



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
NORTHEAST REGION
55 Great Republic Drive
Gloucester, MA 01930-2276

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Small Entity Compliance Guide

Dear Pound Net Licensee:

This letter serves as a small entity compliance guide and to inform you that the Secretary of Commerce has published a final rule that establishes an inspection program for those pound net fishermen who intend to use modified pound net leaders in the Virginia Chesapeake Bay at any time during the period from May 6 through July 15. The purpose of this final rule, issued under the authority of the Endangered Species Act of 1973, as amended (ESA), is to facilitate compliance with the existing regulations (50 CFR 223.206(d)(10)), designed to help protect threatened and endangered sea turtles.

Background

On June 23, 2006, NOAA's National Marine Fisheries Service (NMFS) issued a final rule (71 FR 36024) that required that any offshore pound net leader¹ set in Pound Net Regulated Area I² from May 6 through July 15 meet the definition of a modified pound net leader. 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 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 5/16 inch in diameter and strung vertically at a minimum of every 2 feet; and (e) the vertical lines are hard lay lines with a level of stiffness equivalent to the stiffness of a 5/16 inch diameter line composed of polyester wrapped around a blend of polypropylene and polyethylene and containing approximately 42 visible twists of strands per foot of line. The June 2006 rule also allowed the use of modified pound net leaders from May 6 through July 15 in

¹ An offshore pound net leader refers to a leader with the inland end set greater than 10 horizontal feet from the mean low water line.

² Pound Net Regulated Area I refers to the Virginia waters of the mainstem Chesapeake Bay, south of 37°19.0' N. lat. and west of 76°13.0' W. long., and all waters south of 37°13.0' N. lat. to the Chesapeake Bay Bridge Tunnel (extending from approximately 37°05' N. lat., 75°59' W. long. to 36°55' N. lat., 76°08' W. long.) at the mouth of the Chesapeake Bay, and the portion of the James River downstream of the Hampton Roads Bridge Tunnel (I-64; approximately 36°59.55' N. lat., 76°18.64' W. long.) and the York River downstream of the Coleman Memorial Bridge (Route 17; approximately 37°14.55' N. lat, 76°30.40' W. long.).



nearshore pound net leaders in Pound Net Regulated Area I and all pound net leaders in Pound Net Regulated Area II³.

After the 2006 final rule was published, NMFS determined that an onshore inspection program that checked a modified leader ready for deployment against the regulatory definition would help ensure the protection of sea turtles, while limiting the difficulties of and potential costs to fishermen associated with post-deployment inspections at-sea. For example, most of the pound net leader is typically set under the water, the water clarity in the Chesapeake Bay is generally poor, and there may be debris in the water that could endanger an inspector. In addition, if a fisherman was asked to haul the leader for an inspection once it was deployed, there would be a loss in fishing time. While at-sea inspections may still occur, the inspection program would: (1) provide fishermen with the assurance that their leaders meet aspects of the definition of a modified pound net leader that may be checked on land before setting their gear, thereby limiting the costs associated with having to haul their gear during the fishing season, fix any parts of the leader determined by an authorized officer during an at-sea inspection to be non-compliant with the regulation, and reset the gear; (2) provide managers with the knowledge that the configuration of offshore leaders in a portion of the lower Chesapeake Bay have been evaluated for criteria included in the regulations; and (3) aid in enforcement efforts.

Does this new rule apply to me?

This inspection program applies to you if you intend to use a modified leader in any portion of the Virginia Chesapeake Bay at any time during the period from May 6 through July 15.

To reiterate what was included in the 2006 rule, if you fish with a pound net with the inland end of the leader *greater* than 10 horizontal feet from the mean low water line in Pound Net Regulated Area I, you are required to use a modified leader. If you do not employ a modified pound net leader, you must remove your offshore pound net leaders from the water from May 6 to July 15. If you fish with a pound net set with the inland end of the leader 10 horizontal feet or less from the mean low water line in Pound Net Regulated Area I, or fish with a pound net in Pound Net Regulated Area II, you may use a modified leader if you so choose. If you do not choose to set a modified pound net leader, the leader mesh size and stringer restrictions in the regulations still apply to you. That is, all pound net leaders must have stretched mesh less than 12 inches and must not use stringers from May 6 through July 15 each year.

What do I have to do to comply with the regulations?

Under this new rule, if you decide to use a modified pound net leader anywhere in the Virginia Chesapeake Bay at any time during the period from May 6 to July 15, you must adhere to the following components of the inspection program.

³ Pound Net Regulated Area II refers to Virginia waters of the Chesapeake Bay, outside of Pound Net Regulated Area I as 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.

First, if you intend to use a modified pound net leader in Pound Net Regulated Area I or Pound Net Regulated Area II at any time during the period from May 6 through July 15, you or your representative must call NMFS at (757) 414-0128 at least 72 hours before the modified leaders are to be deployed. During this call, a meeting date, time, and location, as well as your plans for setting your gear, will be discussed. The second component of the inspection program involves NMFS meeting you at the dock, or another mutually agreeable place, to examine the gear for compliance with the definition of a modified pound net leader. During the inspection, NMFS will check the following four criteria taken from the modified leader definition: (1) the lower portion of the leader is mesh and the upper portion consists of only vertical lines; (2) the mesh size is equal to or less than 8 inches stretched mesh; (3) the vertical lines are equal to or greater than 5/16 inch in diameter and strung vertically at least every 2 feet; and (4) the vertical lines are hard lay lines with a level of stiffness equivalent to the stiffness of a 5/16 inch diameter line composed of polyester wrapped around a blend of polypropylene and polyethylene and containing approximately 42 visible twists of strands per foot of line. During the inspection, you must provide accurate and specific latitude and longitude coordinates of the location at which the leader will be deployed, as well as the low water depth at each end of the modified leader at the site at which it will be deployed. NMFS will also measure the height of the mesh in relation to the height of the entire leader.

If the leader meets the four criteria previously described, the measurement of the height of the mesh in relation to the total height of the leader is recorded, and the low water depth and the latitude and longitude coordinates of the specific location at which the leader will be deployed are provided and recorded, the leader will pass inspection. If it passes inspection, NMFS will tag the leader with one or more tamperproof tags (supplied by NMFS), each of which will be marked with a unique identification number. Additionally, you will receive a letter from NMFS noting that the leader has been inspected, the date of the inspection, the license holder's name, the tag number(s) of the attached tag(s), information on the modified leader as collected during the inspection, and the low water depth and the latitude and longitude coordinates for the specific location at which the inspected leader will be deployed. This letter must be retained on the vessel tending the inspected leader at all times it is deployed. You may set the inspected leader only after passing the inspection; the tags must remain on the gear. After tagging by NMFS, the tags may not be tampered with or removed. If a tag is damaged, destroyed, or lost due to any cause, you must call NMFS at (757) 414-0128 within 48 hours of discovery to report this incident.

If the onshore inspection indicates that the leader does not meet one or more of the four criteria, NMFS will tell you how to modify your gear in order to meet the criteria. If you plan on using a modified leader anywhere in Pound Net Regulated Area I or Pound Net Regulated Area II at any time during the period from May 6 through July 15, you must ensure that the leader passes inspection prior to deployment.

Even though NMFS is implementing this onshore inspection program, when you set your modified pound net leader in the water, it is your responsibility to ensure that your gear is in compliance with all components of the modified pound net leader definition.

When can I get my modified pound net leader inspected?

You may have your modified pound net leader inspected during any time of the year. However, if you plan on using a modified leader anywhere in Pound Net Regulated Area I or Pound Net Regulated Area II at any time during the period from May 6 through July 15, you must ensure that the leader passes inspection prior to deployment. For example, if you set your modified pound net leader in March and plan on leaving it in the water for use during the period from May 6 through July 15, you must have your leader inspected before setting it in March. The inspection is only valid for one fishing season (e.g., May 6 to July 15, 2009). If you have questions on arranging the inspection, please call (757) 414-0128.

Are these the same measures as those included in the March 2007 proposed rule?

As a result of the comments received and further assessment, NMFS made two changes from the proposed rule. First, the proposed rule indicated that during the inspection, you must inform NMFS of the “specific location where his or her inspected pound net leader will be set.” The final rule clarifies the type of information sought to identify “specific location” by indicating that, during the inspection, you must provide accurate and specific latitude and longitude coordinates of the location at which the leader will be deployed. If you do not know the latitude and longitude coordinates of your modified pound net leader prior to the inspection, NMFS will have a detailed nautical chart available during the inspection to help you determine the specific coordinates of your gear. It is our understanding that some Virginia Marine Resources Commission licenses have the latitude and longitude coordinates on them, while others provide a written site description.

Second, during the inspection, you must also provide NMFS with information on the low water depth at each end of the modified leader. Depth, in conjunction with NMFS measuring the height of the mesh in relation to the height of the entire leader, will be useful in helping to determine whether the leader, once deployed at the location, meets the requirement that the mesh be no more than one third the depth of mean lower low water.

How can I calculate mean lower low water?

One component of the modified leader definition states that “...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;...” Mean lower low water may be calculated by employing the following methodology. If you have questions about calculating the mean lower low water value using this approach, please call NMFS at (978) 281-9300 extension 6525.

First, you must record the water depth at your leader on a specific day and time. Then, visit the following website: <http://tidesandcurrents.noaa.gov/tides08/tpred2.html#VA>. Click on the area in which the water depth was measured, e.g., Chesapeake Bay Eastern shore, Western shore, etc. The page that comes up shows multiple station locations for the area selected. Choose the specific station location closest to where the depth was measured, noting the latitude/longitude of each station location. Click on “Predictions” for the respective station, and go to the day on which the measurement was taken. Note the times of the high and low tides. Calculate the tide range over the tidal cycle that includes the time the measurement was taken. For example, we

measured a depth of 20 ft at 10:00 a.m. on Feb 14 at Old Plantation Light. A low tide of 0.1 ft above MLLW was predicted for 8:46 a.m., and a high tide of 1.8 ft above MLLW was predicted for 2:13 p.m. Using this information, the tidal range was 1.7 ft (1.8 ft - 0.1 ft) over the course of 5 hours, 27 min (the difference between 8:46 a.m. and 2:13 p.m.). Convert the time to minutes (327 min) and use a ratio to find the portion of the tidal cycle completed at the desired time (10:00 am, or 74 minutes after low tide). For example: $74/327 = X/1.7$, and solve for X to get the amount the tide would have risen at 10:00. That is, $X = 0.38$ ft. At low tide, the prediction was already at 0.1 above MLLW, so the prediction for 10:00 would be $0.1 + 0.38 = 0.48$ ft above MLLW.

Because of the difference between predicted and actual tide readings, the above number should be corrected to reflect actual tides. This is done using the data from the following website: http://tidesandcurrents.noaa.gov/station_retrieve.shtml?type=Tide%20Data&state=Virginia&id1=863. Go to the station closest in proximity to where the measurement was taken. That would be Kiptopeke, VA in our example. After you click on the station, choose the date of interest (the date the depth was measured). Be sure that the time zone selected is "Local". "View Plot" will show the predicted tide and the actual measured tide (both relative to MLLW). If you choose "View Data" you can get the data (predicted and actual) in almost minute by minute intervals. In this situation we need to calculate the difference between predicted and actual tides for the date and time in question. For 10:00 a.m. on Feb 14, using the "View Data" link, the predicted tide was 0.43 ft over MLLW, and the actual was 0.81 ft over MLLW, with the actual being 0.38 ft more over MLLW than the predicted (0.81 - 0.43). Add this to the predicted reading from Old Plantation Light above (0.48 ft), and our recorded value is 0.86 ft above MLLW (0.48 + 0.38 ft). If the water depth was measured at 20 ft, then the depth at MLLW at the site is 19.14 ft (20 ft - 0.86 ft).

What could happen if I don't comply with the regulations?

Under the ESA and its implementing regulations, taking endangered or threatened species is prohibited, with certain exceptions. Take is defined as "to harass, harm, pursue, hunt, shoot, capture, or collect, or to attempt to engage in any such conduct." Incidental take is defined as take that is incidental to, and not the purpose of, the execution of an otherwise lawful activity. Unless the take is authorized pursuant to a regulation, a permit, or in the Incidental Take Statement of a Biological Opinion, the person who incidentally takes a listed animal is subject to civil and criminal penalties.

If you do not comply with the regulations on Virginia pound nets, you could be subject to civil or criminal penalties and/or fines. If you fail to comply with the regulations and do not take a sea turtle, you could still be subject to civil or criminal penalties and/or fines.

If you have a complaint or concern about the lack of compliance with these regulations, please contact NMFS at (978) 281-9300 extension 6435.

A summary of the public comments and NMFS responses is included in the final rule. You are encouraged to obtain a copy of the final rule by calling (978) 281-9300 extension 6525. A copy of the March 1, 2007 proposed rule, the final rule, and this letter can also be obtained on the

NMFS Northeast Region Protected Resources Division web site (under Gear Restrictions for the Virginia Pound Net Fishery - 2008 Modified Leader Inspection Program) at http://www.nero.noaa.gov/prot_res/seaturtles/regs.html OR the rule can be found at <http://edocket.access.gpo.gov/2008/pdf/E8-27344.pdf>.

This Small Entity Compliance Guide complies with section 212 of the Small Business Regulatory Enforcement and Fairness Act of 1996. Thank you for your continued support in the protection of endangered and threatened sea turtles in the Virginia waters of the Chesapeake Bay.

Sincerely,

A handwritten signature in black ink, appearing to read "Patricia A. Kurkul". The signature is fluid and cursive, with a large, stylized initial "P" and "K".

Patricia A. Kurkul
Regional Administrator