

### Alternative to Required Use of TEDs

The authorization provided by this temporary action applies to all shrimp trawlers that are operating in offshore waters of the territorial sea (within 3 nm (5.5 km)) of the State of North Carolina, from the North Carolina/South Carolina border to 076°32' W., the line of longitude through Cape Lookout, in areas which the State has opened to shrimping and who would otherwise be required to use TEDs in accordance with the requirements of 50 CFR 223.206(d)(2). "Offshore waters," as defined at 50 CFR 222.102, means the marine and tidal waters seaward of the 72 COLREGS demarcation line (International Regulations for Preventing Collisions at Sea, 1972), as depicted or noted on nautical charts published by NOAA (Coast Charts, 1:80,000 scale) and as described in 33 CFR part 80. Instead of the required use of TEDs, shrimp trawlers may opt to comply with the sea turtle conservation regulations by using restricted tow times. Through October 31, 1998, a shrimp trawler utilizing this authorization must limit tow times to no more than 55 minutes, measured from the time trawl doors enter the water until they are retrieved from the water. From November 1, 1999 until November 12, 1999, tow times must be limited to no more than 75 minutes measured from the time trawl doors enter the water until they are retrieved from the water.

### Additional State Requirements

The affected area for this exemption lies entirely within the state waters of North Carolina. Nothing in this notice should be considered to affect any State fishing requirement. The NCDMF Director may issue a proclamation specifying additional requirements for shrimp trawlers working under this exemption. Fishermen must comply with all applicable State requirements, including any proclamations by the NCDMF Director issued to help implement this authorization.

### Additional Conditions

NMFS expects that shrimp trawlers operating in North Carolina offshore waters without TEDs, in accordance with this authorization, will retrieve debris that is caught in their nets and return it to shore for disposal or to other locations defined by the NCDMF Director, rather than simply dispose the debris at sea. Proper disposal of debris should help the restoration of the shrimping grounds in the wake of the hurricanes. Shrimp trawlers are reminded that regulations under 33 U.S.C. 1901 *et seq.* (Act to Prevent

Pollution From Ships) may apply to disposal at sea.

### Alternative to Required Use of TEDs; Termination

The AA, at any time, may modify the alternative conservation measures through publication in the **Federal Register**, if necessary, to ensure adequate protection of endangered and threatened sea turtles. Under this procedure, the AA may modify the affected area or impose any necessary additional or more restrictive measures, including more restrictive tow times or synchronized tow times, if the AA determines that the alternative authorized by this rule is not sufficiently protecting turtles, as evidenced by observed lethal takes of turtles aboard shrimp trawlers, elevated sea turtle strandings, or by insufficient compliance with the authorized alternative. The AA may also terminate this authorization for these same reasons or for the reasons that compliance cannot be monitored effectively, or that conditions do not make trawling with TEDs impracticable. The AA may modify or terminate this authorization, as appropriate, at any time. A document will be published in the **Federal Register** announcing any additional sea turtle conservation measures or the termination of the tow time option in North Carolina offshore waters. This authorization will expire automatically on November 12, 1999, unless it is explicitly extended through another notice published in the **Federal Register**.

### Classification

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

The AA has determined that this action is necessary to respond to an emergency situation to allow more efficient fishing for shrimp, while providing adequate protection for endangered and threatened sea turtles pursuant to the ESA and other applicable law.

Pursuant to 5 U.S.C. 553(b)(B), the AA finds that there is good cause to waive prior notice and opportunity to comment on this rule. It is impracticable and contrary to the public interest to provide prior notice and opportunity for comment. The AA finds that an unusually large amount of debris exists in the aftermath of Hurricanes Dennis and Floyd, creating special environmental conditions that may make trawling with TED-equipped nets impracticable. The AA has determined that the use of limited tow times for the described area and time would not

result in a significant impact to sea turtles. Notice and comment are contrary to the public interest in this instance because providing notice and comment would prevent the agency from providing relief within the necessary time frame. The public was provided with notice and an opportunity to comment on 50 CFR 223.206(d)(3)(ii).

Pursuant to 5 U.S.C. 553(d)(1), because this rule relieves a restriction, it is not subject to a 30-day delay in notice. NMFS is making the rule effective October 12, 1999, to ensure that North Carolina has adequate time to issue any necessary proclamations.

Since prior notice and an opportunity for public comment are not required to be provided for this action by 5 U.S.C. 553, or by any other law, the analytical requirements of 5 U.S.C. 601 *et seq.* are inapplicable.

The AA prepared an Environmental Assessment (EA) for the final rule (57 FR 57348, December 4, 1992) requiring TED use in shrimp trawls and creating the regulatory framework for the issuance of notices such as this. Copies of the EA are available (see **ADDRESSES**).

Dated: October 8, 1999.

**Andrew A. Rosenberg,**

*Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Parts 222 and 223

[Docket No.991007270-9270-01; I.D.090399E]

RIN 0648-AM89

#### Sea Turtle Conservation; Summer Flounder Trawling Requirements

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

**ACTION:** Interim final rule; request for comments.

**SUMMARY:** The National Marine Fisheries Service (NMFS) is issuing this interim final rule to amend the regulations that require summer flounder trawlers to use Turtle Excluder Devices (TEDs) in waters off Virginia and North Carolina to reduce the incidental capture of endangered and threatened sea turtles. NMFS is requiring that any approved hard TED or

special TED installed in a summer flounder trawl be installed in a TED extension (a cylinder of webbing in which the TED is installed). NMFS also is introducing specifications for the TED extension and requiring that the TED extension be constructed of webbing no larger than 3.5-inch (8.9 cm) stretched mesh. This interim final rule is necessary to prevent adverse impacts to turtles in the upcoming fall/winter summer flounder trawling season.

**DATES:** This rule is effective November 15, 1999. Comments on this rule are requested, and must be received by December 14, 1999.

**ADDRESSES:** Requests for a copy of the environmental assessment (EA) prepared for this interim final rule, and comments on this action, should be addressed to the Chief, Endangered Species Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910. Requests for copies of the reports on 1999 TED testing should be addressed to the Chief, Harvesting Systems Division, Mississippi Laboratories, Southeast Fisheries Science Center, NMFS, P.O. Drawer 1207, Pascagoula, MS 39568-1207.

**FOR FURTHER INFORMATION CONTACT:** Charles A. Oravetz, 727-570-5312.

**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 (ESA). The Kemp's ridley (*Lepidochelys kempii*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*) are listed as endangered. Loggerhead (*Caretta caretta*) and green (*Chelonia mydas*) turtles are listed as threatened, except for breeding populations of green turtles in Florida and on the Pacific coast of Mexico, which are listed as endangered.

The incidental capture and mortality of these sea turtles during summer flounder trawling has been documented along the Atlantic seaboard. Under the ESA and its implementing regulations, taking sea turtles is prohibited, with exceptions identified in 50 CFR 223.206. Existing sea turtle conservation regulations (50 CFR 223.205 and 223.206) require summer flounder trawlers operating in Atlantic waters between Cape Charles, VA and the NC/SC border to have a NMFS-approved TED installed in each net rigged for fishing, when sea turtles are present. TEDs currently approved by NMFS for summer flounder trawling include single-grid hard TEDs and hooped hard

TEDs conforming to a generic description, the Parker soft TED, and two types of special hard TEDs.

### Current TED Requirements

The use of TEDs has been required in the summer flounder trawl fleet off North Carolina and southern Virginia since the fall of 1992 through a series of temporary or interim rules. NMFS published a final rule on January 24, 1996 (61 FR 1846), that finalized the requirements for flounder trawlers to use TEDs in the "summer flounder fishery-sea turtle protection area" which includes the offshore waters between 37°05' N. lat. (Cape Charles, VA) and the NC/SC border. That final rule also provides for a seasonal exemption from the TED requirement north of Oregon Inlet, NC, from January 15 through March 15, annually. In addition, NMFS has tested and approved the use of a special hard TED, the Flounder TED, that was specifically designed for the summer flounder fishery (58 FR 54066, October 20, 1993). The Flounder TED is probably the primary style used in the fishery. It incorporates large holes in the bottom of the grid to allow the passage of large flatfish. Although the Parker soft TED may be used in the summer flounder fishery, its construction would likely cause a large loss of finfish catch, and NMFS believes that it is not used in the flounder fishery.

The regulations for the technical specifications are at 50 CFR 223.207. These specifications are quite detailed with respect to the final configuration of the TEDs themselves and any allowable modifications, such as accelerator funnels and webbing flaps. The specifications are intended to allow fisherman to choose all the other performance and construction variables of their trawl gear to match their fishing needs, consistent with any restrictions imposed for fishery management purposes. The mesh size of the trawl webbing, in particular, is usually chosen by the fisherman or regulated for fishery management purposes, and NMFS has never specified the size of webbing in which the TED must be installed. Shrimp trawlers generally install TEDs in webbing no larger than 2 inches (5.1 cm). At the time TEDs were first required in the summer flounder fishery, trawl mesh sizes of 3.5 or 4 inches (8.9 or 10.2 cm) were typical.

### Amendment 10 to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan

Amendment 10 was prepared by the Mid-Atlantic Fishery Management Council (the Council) and the Atlantic States Marine Fisheries Commission, in

consultation with the New England and South Atlantic Fishery Management Councils. On December 3, 1997, NMFS published a final rule (62 FR 63872) to implement a number of changes to the summer flounder regulations, as proposed in Amendment 10. Previously, a minimum mesh size requirement of 5.5-inch (14.0 cm) diamond mesh or 6-inch (15.2 cm) square mesh had applied to the codend of the net. The final rule extended this minimum mesh size requirement to the body and extension(s) of the net, effective June 3, 1998. The reason for the change in the mesh regulations was that the Council was concerned about the "choking off" or the constriction of codends in trawl nets in the summer flounder fishery, as a way of circumventing the codend mesh size requirements. The Council was concerned that continued poor compliance with mesh-size regulations would result in higher fishing mortality rates and in a decreased rate of stock recovery for summer flounder. Applying the minimum mesh-size throughout the codend, extension(s), and body of the net was intended to eliminate this problem.

### The TED Extension

Hard TEDs and special hard TEDs are almost always installed into a short cylinder of webbing, called a TED extension, rather than installed directly into the trawl. The TED extension can then be sewn directly to the net, connecting the codend to the body, or any other extension. Using TED extensions not only makes correct construction of a TED easier, but in the summer flounder fishery, where TEDs are only required in certain areas, it greatly simplifies the process of installing and removing the TED as the boat moves into and out of the summer flounder-sea turtle protection area.

When summer flounder trawlers were about to begin working in the summer flounder-sea turtle protection area in the fall of 1998, fishermen began reporting problems installing and using TEDs with the newly required 5.5-inch (14.0-cm) mesh in the TED extension. They were concerned that, when using a larger mesh, the TED would be attached to fewer individual meshes and would therefore be weaker. In addition, they reported difficulties installing the TEDs at an appropriate angle to the water flow because of the longer individual meshes. Proper TED angle is an important performance factor for the TED's ability to exclude turtles and retain catch. Lastly, some captains were concerned that the large mesh in the immediate vicinity of the TED might

present an entanglement risk to the turtles.

### Summary of Observer Results

Through experimental testing of soft TEDs, which use panels of relatively large mesh webbing, NMFS has repeatedly observed that sea turtles can become entangled in trawl webbing as small as 4-inch (10.2-cm), particularly when the turtles have to maneuver in a constricted space or when the webbing is poorly installed and slack. As soon as this potential problem with the large mesh TED extensions was noted, NMFS placed observers aboard summer flounder trawlers. Between November 30, 1998 and February 19, 1999, 140 flounder hauls were observed on boats fishing through the mouth of Chesapeake Bay and Cape Lookout, NC. Thirteen turtles were observed captured in nets equipped with working TEDs installed in large mesh webbing. Of those, the observers specifically noted in five cases that the turtles had reached the TEDs, but had become entangled in the TED extensions when their flippers protruded through the 5.5 inch (14.0 cm) mesh. In four of the other captures, the TED openings were blocked by large amounts of fish around the TED, which was attributed by one captain to the new 5.5 inch (14.0 cm) mesh size. Excluding one turtle that was dead before it was caught, 0.033 turtles were caught per observed hour of trawling with TEDs during the winter of 1998–1999 (NMFS, unpublished data). All of the observed captures were north of Cape Hatteras. This capture rate, with TEDs, is twice the capture rate of 0.0167 turtles per hour, without TEDs, that was observed during the 1991–1992 season (Epperly *et al.*, 1995). Although other factors—primarily the warm ocean temperatures last winter and their effect on turtle distribution—make direct comparisons of these catch rates difficult, the data still indicated that the effectiveness of the TEDs was likely seriously compromised by the large mesh webbing.

### Summary of TED Testing Results

NMFS decided to further investigate the risk of turtle capture in large-mesh TED extensions during controlled TED testing. In June 1999, NMFS gear researchers conducted a TED testing session in the clear waters off Panama City, FL. Small loggerhead turtles were introduced into a flounder trawl with 5.5 inch (14.0 cm) mesh webbing throughout, including the TED extension. Four out of eight turtles became entangled in the webbing immediately forward of the TED and could not escape during the 5-minute

time limit for the test. It was observed in previous TED testing that the turtles are stopped by the bars of the TED and must spend some amount of time exploring the extension before they find the exit hole and escape. During this active exploration, they can easily insert their head or flipper into a large opening but can then become entangled. NMFS originally intended to try to quantify any increased capture rate due to the large-mesh webbing more precisely using more test turtles. It quickly became clear that the capture rate was excessive, however, and the test was terminated. When the mesh size of the TED extension was changed to 3.5 inches (8.9 cm), and no entanglements occurred.

### Provisions of this Interim Final Rule

After considering the comments of the Council, reports from fishermen, observer data, and TED testing results, NMFS has determined that the use of large-mesh webbing around a TED installed in a summer flounder trawl can result in high rate of sea turtle entanglement and capture. The use of smaller webbing in a TED extension can prevent these captures. Fishermen have traditionally used a smaller mesh size for TED extensions, which has the advantages of greater strength, consistency of installation, and reduced clogging with bycatch. Therefore, to avoid adverse impacts on sea turtles, NMFS is requiring the use of TED extensions with hard TEDs and special hard TEDs installed in summer flounder trawls. NMFS is also specifying the mesh size for the TED extension. The TED extension must be constructed of webbing no larger than 3.5 inch (8.9 cm) stretched mesh. The TED extension must extend at least 24 inches (61.0 cm) but nor more than 36 inches (91.4 cm) forward of the leading edge of the TED and aft of the trailing edge of the grid.

### Relationship of This Rule to Other Regulations

This rule is intended to clarify explicitly the requirements affecting the use of approved TEDs in summer flounder trawls. Regulations affecting summer flounder trawl gear have been promulgated by NMFS under two different legal authorities. Regulations pursuant to the ESA are contained in 50 CFR parts 222 and 223, while regulations pursuant to the Magnuson-Stevens Fishery Conservation Management Act are contained in 50 CFR part 648. This interim final rule does not change the mesh size requirements of 50 CFR 648.104(a)(1) for the body, codend, or extension(s) - other than the TED extension - portions of a

summer flounder trawl net. Nor does this rule change any other aspect of the regulations for TED construction and installation, specified in 50 CFR 223.207. In particular, webbing flaps used to cover the escape openings of hard TEDs in summer flounder trawls must be constructed of webbing no larger than 1–5/8 inch (4.1 cm) stretched mesh, as specified in 50 CFR 223.207(d)(3).

### Request for Comments

NMFS is requesting input and will accept written comments (see ADDRESSES) on this interim final rule until December 14, 1999. Any comments, suggestions, or additional data and information on this action will be taken into consideration before a final determination is made.

### References

Epperly, S.A., J. Braun, A.J. Chester, F.A. Cross, J.V. Merriner, and P.A. Tester. 1995. Winter distribution of sea turtles in the vicinity of Cape Hatteras and their interactions with the summer flounder trawl fishery. *Bulletin of Marine Science*, 56(2):547–568.  
 NMFS. Unpublished data. Mid-Atlantic coastal trawl fishery observer data 98/99. Northeast Fisheries Science Center.

### Classification

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

The Assistant Administrator for Fisheries, NOAA (AA), finds that good cause exists, under 5 U.S.C. 553(b)(B), to waive prior notice and an opportunity for public comment on this rule. It is impracticable and contrary to the public interest to provide prior notice and opportunity for comment because the fall summer flounder fishery is expected to begin off Virginia and North Carolina in November. Trawling with TEDs installed in large-mesh webbing is known to capture turtles at a high rate, and turtle abundances are probably highest in the fishing areas in the earliest part of the season. Preventable deaths of endangered and threatened species would occur unless TED extension mesh size changes are made prior to the beginning of fall fishing effort. Furthermore, this fishery is highly valuable and anticipated by the participants, but is limited by quota allocations, and it frequently is very short. Consequently, fishers may experience significant, avoidable impacts if TED extension mesh sizes are changed during the course of the fishery and fishers lose any of their limited fishing time coming into compliance.

Fishers traditionally have to re-equip their nets with TEDs and make any needed net repairs before the fall season begins. Prompt implementation of this mesh size change will allow them to use their rigging time to come into compliance. With sufficient opportunity to make the changes, the mesh size changes in themselves pose a minimal burden on the fishers. The cost of the required materials (new webbing) is estimated at less than \$20 per net, and many fishers can make the needed changes themselves, estimated at about two person-hours per boat. Finally, the use of small mesh webbing adjacent to the TED had been a traditional gear configuration in this fishery prior to the June 3, 1998, requirement for the larger mesh size specified through the Magnuson-Stevens Fishery Conservation Management Act in 50 CFR part 648. Thus, this interim final rule allows for the traditional practice.

Because prior notice and opportunity for public comment are not required for this rule by 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, are inapplicable.

This rule does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act.

The AA prepared an EA for this rule which concludes that this rule will have

no significant impact on the human environment. A copy of the EA is available (see **ADDRESSES**).

#### List of Subjects in 50 CFR Part 223

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

Dated: October 8, 1999.

**Andrew A. Rosenberg,**

*Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 223 is 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 - 1543; subpart B, § 223.12 also issued under 16 U.S.C. 1361 *et seq.*

2. In § 223.206, paragraph (d)(2)(iii)(A) is revised to read as follows:

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

\* \* \* \* \*

(d) \* \* \*

(2) \* \* \*

(iii) \* \* \*

(A) *TED requirement.* (1) Any summer flounder trawler in the summer flounder

fishery-sea turtle protection area must have an approved TED 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. Exceptions to the TED requirement for summer flounder trawlers are provided in paragraph (d)(2)(iii)(B) of this section.

(2) Any approved hard TED or special hard TED installed in a summer flounder trawl must be installed in a TED extension. The TED extension is a cylindrical piece of webbing distinct from the main trawl's body, wings, codend, and any other net extension(s). The TED extension must be constructed of webbing no larger than 3.5 inch (8.9 cm) stretched mesh. The TED extension must extend at least 24 inches (61.0 cm) but not more than 36 inches (91.4 cm) forward of the leading edge of the TED and aft of the trailing edge of the grid.

\* \* \* \* \*

#### PART 223 [Amended]

3. Figure 6 to part 223 is added to read as follows:

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FIGURE 6 to Part 223—TED Extension in Summer Flounder Trawl

