

**50 CFR Parts 217 and 227**

[Docket No. 960116009-6009-01; I.D. 110695D]

RIN 0648-AE12

**Sea Turtle Conservation; Restrictions Applicable to Fishery Activities; Summer Flounder Fishery-Sea Turtle Protection Area**

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

**ACTION:** Final rule.

**SUMMARY:** This final rule requires summer flounder bottom trawlers to have a NMFS-approved turtle excluder device (TED) installed in any net that is rigged for fishing in the waters off Virginia and North Carolina from 37°05' N. lat. (Cape Charles, VA) southward to 33°35' N. lat. (North Carolina-South Carolina border) year round, except for trawlers north of 35°46.1' N. lat. (Oregon Inlet, NC), which are exempt from this requirement from January 15 through March 15 each year. However due to unavoidable delays, the exemption from this requirement in 1996 begins on January 23, 1996. This final rule allows the summer flounder bottom trawl fishery to continue fishing while providing adequate protection to endangered and threatened sea turtles.

**EFFECTIVE DATE:** January 23, 1996.

**ADDRESSES:** Requests for copies of the environmental assessment (EA) or Biological Opinion prepared for this rule should be addressed to the Chief, Endangered Species Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

**FOR FURTHER INFORMATION CONTACT:** Charles A. Oravetz, 813-570-5312, or Phil Williams, 301-713-1401, or Doug Beach, 508-281-9291.

**SUPPLEMENTARY INFORMATION:****Background**

All sea turtles that occur in U.S. waters are listed as either endangered or threatened under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* (ESA). According to the 1990 report on the decline of sea turtles, published by the National Academy of Sciences, incidental capture in shrimp trawls is by far the leading cause of human-induced mortality to sea turtles in the water. However, collectively, activities in non-shrimp fisheries, which include the summer flounder bottom trawl fishery, constitute the second largest source.

In a 1991 biological opinion in conjunction with Amendment 2 to the Fishery Management Plan for the Summer Flounder Fishery, NMFS concluded that the unrestricted operation of this fishery is likely to jeopardize the continued existence of the Kemp's ridley sea turtle, and provided, as a reasonable and prudent alternative, the use of tow-time limits and an observer program. Additional measures pursuant to the sea turtle conservation regulations at 50 CFR part 227 required the use of TEDs by the summer flounder fishery in certain areas in which bottom trawling occurred when sea turtles were present.

NMFS has taken a series of actions to require the use of TEDs in the bottom trawl fishery for summer flounder from 37°05' N. lat. (Cape Charles, VA) southward to 33°35' N. lat. (North Carolina-South Carolina border), defined as the "summer flounder fishery-sea turtle protection area" (hereinafter referred to as the protection area) and to require vessels to carry an observer, if requested to do so. These requirements were initially effective November 15, 1992, through December 15, 1992 (57 FR 53603, November 12, 1992), were extended from December 16, 1992, through January 14, 1993 (57 FR 60135, December 18, 1992), were modified and extended from January 7, 1993, through February 8, 1993 (58 FR 4088, January 13, 1993), and were extended from February 10, 1993, through April 10, 1993 (58 FR 5884, February 16, 1993). On September 20, 1993 (58 FR 48797) an interim final rule again required TED use by summer flounder trawlers in the bottom trawl fishery for summer flounder in the protection area defined above. On March 7, 1994 (59 FR 10584) the northern boundary of the protection area was moved south for a 60-day period to Oregon Inlet, NC. The specific requirements, their background and rationale, comments and responses to comments, and summaries of pertinent biological opinions were included in the cited Federal Register publications and are not repeated here. In addition, NMFS approved the Flounder TED described at 50 CFR 227.72(e)(4)(ii)(A) on October 20, 1993 (58 FR 54066) that was developed specifically for use in the summer flounder bottom trawl fishery.

**Sea Turtle/Fisheries Interactions**

NMFS has determined, based on past interactions between sea turtles and the summer flounder fishery, that bottom trawl nets fished without TEDs for summer flounder can capture sea turtles at a rate comparable with that of shrimp

trawl nets fished without TEDs along the southern U.S. Atlantic coast. TED use is now required at all times in the shrimp trawl fishery.

In addition to documented, observed takes of endangered and threatened species of sea turtles in summer flounder trawls, sea turtle strandings in North Carolina have long been correlated with the activity of the summer flounder fleet. Street (1987) analyzed sea turtle stranding data from 1980-86 from North Carolina ocean beaches and concluded that the summer flounder fishery was responsible for 85 percent of the 456 sea turtle strandings that occurred during the October through April period when the summer flounder fishery is active. Even so, strandings are a minimal indication of actual sea turtle interactions with fishing activities: During the 1991-92 flounder season, the number of dead turtles that washed up on the beaches represented a maximum of 7 to 13 percent of the estimated fishery-induced mortalities (Epperly *et al.* in press).

In the months of October and November, when shallow, nearshore waters are still warm, sea turtles and summer flounder are present in higher numbers. Sea turtle presence is indicated by the strandings in North Carolina that occur coincidentally with the operation of the summer flounder bottom trawl fishery. From October 1993 through March 1994, there were 50 sea turtle strandings in North Carolina, and in the 1994-95 flounder season, 75 strandings occurred in North Carolina. Based on the recent observer data that document direct takes in the summer flounder fishery and the presence of sea turtles indicated by strandings, NMFS believes there continues to be a need to require the use of NMFS-approved TEDs in the summer flounder fishery.

NMFS has determined that the area where TEDs must be used in the summer flounder fishery can be seasonally decreased with minimal risk to sea turtles, based on temperature-driven distribution of turtles. Data acquired by satellite sensors indicate that sea surface temperatures off the coast of North Carolina north of Oregon Inlet are generally less than 11°C during the months of January through March. Aerial surveys conducted from November 1991 through March 1992 indicate that turtle abundance is related to water temperatures, with most turtles documented along the western edge of the Gulf Stream from the vicinity of Cape Hatteras southward where water temperatures were greater than 11°C (Chester *et al.*, 1994; Epperly *et al.*, 1995). NMFS has determined, based on reports from observers aboard trawlers

and from the scientific literature, that the probability of sea turtle captures is minimal when surface water temperatures fall below 11°C.

Except for the cold months of January through March, the co-occurrence of sea turtles and bottom trawling activities is likely in the waters off North Carolina and Virginia. Therefore, NMFS believes that the interim final rule (58 FR 48797, September 20, 1993) should be revised to move the northern boundary of the protection area south to Oregon Inlet, NC from January 15 through March 15 each year, and be adopted as final. NMFS will monitor conditions to determine if additional sea turtle protection measures are necessary.

#### Multi-Species Management

NMFS has reinitiated consultation on the Fishery Management Plan for the Summer Flounder Fishery to include the fisheries management of black sea bass and scup under the same biological opinion. Although the Mid-Atlantic Fishery Management Council has developed separate management plans for the scup and black sea bass fisheries, both NMFS and the Council have investigated the concept of managing the summer flounder, scup, and black sea bass, fisheries as one multi-species unit because the stocks of these three fisheries behave similarly in their movements north to south and offshore to inshore, and in fisheries targeting one species or another there is often a bycatch of the other species. Shepherd and Terceiro's (1994) analysis of commercial interactions between the fisheries showed that "trips landing summer flounder without scup or black sea bass were most frequent (37 percent). The second largest component were trips consisting of all three species (30.7 percent). Trips landing only black sea bass, only scup or scup and black sea bass were relatively rare (1.9, 4.5, and 4.1 percent respectively). Most trips (56.6 percent) landed a multi-species catch with at least two of the three species." This study included both the Mid-Atlantic Bight and New England waters. Based on unpublished NMFS general canvass data, bottom otter trawls were used for approximately 74 percent of the commercial scup and 56 percent of the commercial black sea bass landings for the period between 1983 and 1992. A portion of those landings comes specifically from flynet gear that is used throughout the September-April season to target schools of weakfish, croaker, bluefish, scup and butterfish higher in the water column.

NMFS is considering implementing observer coverage, through the section 7 ESA process, on boats targeting these

species with this gear type to provide specific, empirical data to assess the degree of interaction with listed species, and NMFS is encouraging development of a functional TED for flynets to fully assess the impact of this gear.

#### Comments on the Interim Final Rule

NMFS received a comment from the Center for Marine Conservation during the comment period for the interim final rule (58 FR 48797, September 20, 1993). NMFS' response was published on March 7, 1994 (59 FR 10584) and is not repeated here. NMFS also received a comment from the North Carolina Fisheries Association, Inc., in February, 1995, requesting that the northern boundary of the protection area be moved south automatically each year. NMFS agrees for the reasons set forth herein.

#### Changes from the Interim Final Rule

This final rule adopts as final the provisions of the interim final rule (58 FR 48797, September 20, 1993) with one change regarding the seasonal adjustment of the northern boundary of the protection area.

Summer flounder bottom trawlers in offshore waters south of Cape Charles, VA, to the North Carolina-South Carolina border, are required to have an NMFS-approved TED installed in each net that is rigged for fishing in the summer flounder fishery-sea turtle protection area year round except for trawlers north of 35°46.1' N. lat. (Oregon Inlet, NC) which are exempt from the requirement from January 15 through March 15 each year. However due to unavoidable delays, the exemption from this requirement in 1996 begins on January 23, 1996. While there is a small risk to sea turtles associated with this exemption, NMFS has determined that this risk is minimal and will not jeopardize the continued existence of endangered and threatened sea turtles in a biological opinion prepared in conjunction with this final rule. While the seasonal exemption represents a change to the interim final rule currently in force, it is consistent with past NMFS policy and previous requirements. NMFS moved the northern boundary of the protection area south to Oregon Inlet during the 1992-93 season (58 FR 4088, January 13, 1993) and during the 1993-94 season (59 FR 10584, March 7, 1994). While the exemption was not provided during the 1994-95 season due to the lack of documented trawling effort in the affected area, NMFS believes that a permanent seasonal boundary change is justified. For these reasons, NMFS is incorporating the seasonal exemption

from Cape Charles, VA, to Oregon Inlet, NC in the final rule. While previous rules implementing the exemption in 1993 and 1994 were based primarily on water temperatures, NMFS believes that the exemption in a permanent rule should be based on fixed dates to provide more certainty and consistency to fishermen. NMFS will, however, continue to monitor climatic conditions such as water temperature to ensure that turtles are not likely to be present in the areas where TED use is not required.

Based on this monitoring, NMFS may determine to reinstate the TED requirement north to Cape Charles, VA prior to March 15 or invoke additional conservation measures to protect sea turtles pursuant to 50 CFR 227.72(e)(6). Under that provision, the Assistant Administrator for Fisheries, NOAA (AA) may at any time, modify the requirements of this rule through notification in the Federal Register, if necessary, to ensure adequate protection of endangered and threatened sea turtles. Under this procedure, the AA will impose any necessary additional or more stringent measures, if he or she determines that summer flounder trawl vessels are having a significant adverse affect on sea turtles and additional takings are unauthorized pursuant to 50 CFR 227.72(e)(6)(ii). Likewise, conservation measures may be modified if the incidental take for the fishery is projected to reach the incidental take level established by the biological opinion for this rule issued as a result of consultation under section 7 of the ESA.

The AA will impose additional conservation measures on this fishery if the incidental take level is approached or exceeded, or if significant or unanticipated levels of lethal or nonlethal takings or strandings of sea turtles associated with summer flounder fishing activities occur. Such additional measures may include reinstating the TED requirement from Oregon Inlet to Cape Charles between January 15 and March 15 each year, or expanding the restricted area or the time during which TEDs are required or impose requirements to carry NMFS-approved observers at the expense of vessel owners or operators. The AA may withdraw or modify the requirement for specific conservation measures or any restriction on fishing activities if the AA determines that such action is warranted. Notification of any additional sea turtle conservation measures, will be published in the Federal Register.

References

Previous references cited that are not included below are available in the biological opinion prepared for this action (see ADDRESSES).

Shepherd, G.R. and M. Terceiro. 1994. The Summer Flounder, Scup, and Black Sea Bass Fishery of the Middle Atlantic Bight and Southern New England Waters. NOAA Technical Report, NMFS 122. 13 pp.

Classification

This rule has been determined to be not significant for purposes of E.O. 12866.

The interim final rule with one change—the seasonal adjustment of the northern boundary of the protection area—is adopted as final without further notice and opportunity for further public comment. The public has had ample opportunity to comment on the boundary adjustment in previous years, and these comments were responded to in previous years (58 FR 8554, February 16, 1993; 58 FR 48797, September 10, 1993; 59 FR 10584, March 7, 1994). No useful purpose would be served by providing additional opportunity for public comment.

Since the exemption for trawlers north of Oregon Inlet, NC, from January 15 to March 15 each year relieves a restriction on the fishery, under 5 U.S.C. 553(d)(1), it is not subject to a 30-day delay in effective date.

The AA prepared an EA for the final rule for Amendment 2 to the Fishery Management Plan for the Summer Flounder Fishery (57 FR 57348, December 4, 1992). A copy of the EA

prepared for this final rule is available (see ADDRESSES).

List of Subjects

50 CFR Part 217

Endangered and threatened species, Exports, Fish, Imports, Marine mammals, Transportation.

50 CFR Part 227

Endangered and threatened species, Exports, Imports, Marine mammals, Transportation.

Dated: January 18, 1996.

Gary Matlock,

Program Management Officer, National Marine Fisheries Service.

For the reasons set out in the preamble, the interim final rule amending 50 CFR parts 217 and 227, which was published at 58 FR 48797 on September 20, 1993, is adopted as a final rule with the following changes:

**PART 217—GENERAL PROVISIONS**

1. The authority citation for part 217 continues to read as follows:

Authority: 16 U.S.C. 1531–1544; and 16 U.S.C. 742a *et seq.*, unless otherwise noted.

2. In § 217.12, in the definition for “Summer flounder fishery-sea turtle protection area”, paragraph (2) is removed.

**PART 227—THREATENED FISH AND WILDLIFE**

3. The authority citation for part 227 continues to read as follows:

Authority: 16 U.S.C. 1531 *et seq.*

4. In § 227.72, paragraph (e)(2)(iii)(A) is revised, paragraphs (B) and (C) are redesignated as paragraphs (C) and (D), respectively, and paragraph (B) is added, to read as follows:

**§ 227.72 Exceptions to prohibitions.**

\* \* \* \* \*

(e) \* \* \*

(2) \* \* \*

(iii) *Gear requirement—summer flounder trawlers—(A) TED requirement.* Except as provided in paragraph (e)(2)(iii)(B) of this section, any summer flounder trawler in the summer flounder fishery-sea turtle protection area must have an approved TED (as defined in § 217.12 of this chapter) installed in each net that is rigged for fishing. A net is rigged for fishing if it is in the water, or if it is shackled, tied, or otherwise connected to any trawl door or board, or to any tow rope, cable, pole or extension, either on board or attached in any manner to the summer flounder trawler.

(B) *Exemptions from the TED requirement.* Any summer flounder trawler north of 35°46.1' N. lat. (Oregon Inlet, NC) from January 15 through March 15 annually is exempt from the TED requirement of paragraph (e)(2)(iii)(A) of this section, unless the Assistant Administrator determines that TED use is necessary to protect sea turtles or ensure compliance, pursuant to the procedures of paragraph (e)(6) of this section.

\* \* \* \* \*

[FR Doc. 96–961 Filed 1–23–96; 8:45 am]

BILLING CODE 3510–22–F