

requirements of the Petition for Relocation.

(c) *Petition after failure to reach an agreement.* If the parties fail to reach an agreement as provided in § 301.120 and non-binding arbitration has occurred pursuant to § 301.130, the licensee may file a petition for relocation with NTIA after a decision has been rendered by the arbitrator. Any recommended decision by the arbitrator may be requested by NTIA as part of the record in a petition for relocation under § 301.140. The recommended decision may be a factor, among others, in the NTIA determination on the Petition for Relocation.

#### § 301.150 Request for withdrawal.

As an alternative to a Petition for Relocation, if the parties reach an agreement in negotiations or mediation or agree with the decision of the arbitrator, the Federal entity may seek voluntary withdrawal of the assignments that are the subject of the relocation.

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## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

#### 49 CFR Parts 350 and 385

[Docket No. FMCSA-2001-11060]

RIN 2126-AA64

#### Certification of Safety Auditors, Safety Investigators, and Safety Inspectors; Delay of Effective Date

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Interim final rule; delay of effective date.

**SUMMARY:** The FMCSA delays for 30 days the effective date of the interim final rule titled "Certification of Safety Auditors, Safety Investigators, and Safety Inspectors," published in the *Federal Register* on March 19, 2002 at 67 FR 12776. That rule establishes procedures to certify and maintain certification for auditors and investigators. It also requires certification for State or local government Motor Carrier Safety Assistance Program (MCSAP) employees performing driver/vehicle roadside inspections. The FMCSA needs more time to review all of the comments received on this rulemaking.

**DATES:** The effective date of the interim final rule amending 49 CFR parts 350

and 385 published at 67 FR 12776, March 19, 2002, is delayed for 30 days from June 17, 2002 until July 17, 2002.

**FOR FURTHER INFORMATION CONTACT:** Mr. Larry Minor, 202-366-4009, Acting Chief, Driver and Carrier Operations Division, Federal Motor Carrier Safety Administration, 400 Seventh Street, SW., MC-PSD, Washington, DC 20590-0001. Office hours are from 7:45 a.m. to 4:15 p.m. EST, Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:** The FMCSA believes that an additional 30 days are necessary to fully consider all of the comments received on the rule, including those related to potential environmental impacts of this action. The FMCSA's implementation of this action without opportunity for public comment, effective immediately upon publication today in the *Federal Register*, is based on the good cause exceptions in 5 U.S.C. 553(b)(B) and 553(d)(3). Seeking public comment is impracticable, unnecessary, and contrary to the public interest. The brief 30-day delay in effective date is necessary to give agency officials the opportunity to do further analysis in response to the comments. Given the imminence of the effective date, seeking prior public comment on this brief delay would have been impracticable, as well as contrary to the public interest in the orderly promulgation and implementation of regulations. The imminence of the effective date is also good cause for making this action effective immediately upon publication.

Dated: June 12, 2002.

**Joseph M. Clapp,**  
Administrator.

[FR Doc. 02-15272 Filed 6-13-02; 11:55 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Parts 222 and 223

[Docket No. 020319061-2122-02; I.D. 031402B]

RIN 0648-AP81

#### Sea Turtle Conservation Measures for the Pound Net Fishery in Virginia Waters

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

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

**SUMMARY:** NMFS is prohibiting the use of all pound net leaders measuring 12 inches (30.5 cm) and greater stretched mesh and all pound net leaders with stringers in the Virginia waters of the mainstem Chesapeake Bay effective immediately through June 30 and then from May 8 to June 30 each year. The affected area includes all Chesapeake Bay waters between the Maryland and Virginia state line (approximately 38° N. lat.) and the COLREGS line at the mouth of the Chesapeake Bay, and the waters of the James River, York River, and Rappahannock River downstream of the first bridge in each tributary. NMFS is also imposing year round reporting and, when requested, monitoring requirements for the Virginia pound net fishery. This action, taken under the Endangered Species Act of 1973 (ESA), is necessary to conserve sea turtles listed as threatened or endangered and to enable the agency to gather further information about sea turtle interactions in the pound net fishery.

**DATES:** Effective June 12, 2002, with the exception of 50 CFR 223.206(d)(2)(v)(C), which requires approval by the Office of Management and Budget pursuant to the Paperwork Reduction Act. The effective date of 50 CFR 223.206(d)(2)(v)(C) will be announced in the *Federal Register*.

Comments on this interim final rule are requested, and must be received at the appropriate address or fax number (**ADDRESSES**) by no later than 5 p.m., eastern daylight time, on July 17, 2002.

**ADDRESSES:** Written comments on this action or requests for copies of the literature cited, the Environmental Assessment (EA), or Regulatory Impact Review (RIR) should be addressed to the Assistant Regional Administrator for Protected Resources, NMFS, One Blackburn Drive, Gloucester, MA 01930. Comments and requests for supporting documents may also be sent via fax to 978-281-9394. Comments will not be accepted if submitted via e-mail or the Internet.

**FOR FURTHER INFORMATION CONTACT:** Mary A. Colligan (ph. 978-281-9116, fax 978-281-9394), or Barbara A. Schroeder (ph. 301-713-1401, fax 301-713-0376).

#### SUPPLEMENTARY INFORMATION:

##### Background

Pound net leaders with greater than or equal to 12 inches (30.5 cm) stretched mesh and leaders with stringers have been documented to incidentally take sea turtles (Bellmund *et al.*, 1987). High strandings of threatened and endangered sea turtles are documented on Virginia beaches each spring, and the magnitude of the stranding event has

increased in recent years. No cause of mortality is immediately apparent for the majority of turtles that strand in Virginia, but the circumstances surrounding the recent stranding events are consistent with fishery interactions. In 2001, NMFS explored the various mortality sources potentially contributing to the high annual stranding event. While a number of fisheries may contribute to sea turtle strandings, based upon the best available information, pound net leaders were a likely contributor to high sea turtle strandings in Virginia in May and June of 2001. The documented incidental take of sea turtles in leaders, the ability of leaders to continue to take sea turtles in the future, and the annual high mortality of sea turtles in Virginia in May and June are of particular concern because approximately 50 percent of the Chesapeake Bay loggerhead foraging population is composed of the northern subpopulation, a subpopulation that may be declining. In addition, recently most of the stranded turtles have been juveniles, a life stage found to be critical to the long term survival of the species. This action is necessary to provide for the conservation of threatened and endangered turtles by minimizing incidental take in the Virginia pound net fishery during the spring. Details concerning the justification for the pound net leader restriction regulations and the high sea turtle stranding events in Virginia were provided in the preamble to the proposed rule (67 FR 15160, March 29, 2002) and are not repeated here.

#### Approved Measures

To conserve sea turtles, the Assistant Administrator, NOAA, (AA) prohibits the use of all pound net leaders measuring 12 inches (30.5 cm) or greater stretched mesh and all pound net leaders with stringers in the Virginia waters of the mainstem Chesapeake Bay and portions of the Virginia tributaries from May 8 to June 30 each year. The area where this gear restriction applies includes the Virginia waters of the mainstem Chesapeake Bay from the Maryland-Virginia state line (approximately 37° 55' N. lat., 75° 55' W. long.) to the COLREGS line at the mouth of the Chesapeake Bay; the James River downstream of the Hampton Roads Bridge Tunnel (I-64; approximately 36° 59.55' N. lat., 76° 18.64' W. long.); the York River downstream of the Coleman Memorial Bridge (Route 17; approximately 37° 14.55' N. lat., 76° 30.40' W. long.); and the Rappahannock River downstream of the Robert Opie Norris Jr. Bridge (Route

3; approximately 37° 37.44' N. lat., 76° 25.40' W. long.).

This prohibition of pound net leaders is effective upon filing through June 30 for this year, and from 12:00 a.m. local time on May 8 through 11:59 p.m. local time on June 30 each subsequent year. For the duration of this gear restriction, fishermen are required to stop fishing with pound net leaders measuring 12 inches (30.5 cm) or greater stretched mesh and pound net leaders with stringers in the designated area.

In addition to establishing the annual restriction on leader mesh size and leaders with stringers, this interim final rule also establishes year-round reporting (enforceable after OMB approval pursuant to the Paperwork Reduction Act (PRA)) and monitoring requirements for this fishery.

This interim final rule also establishes a framework mechanism by which NMFS may make changes to the restrictions and/or their effective dates on an expedited basis in order to respond to new information and protect sea turtles. Under this framework mechanism, if NMFS believes based on, for example, vessel reports, observer information, or water temperature and the timing of sea turtles' migration, that sea turtles may still be vulnerable to entanglement in pound net leaders after June 30, the AA may extend the effective dates of the prohibition established by this regulation. Should an extension of the effective dates of the prohibition of pound net leaders measuring 12 inches (30.5 cm) or greater stretched mesh and pound net leaders with stringers be necessary, NMFS would issue a final rule to be effective upon publication in the **Federal Register** explicitly stating the duration of the extension of the prohibition. Under this framework provision, such an extension would not exceed thirty days, or beyond July 30. Should NMFS determine that this gear restriction needs to be in place at other times of the year, NMFS would take action either pursuant its emergency rulemaking authority under the ESA or under the Administrative Procedure Act, but not under the framework mechanism established by this rule.

NMFS intends to continue to monitor sea turtle stranding levels and other fisheries active in the Virginia Chesapeake Bay and ocean waters, including pound net leaders with a stretched mesh size measuring less than 12 inches (30.5 cm). If monitoring of pound net leaders during the time frame of the gear restriction, May 8 through June 30 of each year, reveals that one sea turtle is entangled alive in a pound net leader less than 12 inches (30.5 cm)

stretched mesh or that one sea turtle is entangled dead and NMFS determines that the entanglement contributed to its death, then NMFS may determine that additional restrictions are necessary to conserve sea turtles and prevent entanglements. Such additional restrictions may include reducing the allowable mesh size for pound net leaders or prohibiting all pound net leaders regardless of mesh size in Virginia waters. Should NMFS determine that an additional restriction is warranted, NMFS would immediately file a final rule with the Office of the Federal Register. Such a rule would explicitly state the new mandatory gear restriction as well as the time period, which may also be extended for up to 30 days by a final rule pursuant to this framework mechanism. The area where additional gear restrictions would apply includes the same area as the initial restriction, namely the Virginia waters of the mainstem Chesapeake Bay from the Maryland-Virginia State line (approximately 38° N. lat.) to the COLREGS line at the mouth of the Chesapeake Bay, and portions of the James River, the York River, and the Rappahannock River.

#### Comments and Responses

On March 29, 2002, NMFS published a proposed rule that would prohibit the use of all pound net leaders measuring 12 inches (30.5 cm) and greater stretched mesh and all pound net leaders with stringers in the Virginia waters of the mainstem Chesapeake Bay from May 8 to June 30 each year. Comments on this proposed action were requested through April 15, 2002. Nine comment letters were received during the public comment period for the proposed rule. 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, is provided here.

#### General Comments

*Comment 1:* Six commenters supported the adoption of the proposed regulations to ensure sea turtle populations are not further compromised in the Virginia Chesapeake Bay.

*Response:* NMFS agrees that the restriction of pound net leaders is necessary to conserve sea turtles listed as threatened or endangered under the ESA.

*Comment 2:* Two commenters stated that the proposed pound net restrictions may not be effective at reducing spring sea turtle strandings in Virginia waters. Both commenters suggested NMFS

consider the contribution of other fisheries active in Virginia during the spring to the high turtle strandings.

*Response:* NMFS does not believe that pound nets are the sole source of spring turtle mortalities in Virginia. NMFS does believe that pound nets play a role in the annual spring stranding event. Prohibiting a gear type known to entangle sea turtles, leaders with greater than or equal to 12 inches (30.5 cm) stretched mesh and leaders with stringers, will protect sea turtles from entanglement in pound net leaders while minimizing the impacts to the pound net fishery. However, should sea turtle entanglement in compliant pound net leaders occur, NMFS may enact additional management measures as appropriate.

Based upon available information, it does not appear that another fishery was a significant contributor to the high strandings exhibited in 2001. In fact, a number of the fisheries active in the spring had adequate observer coverage, and few turtle takes were observed. However, NMFS recognizes that variations in fishery-turtle interactions may occur in any given year, and is committed to continued monitoring of fisheries active in Virginia state waters. Again, it should be stressed that NMFS believes that high spring strandings may be a result of an accumulation of factors, most notably fishery interactions, but pound net leaders are known to take sea turtles and likely contribute to the overall strandings.

*Comment 3:* Three comments were received on the timing of the regulations, namely May 8 to June 30. Two commenters supported the time frame of the restrictions. One commenter felt that the time frame of the restrictions was too long given the distribution of strandings in Virginia waters, and suggested a time period of approximately late May to mid-June.

*Response:* NMFS believes that, given the available information, the time period for the pound net restrictions is appropriate. From 1994 to 2001, the average date of the first reported stranding in Virginia was May 15. However, sea turtle mortality would have occurred before the animals stranded on Virginia beaches. While the peak of the spring strandings may occur later in May, historical strandings data indicate that sea turtle mortality begins in early May and regulations should be in effect as close to that time as possible if sea turtle protection measures are to be effective at reducing takes in leaders and strandings. In order for the proposed pound net restrictions to reduce sea turtle interactions with pound net leaders and reduce

subsequent strandings on Virginia beaches, the proposed measures should go into effect at least 1-week prior to the stranding commencement date, or on May 8 each year. Information submitted with one of the comments shows that in approximately 7 years prior to 1994, the date of the first turtle stranding was earlier than May 15. This supports the implementation of the leader restrictions in early May.

Strandings data from 1999 to 2001 show that the state of decomposition for the majority of stranded turtles progresses with the season, suggesting that most turtles stranding in later June may have been subjected to mortality sources earlier in the season (Mansfield *et al.*, 2002). Turtles stranding in June may have been dead for anywhere from a few days to two weeks. Whether the differences in decomposition levels by week are statistically significant remains to be determined. Based on historical Sea Turtle Stranding and Salvage Network (STSSN) stranding data, strandings in Virginia typically remain elevated until June 30, indicating that turtles may be vulnerable to entanglement in pound net leaders until this time. Implementing management measures for only a 3 to 4-week period (ending in approximately early to mid-June) may result in a large number of sea turtles remaining vulnerable to pound net leader entanglement after the restrictions are lifted. Furthermore, information submitted with one of the comments shows that the stranding peak persists until late June in some years. In some years the peak period of high strandings may be shorter than the time period of the regulations, but historically, high sea turtle strandings have been documented throughout the proposed time period of the leader restrictions. Implementation of the gear restrictions from May 8 to June 30 will account for stranding peak variability among years and is expected to prevent the occurrence of sea turtle takes in the pound net fishery in the spring and reduce the high numbers of strandings in Virginia. NMFS retains the option to lift the restriction if information such as stranding levels, monitoring, or observations of turtles, suggests that it would be appropriate.

*Comment 4:* One commenter suggested that the initiation of large mesh and stringer prohibitions coincide with 16°C surface water temperature.

*Response:* While monitoring surface water temperature and implementing restrictions based on reaching a pre-designated water temperature may account for seasonal variability, enacting regulations based upon real time water temperature is impractical

due to the amount of time required for the agency to implement and for fishermen to comply with the regulations, and the potential variability of water temperature within different locations in the Chesapeake Bay and within the water column. NMFS understands that the Virginia Institute of Marine Science (VIMS) has collected strandings data for 22 years, and spring strandings occur every year, generally when surface water temperature reaches 18°C. NMFS has considered historical surface water temperatures (not real time monitoring) in establishing previous area closures, but real time monitoring of water temperature as a trigger for regulations is not practical for this situation, nor is it appropriate given the predictable time period of annual spring strandings in Virginia. Further, NMFS believes that a consistent effective date better enables industry to plan their fishing activities, as fishermen would know in advance specifically when the restrictions would be effective. As mentioned, from 1994 to 2001, the average stranding commencement date in Virginia was May 15. While NMFS recognizes that the commencement date of strandings may vary from year to year, NMFS believes that an average date of May 15 accounts for seasonal variability and should be used as the average date when turtles begin to strand on Virginia shores.

*Comment 5:* One commenter expressed concern with the delay in publishing the proposed regulations and the limited public comment period.

*Response:* NMFS has been working with the Commonwealth of Virginia, in particular the Virginia Marine Resources Commission (VMRC), since August of 2001 to address potential sea turtle interactions with Virginia pound nets. In September 2001, VMRC forwarded to NMFS a proposed plan, developed in conjunction with the pound net industry and VIMS, intending to reduce sea turtle interactions with pound net leaders in Virginia. As NMFS wanted to ensure that the Commonwealth of Virginia had ample opportunity to develop a plan for reducing sea turtle interactions with pound nets, discussions on the specifics and content of this proposed plan continued until mid-December 2001. By that time, it became clear that NMFS should initiate its own rulemaking process to develop a plan to conserve listed sea turtles. NMFS has been committed to enacting regulations on 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 historical period of high

strandings. NMFS issued the proposed rule as soon as possible after taking the necessary time to acquire and sufficiently analyze the available data, explore all of the management alternatives, and prepare and review the appropriate documents.

Further, NMFS believes that the 15-day comment period was a reasonable amount of time given the relative simplicity of the proposed rule, consisting of only a restriction on leader mesh size and use of stringers, plus the framework procedure. A notice of the proposed regulation was also sent to all Virginia pound net licensees on March 29, 2002, to augment notice provided through the **Federal Register** and expedite public comments.

#### *Regulation Justification Comments*

*Comment 6:* One commenter supported that the strandings were specifically a result of fishery interactions.

*Response:* NMFS believes that the circumstances surrounding the recent spring strandings are consistent with fishery interactions, which include relatively healthy turtles prior to the time of their death, a large number of strandings in a short time period, no external wounds on the majority of the turtles, no common characteristic among stranded turtles that would suggest disease as the main cause of death, and turtles with fish in their stomach. Sea turtles are generally not agile enough to capture finfish under natural conditions, and thus would only consume large quantities of finfish by interacting with fishing gear or bycatch (Mansfield, *et al.* 2002, Bellmund, *et al.* 1987, Shoop and Ruckdechel 1982).

*Comment 7:* Two commenters felt that there is not a significant relationship between pound nets and sea turtle strandings. Both commenters noted that there are currently fewer pound nets in the Chesapeake Bay, but strandings have increased in recent years. One commenter was concerned that justification for the proposed regulations were based upon 1980s strandings data, when there were more pound nets being fished.

*Response:* NMFS recognizes that there are currently fewer pound net leaders, in particular those utilizing large mesh leaders, in the Virginia Chesapeake Bay in comparison to the 1980s. NMFS disagrees that turtle strandings cannot be attributed to large mesh leaders because strandings have increased while the number of large mesh leaders have decreased. The best available information does date back to the mid-1980s, but this study found that in 173 pound nets examined with large mesh

leaders (defined as greater than 12 to 16 inches (30.5 to 40.6 cm) stretched mesh), 30 turtles were found entangled (0.2 turtles *per net*; Bellmund *et al.*, 1987). This study also found that in 38 nets examined with stringer mesh, 27 turtles were documented entangled (0.7 turtles *per net*). NMFS recognizes that the increase in documented sea turtle mortalities could be a function of the increase and improvement in the level of stranding effort and coverage that has occurred, as well as a function of the apparent increase in abundance of the southern population of loggerheads, which make up approximately 50 percent of the loggerheads found in the Virginia Chesapeake Bay. However, even with a decline in pound net leaders, interactions proportional to what have been documented in this gear type in the past could lead to an increase in strandings. Listed sea turtles in the Chesapeake Bay must be protected to ensure that populations recover.

In response to the claim that the information available to link the recent sea turtle mortalities to the pound net fishery is limited and old, NMFS recognizes that many of the documented sea turtle entanglements in large mesh and stringer leaders are from the 1980s, but the factors involved in entanglement remain the same now as they were then—sea turtle head and flipper size relative to leader mesh size and stringer use. Large mesh nets (regardless of how many are in the Chesapeake Bay) still entangle sea turtles, based upon the mesh size and manner in which they are fished. Additionally, the ESA requires NMFS to use the best available scientific information. There have been several documented sea turtle entanglements in large mesh leaders that were determined to have caused mortality by drowning. While it is possible that some turtles documented in 2001 may have been dead prior to entanglement and floated into the leaders, there have been observations of live turtles entangled in leaders under water.

Few sea turtles strand with evidence of fishery interactions, but the lack of gear on a carcass is not indicative of a lack of fishery interaction (see response to Comment 6). While none of the sea turtles in Virginia have had pound net fishing gear on them when they have washed up on shore, it is not unusual for turtles to strand without gear on them, especially given the fact that pound net leaders are fixed fishing structures and secured to stakes set in the ground. It is very unlikely that a turtle would dislodge the gear so that it remained on the turtle when it stranded.

*Comment 8:* Three commenters disagreed that pound nets are a significant factor in the high spring stranding events, given other potential mortality sources in Virginia waters (e.g., boat strikes). One commenter stated that the location of the average percentage of strandings (55 percent) from 1986 to 2001 occurred in Virginia Beach Ocean and Western Chesapeake Bay areas, and it is likely that other mortality sources outside of Virginia waters resulted in a number of these strandings.

*Response:* NMFS recognizes that additional mortality sources may result in sea turtle strandings in Virginia during the spring. Consequently, NMFS has investigated other potential causes for the annual spring sea turtle mortality event and concludes that natural or non-fishing related anthropogenic causes are not consistent with the nature of most of the strandings. The absence of other species in the most recent stranding events and the absence of consistently high sea turtle strandings in other Atlantic states during the time period when turtles are migrating are inconsistent with cold stunning, a toxic algae bloom, epizootic or other disease. Further, the stranded turtles exhibited no major traumatic injuries such as might be caused by dredging or blasting. From May through December 2001, Virginia STSSN members documented 34 turtles with injuries that appeared to be from boat strikes, 4 entangled or hooked in hook and line fishing gear, and 2 entangled in longline/trotline gear, but most of the stranded sea turtles appeared to be relatively healthy. It is possible that vessel collisions or recreational fishing gear resulted in some spring strandings, but if these factors were a major contributor to strandings, a larger number of stranded sea turtles would exhibit carapace wounds or imbedded fish hooks. As mentioned, the majority of the strandings were consistent with fishery interactions. Nevertheless, NMFS will continue to explore and consider the contributions of other mortality sources to the annual spring stranding event.

It is possible that some Virginia Chesapeake Bay turtle strandings are swept into the Chesapeake Bay from elsewhere, or that some sea turtles are swept out of the Chesapeake Bay and onto ocean-facing beaches (if they strand at all), as the water patterns and currents entering or leaving the Chesapeake Bay could concentrate sea turtle strandings around the mouth of the Chesapeake Bay. However, it is likely that in the Virginia Chesapeake Bay, most mortalities have occurred relatively close to the stranding location

(Lutcavage, 1981). Further, it has been estimated that strandings on ocean facing beaches represent, at best, only approximately 20 percent of the at-sea nearshore mortality, as only those turtles killed close to shore are most likely to strand (NMFS SEFSC 2001). NMFS agrees that, historically, most of the spring strandings in Virginia have been documented on the ocean facing beaches south of Cape Henry and the inshore beaches in the southern Chesapeake Bay. However, the majority of the spring strandings in 1998, 2000, and 2001 occurred in inshore waters with concentrations around the southern tip of the eastern shore and the southern portion of the Chesapeake Bay around Virginia Beach and Hampton. Strandings in 2001 were of particular concern because the majority of the strandings in May and June occurred along the Chesapeake Bay side of the eastern shore of Virginia and along the southern tip near Kiptopeke and Fisherman's Island, indicating a possible localized interaction. Pound nets are the dominant fishing gear observed immediately offshore of this area. During 1980, high strandings were also documented in areas where there were large numbers of working pound nets (Lutcavage, 1981).

As mentioned in the proposed rule (67 FR 15160, March 29, 2002), NMFS evaluated the potential inshore and offshore contributors to high strandings in 2001. While a number of the fisheries active in Virginia were observed, NMFS did not detect significant sea turtle incidental take. However, additional observer coverage is needed to better determine the level of sea turtle interactions with the various fisheries operating during the spring. NMFS intends to continue both monitoring and characterizing the offshore and nearshore Virginia fisheries that may potentially contribute to the spring strandings.

As presented in the responses to Comments 6 and 7, sea turtle interactions with fishing gear are not always apparent. NMFS must rely on the best available information to determine the cause of sea turtle mortality and enact appropriate measures to reduce this mortality. Based on the best available information, including the nature and location of turtle strandings, the type of fishing gear in the vicinity of the greatest number of strandings, the lack of observed takes in other fisheries operating in Virginia waters during the 2001 stranding period, the known interactions between sea turtles and large mesh and stringer pound net leaders, and several documented sea turtle entanglements in

pound net leaders, NMFS concluded that pound nets contributed to the high sea turtle strandings in Virginia in May and June 2001.

#### *Stranding/Entanglement Data Comments*

*Comment 9:* Two commenters noted that the recent data on sea turtle entanglements in pound net leaders are limited (e.g., 10 turtles documented in 2001).

*Response:* NMFS recognizes that the data on observed sea turtle entanglements in pound net leaders are limited, and that other factors likely contribute to some spring sea turtle mortality in Virginia. The level of sea turtle interactions with other potential mortality sources (e.g., other fisheries) has not yet been conclusively determined, but available information suggests that the level of interaction between non-pound net fisheries and sea turtles in Virginia waters during the spring has not been high. Conversely, NMFS has data indicating that pound net leaders have resulted in sea turtle entanglements. The documentation of live sea turtles entangled in pound net leaders (e.g., 1 documented in 2001, 2 in 2000) with limited observer coverage, as well as previous scientific studies indicating that entanglements occur in large mesh and stringer leaders, indicates that sea turtle entanglements occur in pound net leaders and the frequency of these interactions may not have been sufficiently documented in recent years.

The exact number of turtles found in association with pound net leaders has been difficult to definitively determine, due to the number of entities involved in collecting the data and the interpretation of whether the turtle was entangled in the leader, floated in post-mortem, or impinged on the leader and died as a result. It is likely that many more turtles interacted with pound net leaders last year than were reported. Observers (NMFS, VMRC, and VIMS) did not begin to monitor pound nets until mid-June, well after the high stranding period, so some sea turtle entanglements could have been missed earlier in the season. NMFS has established a reporting system for 2002 to ensure that all involved monitoring personnel are collecting the appropriate data should an entanglement of a sea turtle in a pound net leader be documented.

*Comment 10:* One commenter noted that there were no turtle entanglements observed during side scan sonar surveys conducted on 55 active leaders from June 1 to October 31, 2001.

*Response:* The use of side scan sonar as a means to detect sub-surface sea turtle entanglements has potential, but is still being explored. A number of factors may influence the utility of sonar to detect sea turtle entanglements, including weather, sea conditions, water turbidity, the size and decomposition state of the animal, and the orientation of the turtle in the net. Further research on the effectiveness and practicality of side scan sonar techniques in observing sea turtle entanglements in pound net leaders, and real time verification of the side scan sonar surveys by video, will be conducted during May and June 2002. Until this technique can be validated with ground truthing and verification, NMFS is reluctant to base management decisions on the lack of sea turtle acoustical signatures.

Additionally, sonar surveys conducted after the initiation of the mass stranding period may not be reflective of what was occurring in May. It appears that a large number of spring sea turtle mortalities occur in May, given the decomposition states of the stranded sea turtles (Mansfield *et al.*, 2002). Sea turtles may be more common in the upper water column in May, where the surface temperatures range from 18° to 24° C (Musick and Mansfield, 2001), but they are known to occur in water temperatures 11° C or greater. As such, turtles may be periodically near the bottom during the spring and subject to entanglement in leaders sub-surface. The lack of sea turtle acoustic signatures in pound net leaders at depth during the VIMS June to October 2001 survey does not necessarily indicate that turtles are not periodically entangled sub-surface during the spring.

*Comment 11:* One commenter stated that the majority of strandings on the eastern shore were severely decomposed, when one would expect much fresher turtle strandings if the pound nets in close proximity to the eastern shore were responsible for the strandings.

*Response:* NMFS can understand how one might think that mortality sources close to shore should result in a higher proportion of fresh dead turtles. Nearshore mortality sources also would increase the likelihood for the carcasses reaching the shore. However, one factor that may contribute to the decomposition state of a stranded sea turtle is the duration of time the sea turtle is entangled in the water, or in this case, the pound net leader. It is NMFS' understanding that pound net fishermen do not typically tend their leaders, so a turtle entangled in a leader, even at the surface, may go undetected.

While additional information is necessary to adequately determine how often sea turtles become disentangled from pound net leaders, it is plausible that entangled turtles may become dislodged from pound net leaders either by the strong current in certain areas of the Chesapeake Bay, by the decomposition process, or by fishermen disentangling dead sea turtles if detected. This hypothesis needs to be explored, but it is possible that turtles remain in leaders and wash onto beaches several days, or even weeks, after their death in various stages of decomposition from slight to severe.

#### *Gear Restriction Comments*

*Comment 12:* Two commenters requested additional time to equip leaders with a mesh size that would be in compliance with the regulations.

*Response:* NMFS is sensitive to the industry's time constraints required to outfit their gear with mesh in compliance with the regulations. However, the time frame for the implementation of this regulation is also of concern, as the large mesh and stringer leader restriction should be in effect 1 week prior to the historical average stranding date to effectively protect sea turtles. Therefore, to maximize the ability to conserve sea turtles, the restrictions should be in effect immediately.

*Comment 13:* One commenter supported the implementation of the plan proposed by VMRC and the pound net industry (Non-Preferred Alternative 3 analyzed in the EA/RIR), namely the component of the plan requiring pound net leaders with stringers to drop the mesh to 9 feet (2.7 m) below mean low water and to space stringer lines at least 3 feet (0.9 m) apart. This commenter specifically requested implementation of a plan that would permit a leader with 16 inches (40.6 cm) stretched mesh 10 ft (3 m) below the surface.

*Response:* Lowering the mesh on those leaders using stringers may allow the sea turtles near the surface to swim over the larger mesh leaders and through the stringers. However, sea turtles are still vulnerable to entanglement in leaders more than 9 ft (2.7 m) below the surface. Musick *et al.*, (1984) documented two sea turtles entangled in pound net leaders approximately 9 ft (2.7 m) below the surface in early June 1983. Turtles may be more common in the upper water column during the spring, but if they are foraging for preferred prey, they are periodically near the bottom, and thus subject to entanglement in leaders more than 9 ft (2.7 m) below the surface. Sea turtle entanglements have been

documented in large mesh leaders and are likely to occur in stretched mesh greater than 16 inches (40.6 cm). Without adequate support that these measures will reduce sea turtle entanglement in the stringers themselves and in the mesh dropped more than 9 ft (2.7 m) below mean low water, the specific benefits to sea turtles remain unclear. A detailed description and review of all of the components of this plan are included in the EA/RIR.

*Comment 14:* One commenter disagreed with NMFS' assumption that fishermen are using the minimum leader mesh size that is operational, and indicated that mesh in compliance with the regulations will not be available by May 8.

*Response:* NMFS explained in the EA/RIR that, because the data used for the economic analysis did not give the exact location of pound nets, it would assume for the purposes of the impact analysis that fishermen were using the minimum leader mesh size that they believed to be operational. The EA/RIR then described the economic impacts based on that assumption, which provided for a worst-case analysis. However, the EA/RIR also indicated that another scenario is possible; namely that fishermen could switch to a smaller leader mesh size and remain operational. The EA/RIR also described the impacts based on that different assumption. This regulation is necessary to conserve listed sea turtles, so for the regulation to be effective at reducing sea turtle mortality and preventing entanglement in large mesh and stringer pound net leaders, all pound net leaders, in the geographical area affected by the restriction, must have mesh smaller than 12 inches (30.5 cm) stretched mesh during the restricted period or fishermen must remove their non-compliant leaders.

#### *Observer Coverage/Monitoring Comments*

*Comment 15:* Two commenters supported the framework in the proposed rule, which includes monitoring the smaller mesh pound net leaders and the implementation of additional restrictions if necessary.

*Response:* NMFS believes that prohibiting leaders with greater than or equal to 12 inches (30.5 cm) stretched mesh and leaders with stringers will reduce sea turtle entanglements and subsequent spring strandings. The framework monitoring program will document any sea turtle interactions with smaller leader mesh sizes, which will provide information beneficial for future management, both in Virginia and potentially in other states. Should the monitoring of pound net leaders

during May and June document turtle entanglement, under the framework mechanism NMFS may impose additional restrictions during the gear restriction period on an expedited basis. The gear restriction as proposed and any additional restrictions could be extended by NMFS for a period not to exceed 30 days after June 30, or not beyond July 30.

*Comment 16:* Four commenters recognized the need for NMFS to continue monitoring the sea turtle stranding situation in Virginia and supported increased observer coverage on the other spring fisheries in the Virginia Chesapeake Bay, nearshore, and offshore waters.

*Response:* NMFS will continue to closely monitor sea turtle stranding levels and other fisheries active in Virginia waters. While NMFS believes that pound nets contribute to the high spring sea turtle strandings, NMFS also recognizes that other fisheries may contribute to some of the annual sea turtle stranding event in Virginia and is committed to appropriately addressing the mortality sources. The NMFS 2002 monitoring program includes observer coverage of the large mesh and small mesh gillnet fisheries in offshore Virginia and Chesapeake Bay waters; alternative platform observer coverage of the large mesh gillnet black drum and sandbar shark fisheries; offshore and inshore aerial surveys to record sea turtle distribution, sea surface temperature, and commercial fishing gear; investigations into sea turtle interactions with the whelk and crab pot fisheries; and pound net monitoring. Coverage of the pound net fishery will include alternative platform observer coverage of pound net leaders, pound net leader monitoring using side scan sonar and video, and aerial monitoring of the pound net fishery. Additionally, NMFS will continue to evaluate interactions with other fisheries not previously considered that may contribute to sea turtle strandings.

*Comment 17:* Two commenters expressed their concern with the level of 2001 observer coverage on fisheries in the Virginia area (e.g., on large mesh and small mesh gillnet fisheries), and felt that more observer coverage was necessary.

*Response:* NMFS believes the coverage on these fisheries in 2001 was sufficient to monitor the take of sea turtles. The federally managed monkfish large mesh gillnet fishery (approximately 10–12 inch (25.4–30.5 cm) mesh) had approximately 41 percent observer coverage in waters off Virginia from May 1 until it stopped operating off Virginia on May 29 when

the fleet moved northward. In Virginia, 107 monkfish trips were observed, and one dead and two live loggerhead turtles were incidentally captured in this fishery. The state water black drum large mesh (approximately 10–14 inch (25.4–35.6 cm) mesh) gillnet fishery had approximately 8 percent observer coverage during May and June, and no turtle takes were observed. Twenty-two trips targeting both black drum and sandbar shark were conducted from May 15 to June 6. The amount of small mesh (smaller than 6 inch (15.2 cm) mesh) gillnet effort occurring in the Chesapeake Bay waters during May and June appears to be relatively minimal. NMFS observed 2 percent of the Atlantic croaker fishery and 12 percent of the dogfish fishery during May and June; no turtle takes were observed.

While 100-percent observer coverage was intended for the Federal monkfish fishery in 2001 (note that the percent coverage off of North Carolina was higher than off of Virginia), the limited number of observers and increase in the number of vessels fishing for monkfish resulted in less than 100-percent coverage. NMFS intends to continue observer coverage in these gillnet fisheries during 2002 to document any sea turtle takes that may ensue.

*Comment 18:* One commenter stated that aerial surveys are needed from mid-April through June to identify the active spring fisheries and determine the number of participants in these fisheries.

*Response:* In 2001, aerial surveys in both offshore and inshore Virginia waters were conducted to document sea turtle distribution and commercial fishing gear. During May and June, offshore aerial surveys from the beach out to the shelf break were conducted from the Virginia/North Carolina border to the Virginia/Maryland border. Inshore aerial surveys were flown from late May to October, surveying transect lines from the mouth of the Chesapeake Bay to the Virginia/Maryland border. NMFS considered the results of these aerial surveys (e.g., observations of fishing activity) in the development of the 2001 temporary rule on the Virginia pound net fishery (66 FR 33489, June 22, 2001), as well as this action. NMFS will conduct similar aerial surveys in May and June 2002.

*Comment 19:* One commenter suggested that NMFS work with the VMRC, VIMS, and the Virginia Department of Game and Inland Fisheries (VA DGIF), on the development of monitoring plans.

*Response:* NMFS has been in close coordination with VMRC and VIMS on the development of the pound net

monitoring plan and schedule, as well as the aerial survey flights and observer coverage on other spring fisheries in Virginia. To date, NMFS has had limited contact with the VA DGIF, as their role in managing the fisheries that may be resulting in sea turtle mortality was not previously defined.

#### Changes from Proposed Rule

Based on review of the comments received on the proposed rule and on its own review, NMFS has added two new paragraphs in the interim final rule. One requires that when a turtle is captured live and uninjured in the pound, fishers in the Virginia pound net fishery notify NMFS within 24 hours of returning from the trip. This provision also requires fishers to immediately notify NMFS and the appropriate rehabilitation or stranding network, as determined by NMFS, if a turtle is captured live but injured or if a turtle is entangled or captured dead in the pound net gear. The second requires that pound net fishing operations must be observed by a NMFS-approved observer if requested by the Northeast Regional Administrator. It also provides that all NMFS-approved observers will report any violations of this section, or other applicable regulations and laws, and that information collected by observers may be used for law enforcement purposes.

The interim final rule also does not include the proposed revision to 50 CFR 224.104, which provided NMFS' proposed policy determination that no civil penalties will be sought against those who are in compliance with the gear restrictions and other requirements above, but that nevertheless incidentally take an endangered sea turtle. While NMFS has the discretion to make that determination, NMFS at this time chooses not to issue a regulatory statement to that effect.

#### Review and Request for Additional Comments

NMFS continues to request public comments on this interim final rule to assist in the development of a final rule on Virginia pound nets and perhaps a management scheme for pound nets in other states via NMFS' Strategy for Sea Turtle Conservation and Recovery in Relation to Atlantic Ocean and Gulf of Mexico Fisheries (66 FR 39474, July 31, 2001).

#### Classification

This interim final rule has been determined to be significant for purposes of Executive Order 12866.

The AA finds good cause under 5 U.S.C. 553(d)(3) not to delay the

effective date of this interim final rule for 30 days. Such a delay would be contrary to the public interest because sea turtles typically migrate into Virginia waters in May, and at this time, they would likely be subject to entanglement in pound net leaders and potential subsequent mortality, unless this rule is in effect immediately (see response to Comment 3). Any delay in the effective date of this interim final rule would prevent NMFS from meeting its obligations under the ESA to prevent harm to sea turtles.

NMFS has prepared a final regulatory flexibility analysis (FRFA) that describes the economic impact this interim final rule would have on small entities. The FRFA is as follows: This rule prohibits pound net leaders with stretched mesh 12 inches (30.5 cm) or greater and leaders with stringers, requires year round reporting and monitoring, and provides a mechanism for modifying the restrictions from May 8 to June 30, and for extending the original or additional restrictions through July 30. The purpose is to prevent entanglement of threatened and endangered sea turtles in pound net leaders. This action is necessary to conserve listed sea turtles, help promote their recovery, and aid in the enforcement of the ESA.

The fishery affected by this interim final rule is the Virginia pound net fishery in the Chesapeake Bay. According to the 2001 VMRC survey data, of the 160 pound net licenses issued in Virginia, where one license is assigned to each pound net, 72 licenses are fishing in the waters potentially affected by this proposed (67 FR 15160, March 29, 2002) rule. According to VMRC data from 1999 to 2001, 27 fishermen were fishing approximately 64 pound nets from May 8 to June 30. Prohibiting the use of all pound net leaders with greater than or equal to 12 inches (30.5 cm) stretched mesh and leaders with stringers from May 8 to June 30 would potentially affect approximately 11 fishermen fishing approximately 24 pound nets. If pound net leaders greater than or equal to 8 inches (20.3 cm) are prohibited, approximately 13 fishermen fishing approximately 31 pound nets would be affected. If all pound net leaders regardless of mesh size are prohibited, 27 fishermen fishing approximately 64 pound nets would be affected.

This interim final rule prohibits pound net leaders with 12 inches (30.5 cm) and greater stretched mesh, as well as those using stringers, from May 8 to June 30, and provides a mechanism for extending and/or modifying the restrictions. This interim final rule

employs the best available information on sea turtle and pound net leader interactions to reduce sea turtle entanglement and strandings, while minimizing the impacts to the pound net industry. Four alternatives to the interim final rule have been considered. Given the inability to provide a quantitative analysis of these regulatory alternatives, the alternatives were considered with respect to mitigating the known costs on small entities while providing sea turtle protection. One alternative being status quo would not provide any protection to sea turtles, but would not have any economic consequences at least in the short term. No action now may lead to more severe and costly action to protect sea turtles in the future. The non-preferred alternative 1 would have prohibited pound net leaders with 8 inches (20.3 cm) and greater stretched mesh, as well as those using stringers, from May 8 to June 30. Compared to this interim final rule's restrictions, the non-preferred alternative 1 may not necessarily have provided greater sea turtle protection, and the industry costs would have been higher. The level of interaction between sea turtles and pound net leaders with between 8 inches (20.3 cm) and 12 inches (30.5 cm) stretched mesh has not been adequately documented in Virginia waters. The non-preferred alternative 2 that would have prohibited all pound net leaders from May 8 to June 30, would not necessarily have provided the most protection to sea turtles, but it would have been the most costly to the industry. The level of interaction between sea turtles and pound net leaders with less than 12 inches (30.5 cm) stretched mesh has not been adequately documented in Virginia waters. Finally, the non-preferred alternative 3 would have prohibited pound net leaders with greater than 16 inches (40.6 cm) stretched mesh, and would have required fishermen to drop the mesh of those leaders using stringers to 9 ft (2.7 m) below mean low water and to space stringer lines at least 3 ft (0.9 m) apart, for approximately a three and a half week period beginning on May 15. This alternative would have been the least burdensome to industry, but would have offered the lowest expected protection to sea turtles, with the exception of the no action alternative. Without adequate support to ensure that sea turtles would not have become entangled in the allowable leaders of this alternative, the benefits of this alternative to sea turtles are uncertain.

No comments were received on the initial regulatory flexibility analysis.

New § 223.206(d)(2)(v)(C) requires a collection of information which is not approved pursuant to the PRA. This section will only be effective upon receipt of that approval and publication of that approval in the **Federal Register**.

A formal consultation pursuant to section 7 of the ESA was conducted on this action. The biological opinion on this action concluded that NMFS' sea turtle conservation measures for the Virginia pound net fishery, may adversely affect but are not likely to jeopardize the continued existence of the loggerhead, leatherback, Kemp's ridley, green, or hawksbill sea turtle, or shortnose sturgeon. An incidental take statement was issued for this action. Copies of this biological opinion are available (see **ADDRESSES**).

This interim final rule contains policies with federalism implications that were sufficient to warrant preparation of a federalism assessment under Executive Order 13132. Accordingly, the Assistant Secretary for Legislative and Intergovernmental Affairs provided notice of the proposed action to the Governor of Virginia on April 2, 2002. No comments on the federalism implications of the proposed action were received in response to the April 2002 letter.

Dated: June 11, 2002.

**Rebecca Lent,**

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

#### List of Subjects

##### 50 CFR Part 222

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

##### 50 CFR Part 223

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

For the reasons set forth 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 definition of "Pound net leader" is added in alphabetical order to read as follows:

#### **§ 222.102 Definitions.**

*Pound net leader* means a long straight net that directs the fish offshore towards the pound, an enclosure that captures the fish. Some pound net leaders are all mesh, while others have stringers and mesh. Stringers are vertical lines in a pound net leader that are spaced a certain distance apart and are not crossed by horizontal lines to form mesh.

\* \* \* \* \*

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

1. The authority citation for part 223 is revised to read as follows:

**Authority:** 16 U.S.C. 1531 *et seq.*; subpart B, § 223.12 also issued under 16 U.S.C. 1361 *et seq.*

2. In § 223.205, paragraphs (b)(14) and (b)(15) are revised and paragraph (b)(16) is added to read as follows:

#### **§ 223.205 Sea turtles.**

\* \* \* \* \*

(b) \* \* \*

(14) Sell, barter, trade or offer to sell, barter, or trade, a TED that is not an approved TED;

(15) Fail to comply with the restrictions set forth in § 223.206(d)(2)(v) regarding pound net leaders; or

(16) Attempt to do, solicit another to do, or cause to be done, any of the foregoing.

\* \* \* \* \*

3. In § 223.206, paragraph (d)(2)(v) is added to read as follows:

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

\* \* \* \* \*

(d) \* \* \*

(2) \* \* \*

(v) *Gear requirement—pound net leaders—(A) Restrictions on pound net leaders.* During the time period of May 8 through June 30 of each year, any pound net leader in the waters described in paragraph (d)(2)(v)(B) of this section must have a mesh size less than 12 inches (30.5 cm) stretched mesh and may not employ stringers. Any pound net leader with stretched mesh measuring 12 inches (30.5 cm) or greater or any pound net leader with stringers must be removed from the waters described in paragraph (d)(2)(v)(B) of this section prior to May 8 of each year and may not be reset until July 1 of each year unless that date is extended by the AA pursuant to paragraph (d)(2)(v)(E) of this section.

(B) *Regulated waters.* The restrictions on pound net leaders described in paragraph (d)(2)(v)(A) of this section

apply to the following waters: the Virginia waters of the mainstem Chesapeake Bay from the Maryland-Virginia State line (approximately 37° 55' N. lat., 75° 55' W. long.) to the COLREGS line at the mouth of the Chesapeake Bay; the James River downstream of the Hampton Roads Bridge Tunnel (I-64; approximately 36° 59.55' N. lat., 76° 18.64' W. long.); the York River downstream of the Coleman Memorial Bridge (Route 17; approximately 37° 14.55' N. lat, 76° 30.40' W. long.); and the Rappahannock River downstream of the Robert Opie Norris Jr. Bridge (Route 3; approximately 37° 37.44' N. lat, 76° 25.40' W. long.).

(C) *Reporting requirement.* At any time during the year, if a turtle is taken live and uninjured in a pound net operation, in the pound or in the leader, the operator of vessel must report the incident to the NMFS Northeast Regional Office, (978) 281-9388 or fax (978) 281-9394, within 24 hours of returning from the trip in which the incidental take occurred. The report

shall include a description of the turtle's 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 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.

(D) *Monitoring.* Pound net fishing operations must 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.

(E) *Expedited modification of restrictions and effective dates.* From May 8 to June 30 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)(2)(v)(A) of this section on pound net leaders in the waters identified in paragraph (d)(2)(v)(B) of this section, the AA 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 strandings will likely continue beyond June 30, the AA may issue a final rule extending the effective date of the restrictions, including any additional restrictions imposed under this subparagraph, for an additional 30 days, but not beyond July 30, to protect threatened sea turtles.

\* \* \* \* \*

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