

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

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

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

Dated: March 30, 2006.

**Mark B. McClellan,**

*Administrator, Centers for Medicare & Medicaid Services.*

Approved: May 22, 2006.

**Michael O. Leavitt,**

*Secretary.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Parts 222 and 223

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

RIN 0648-AU10

#### Sea Turtle Conservation; Modification to Fishing Activities

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

**ACTION:** Final rule.

**SUMMARY:** NMFS is requiring that any offshore pound net leader in the Virginia waters of the mainstem Chesapeake Bay, south of 37°19.0' N. lat. and west of 76°13.0' W. long., and all waters south of 37°13.0' N. lat. to the Chesapeake Bay Bridge Tunnel at the mouth of the Chesapeake Bay, and the James and York Rivers downstream of the first bridge in each tributary, during the period of May 6 through July 15, meet the definition of a modified pound net leader. Without this final rule, existing regulations would continue to prohibit all offshore pound net leaders in that area during that time frame. An offshore pound net leader refers to a leader with the inland end set greater than 10 horizontal feet (3 m) from the mean low water line. While restrictions promulgated in 2004 on pound net leaders in the Virginia waters of the Chesapeake Bay outside the aforementioned area remain in effect, this final rule creates an exception to those restrictions by allowing the use of modified pound net leaders in this area. This action, taken under the Endangered Species Act of 1973 (ESA), responds to new information generated by gear research. It is intended to conserve sea turtles listed as threatened under the ESA and to help enforce the provisions of the ESA, including the provisions against takes of endangered species, while enabling fishermen to use leaders, an important component of pound net gear, during the regulated period.

**DATES:** Effective June 23, 2006.

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

#### SUPPLEMENTARY INFORMATION:

##### Background

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

a portion of the Virginia Chesapeake Bay, which is renamed in this final rule "Pound Net Regulated Area I", from May 6 through July 15 each year. An offshore pound net leader refers to a leader with the inland end set greater than 10 horizontal feet (3 m) from the mean low water line. The 2004 rule also prohibited the use of 12 inches (30.5 cm) and greater stretched mesh and stringers in nearshore pound net leaders in Pound Net Regulated Area I and all pound net leaders employed in the remainder of the Virginia Chesapeake Bay, which is renamed in this final rule "Pound Net Regulated Area II", from May 6 through July 15. The 2004 rule contained other provisions that are not relevant to this action. For complete details and justification for the 2004 rule, see 69 FR 24997.

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

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

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

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

#### Approved Measures

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

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

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

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

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

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

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

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

### Comments and Responses

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

received during the public comment period for the proposed rule. Six comment letters supported the action, while no letters opposed the modified leader requirement. Two comment letters were neither in favor nor against the proposed action. A public hearing was also held in Virginia Beach, Virginia on April 26, 2006, at which five individuals provided oral comments. None of the oral comments were in opposition to the proposed action. NMFS considered these comments on the proposed rule as part of its decision making process. A complete summary of the comments and NMFS' responses, grouped according to general subject matter in no particular order, is provided here.

#### General Comments

*Comment 1:* One commenter stated that NMFS does not recognize the impact of strong tidal currents on the risk of sea turtle impingements in pound net leaders set Pound Net Regulated Area I and in nearshore pound net leaders. The commenter recommended that the importance of water current be addressed by refining the definition of "nearshore" and "offshore" pound nets to "shoal water" and "deep water" pound nets, respectively. The commenter suggested that the effect of water depth on current strength is what drives the risk of sea turtle impingements, not just distance from shore, and recommended that the following text be added to the definition of a nearshore pound net: "or the pound net trap head be located in a low water depth of 18 feet or less."

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

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

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

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

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

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

net leaders with varying current strength.

NMFS believes an impingement may compromise a sea turtle and result in mortality. Based on the observations of impinged sea turtles on pound net leaders during NMFS monitoring efforts and the modified leader experiment, if an animal was impinged on a leader by the current with its flippers inactive, NMFS believes that without any human intervention the turtle could either swim away alive when slack tide occurred, become entangled in the leader mesh when trying to free itself, or drift away dead if it drowned prior to slack tide. In 2002 and 2003, six observed live impingements occurred near the surface, but seven turtles were found underwater, unable to reach the surface to breathe. Based on information on forcibly submerged sea turtles, it is likely that if a turtle could not breathe from the position where it was impinged on the net, it would have a low likelihood of survival if it remained on the net for longer than approximately one hour, even if it were a healthy turtle before becoming impinged (Henwood and Stuntz, 1987; Lutcavage and Lutz, 1997).

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

#### *Comments in Support of Alternatives Other Than the Proposed Alternative*

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

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

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

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

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

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

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

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

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

#### *Comments Regarding the Modified Pound Net Leader Design*

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

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

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

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

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

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

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

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

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

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

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

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

#### *Comments on the Definition of Hard Lay Line*

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

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

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

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

#### *Comments Related to Stranding Levels*

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

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

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

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

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

NMFS will also continue to closely monitor sea turtle stranding levels and to evaluate interactions with other mortality sources not previously considered that may contribute to sea turtle strandings. NMFS and the U.S. Fish and Wildlife Service (USFWS) are working to minimize the impacts to sea turtles from other activities in addition to fishing (e.g., habitat degradation, marine debris, dredging, water quality, power plant impingement). Fishing activities, however, have been recognized as one of the most significant threats to sea turtle survival (Magnuson *et al.*, 1990, Turtle Expert Working Group 2000).

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

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

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

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

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

NMFS continues to consider the impacts to listed sea turtles, including loggerheads, and to reduce threats from known sources. NMFS and USFWS are working to minimize the impacts to sea turtles from activities such as nesting habitat degradation, marine debris, dredging, and power plant impingement, but fishing activities have been recognized as one of the most significant threats to sea turtle survival (Magnuson *et al.*, 1990, Turtle Expert Working Group 2000). To respond to these threats, NMFS is comprehensively evaluating the impacts of fishing gear types on sea turtles throughout the U.S. Atlantic Ocean and Gulf of Mexico, as part of the Strategy for Sea Turtle Conservation and Recovery in Relation to Atlantic Ocean and Gulf of Mexico Fisheries (Strategy) (NMFS 2001). Based on the information developed for the Strategy, NMFS may impose restrictions on or modifications to other activities that adversely affect sea turtles. NMFS will continue to monitor fishing activities in Virginia, as well as other potential sea turtle mortality sources.

#### *Comments Related to Economic and Social Impact Assessment*

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

*Response:* NMFS has been committed to enacting regulations to require modified leaders in a portion of the Virginia pound net fishery as expeditiously as possible, in order to give the fishermen advance notification and ensure measures are in place before the regulated period begins on May 6. However, the new regulations contained in this final rule were not enacted before the start of the fishing season this year. NMFS recognizes that the industry begins planning for the next fishing season in approximately December or January and is sensitive to the industry's time constraints required to outfit their gear in compliance with the regulations.

#### *Changes From the Proposed Rule*

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

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

#### **Classification**

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

The Assistant Administrator for Fisheries (AA) finds good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effective date of this final rule. To determine the appropriate properties for the modified pound net leader in this rulemaking, NMFS needed the results of the 2005 modified pound net leader experiment. The final report for the experiment was not available to NMFS until January 2006. NMFS then reviewed and analyzed the report and integrated the new information into the rulemaking documents.

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



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

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

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

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

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

Non-preferred alternative 1 (NPA 1) would maintain the current regulations, including a prohibition on the use of offshore pound net leaders in Pound Net Regulated Area I, and would prohibit leaders with stretched mesh greater than or equal to 12 inches (30.5 cm) and leaders with stringers in the remainder of the Virginia Chesapeake Bay during the period of May 6 through July 15 each year. NPA 1 would not have changed the economic status quo. NPA 1 was rejected because it would not take advantage of the modified leader design developed to enable fishermen to generate revenues by fishing while also protecting sea turtles.

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

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

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

This action does not contain new reporting or recordkeeping requirements.

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

A formal consultation pursuant to section 7 of the ESA was conducted on the previous 2004 rule (69 FR 24997, May 5, 2004). The April 16, 2004 Biological Opinion concluded that the operation of the Virginia pound net fishery with NMFS' sea turtle conservation measures may adversely affect but is not likely to jeopardize the continued existence of the loggerhead, leatherback, Kemp's ridley, green, or hawksbill sea turtle, or shortnose sturgeon. NMFS has determined that this action does not trigger reinitiation of formal consultation.

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



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

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#### List of Subjects

##### 50 CFR Part 222

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

##### 50 CFR Part 223

Endangered and threatened species, Exports, Transportation.

Dated: June 16, 2006.

#### James W. Balsiger,

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

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

#### PART 222—GENERAL ENDANGERED AND THREATENED MARINE SPECIES

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

**Authority:** 16 U.S.C. 1531 *et seq.*; 16 U.S.C. 742a *et seq.*; 31 U.S.C. 9701.

■ 2. In § 222.102, the definitions of “Modified pound net leader” and “Pound Net Regulated Area I” and “Pound Net Regulated Area II” are added in alphabetical order to read as follows:

##### § 222.102 Definitions.

\* \* \* \* \*

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

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

\* \* \* \* \*

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

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

\* \* \* \* \*

#### PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

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

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

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

**§ 223.206 Exceptions to prohibitions relating to sea turtles.**

\* \* \* \* \*

(d) \* \* \*

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

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

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

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

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

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

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

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

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