

Northern North Carolina state waters means the area consisting of all regulated waters bounded on the north by a line extending eastward from the Virginia/North Carolina state border, on the east within 3 nautical miles (5.56 km) of shore, and on the south by a line extending eastward from Cape Lookout, North Carolina (34°37.22' N. latitude).

Northern Virginia state waters means the area consisting of all regulated waters bounded on the north by a line extending eastward from the Virginia/Maryland border, on the east within 3 nautical miles (5.56 km) of shore, and on the south by a line extending eastward from Cape Charles Light on Smith Island in the Chesapeake Bay mouth (37°07.23' N. latitude).

\* \* \* \* \*

South Carolina, Georgia, and Florida waters means the area consisting of all regulated waters bounded on the north by a line extending eastward from the North Carolina/South Carolina border, on the east within 14.6 nautical miles (27 km) from shore, and on the south by the fishery management council demarcation line between the Atlantic Ocean and the Gulf of Mexico (as described in § 600.105 of this title).

\* \* \* \* \*

Southern North Carolina state waters means the area consisting of all

regulated waters bounded on the north by a line extending eastward from Cape Lookout, North Carolina (34°37.22' N. latitude), on the east within 3 nautical miles (5.56 km) from the shoreline, and on the south by a line extending eastward from the North Carolina/South Carolina border.

*Southern Virginia state waters* means the area consisting of all regulated waters bounded on the north by a line extending eastward from the Cape Charles Light on Smith Island in the Chesapeake Bay mouth (37°07.23' N. latitude), on the east within 3 nautical miles (5.56 km) of shore, and on the south by a line extending eastward from the Virginia/North Carolina border.

\* \* \* \* \*

3. In subpart A, § 229.3, paragraphs (r), (s), and (t) are added to read as follows:

**§ 229.3 Prohibitions.**

\* \* \* \* \*

(r) It is prohibited to fish with, or possess on board a vessel unless stowed, or fail to remove any gillnet gear from the areas specified in § 229.35(c)(1) and (c)(2) unless the gear complies with the specified gear marking requirements and other restrictions set forth in § 229.35(d) and (e).

(s) It is prohibited to fish with, or possess on board a vessel unless stowed, or fail to remove any North Carolina long haul seine as defined in § 229.35(b) from the areas specified in § 229.35(c)(1) and (c)(2) unless the gear complies with the specified gear marking requirements set forth in § 229.35(d)(1).

(t) It is prohibited to fish with, or possess on board a vessel unless stowed, or fail to remove any seine gear as defined in § 229.35(b) from the areas specified in § 229.35(c)(1) and (c)(2) unless the gear complies with the specified gear marking requirements and other restrictions set forth in § 229.35(d)(1) and § 229.35(e)(3)(i)(A).

4. In subpart C, § 229.35 is added to read as follows:

**§ 229.35 Bottlenose Dolphin Take Reduction Plan.**

(a) *Purpose and scope.* The purpose of this section is to implement the Bottlenose Dolphin Take Reduction Plan to reduce incidental mortality and serious injury of western North Atlantic coastal bottlenose dolphins in specific Category I and Category II commercial fisheries from New Jersey through Florida. Gear affected by this section includes gillnets, seines, North Carolina long haul seines, and North Carolina roe mullet stop nets.

(b) *Definitions.* Unless otherwise noted, in this § 229.35:

*Beach* means landward of and including the mean low water line.

*Beach/water interface* means the mean low water line.

*Large mesh gillnet* means a gillnet constructed with a mesh size greater than or equal to 7-inches (17.8 cm) stretched mesh.

*Medium mesh gillnet* means a gillnet constructed with a mesh size of greater than 5-inches (12.7 cm) to less than 7-inches (17.8 cm) stretched mesh.

*Night* means any time between one hour after sunset and one hour prior to sunrise.

*North Carolina long haul seine gear* means all fishing efforts in North Carolina state waters that use a nylon or twine net towed between two boats.

Fish are encircled and concentrated by pulling the net around a fixed stake.

*North Carolina roe mullet stop net gear* means a gillnet that targets striped mullet that is deployed from shore and retrieved to catch fish that have been corralled.

*Seine* means a net that fishes vertically in the water, is pulled by hand or by power, and captures fish by encirclement and confining fish within itself or against another net, the shore or bank as a result of net design, construction, mesh size, webbing diameter, or method in which it is used. The net typically is constructed with a capture bag in the center of the net which concentrates the fish as the net is closed.

*Small mesh gillnet* means a gillnet constructed with a mesh size of less than or equal to 5-inches (12.7 cm) stretched mesh.

*Sunrise* means the time of sunrise as determined for the date and location in The Nautical Almanac, prepared by the U.S. Naval Observatory.

*Sunset* means the time of sunset as determined for the date and location in The Nautical Almanac, prepared by the U.S. Naval Observatory.

(c) *Affected area (1) Regulated waters.* The regulations in this section apply to all tidal and marine waters within 6.5 nautical miles (12 km) of shore from the New York-New Jersey border southward to Cape Hatteras, North Carolina, and within 14.6 nautical miles (27 km) of shore from Cape Hatteras southward to, and including, the east coast of Florida down to the fishery management council demarcation line between the Atlantic Ocean and the Gulf of Mexico (as described in § 600.105 of this title), except for the areas exempted in paragraph (c)(2) of this section, or where otherwise noted.

(2) *Exempted waters.* The regulations in paragraph (e) of this section do not apply to waters landward of the first

bridge over any embayment, harbor, or inlet. In those instances where there is no bridge over said embayment, harbor, or inlet or close to the mouth of said embayment, harbor, or inlet, including, but not limited to Delaware Bay, the regulations in this section do not apply to marine and tidal waters landward of the 72 COLREGS demarcation line (International Regulations for Preventing Collisions at Sea, 1972), as depicted or noted on nautical charts published by the National Oceanic and Atmospheric Administration (Coast Charts 1:80,000 scale), and as described in 33 CFR part 80. The regulations in this section do not apply to waters landward of the lines in § 229.34(a)(2).

(d) *Gear marking requirements (1) Universal gear marking requirements.*

Any person who owns or fishes with gear in Category I or II fisheries affected by this section (as described in paragraph (a) of this section, except the Atlantic blue crab trap/pot and Virginia pound net fisheries) in areas specified in paragraphs (c)(1) and (c)(2) of this section shall permanently mark their gear with identification tags containing the last name and first and middle initials of the owner, gear mesh size, and one of the following: state vessel registration number, U.S. Coast Guard documentation number, or state commercial fishing license number. These identification tags, made of plastic or metal, shall be attached along the floatline, as close to the floatline as operationally feasible, at least once every 300 feet (91.4 m).

(2) *Special gear marking requirement for gillnets.* For gillnet gear, in addition to the identification tags described in paragraph (d)(1) of this section, gear shall be marked on the end flag or ball by using engraved flag(s) or ball buoy(s), or by attaching engraved metal or plastic tags to the flag(s) and ball buoy(s). One end of the net shall be marked by a square flag not less than 144 square inches (929.03 square cm) and at least 3 feet (0.91 m) above the water. The opposite end of the net shall also be marked by such a square flag or an 8-inch (20.32 cm) minimum diameter ball buoy with the gear mesh size. All such flag(s) and ball buoy(s) shall be marked with at least two stripes of reflective material that are not less than 2 inches (5.08 cm) in width and visible for 360 degrees.

(e) *Regional Management Measures (1) New Jersey, Delaware, and Maryland state waters (i) Medium and large mesh.* From June 1 through October 31, in the state waters of New Jersey, Delaware, and Maryland, no person may fish with any medium or large mesh anchored gillnet gear at night unless such person

remains within 0.5 nautical mile (0.93 km) of the closest portion of each gillnet and removes all such gear from the water and stows it on board the vessel before the vessel returns to port.

(ii) [Reserved]

(2) *Virginia state waters* (i) *Area-wide restrictions* (A) *Medium and large mesh.* From June 1 through October 31, in Southern and Northern Virginia state waters, no person may fish with any medium or large mesh anchored gillnet gear at night unless such person remains within 0.5 nautical mile (0.93 km) of the closest portion of each gillnet and removes all such gear from the water and stows it on board the vessel before the vessel returns to port.

(B) [Reserved]

(ii) *Area-specific gear restrictions* (A) *Southern Virginia state waters* (1) *Large mesh gillnets.* From November 1 through December 31, in Southern Virginia state waters, no person may fish with, possess on board a vessel unless stowed, or fail to remove from the water, any large mesh gillnet gear at night.

(B) [Reserved]

(3) *North Carolina state waters* (i) *Area-wide restrictions* (A) *Beach Gear.* Year-round, along the coast of North Carolina, no person may fish with

gillnet gear or seine gear within 300 feet (91.4 m) of the beach/water interface unless it consists of multi-fiber nylon that is 4 inches (10.2 cm) or less stretched mesh. Use of nets consisting of monofilament material is prohibited in this area.

(B) [Reserved]

(ii) *Area-specific restrictions*—(A) *Northern North Carolina state waters* — (1) *Small mesh gillnets.* From May 1 through October 31, in Northern North Carolina state waters, no person may fish with any small mesh gillnet gear longer than 1,000 feet (304.8 m).

(2) *Medium mesh gillnets.* From November 1 through April 30 of the following year, in Northern North Carolina state waters, no person may fish with any medium mesh gillnet at night. This provision expires on November 12, 2007.

(3) *Large mesh gillnets.* (i) From April 15 through December 15, in Northern North Carolina state waters, no person may fish with any large mesh gillnet.

(ii) From December 16 through April 14 of the following year, in Northern North Carolina state waters, no person may fish with any large mesh gillnet without tie-downs at night.

(B) *Southern North Carolina state waters* (1) *Medium mesh gillnets.* From

November 1 through April 30 of the following year, in Southern North Carolina state waters, no person may fish with any medium mesh gillnet at night. This provision expires on November 12, 2007.

(2) *Large mesh gillnets.* (i) From April 15 through December 15, in Southern North Carolina state waters, no person may fish with any large mesh gillnet.

(ii) From December 16 through April 14 of the following year, in Southern North Carolina state waters, no person may fish, possess on board unless stowed, or fail to remove from the water, any large mesh gillnet at night.

(4) *South Carolina, Georgia, and Florida waters* (A) *Gillnets.* Year-round, in South Carolina, Georgia, and Florida waters, no person may fish with any gillnet gear unless such person remains within 0.25 nautical miles (0.46 km) of the closest portion of the gillnet. Gear shall be removed from the water and stowed on board the vessel before the vessel returns to port.

(B) [Reserved]

\* \* \* \* \*

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