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Taking of Marine Mammals Incidental to Commercial Fishing Operations; Bottlenose Dolphin Take Reduction Plan Regulations; Sea Turtle Conservation; Restrictions to Fishing Activities; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 229

[Docket No. 040903253–5337–02; I.D. 081104H]

RIN 0648–AR39

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Bottlenose Dolphin Take Reduction Plan Regulations; Sea Turtle Conservation; Restrictions to Fishing Activities

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement regulatory and non-regulatory management measures to reduce the incidental mortality and serious injury (bycatch) of the western North Atlantic coastal bottlenose dolphin stock (dolphin) (*Tursiops truncatus*) in the mid-Atlantic coastal gillnet fishery and eight other coastal fisheries operating within the dolphin's distributional range. This final rule also revises the large mesh size restriction under the mid-Atlantic large mesh gillnet rule for conservation of endangered and threatened sea turtles (mid-Atlantic large mesh gillnet rule) to provide consistency among Federal and state management measures. The measures contained in this final rule will implement gillnet effort reduction, gear proximity requirements, gear or gear deployment modifications, and outreach and education measures to reduce dolphin bycatch below the marine mammal stock's potential biological removal level (PBR).

DATES: The regulations in this final rule are effective on May 26, 2006.

ADDRESSES: Copies of the Final Environmental Assessment (EA), Final Regulatory Flexibility Analysis (FRFA), the Bottlenose Dolphin Take Reduction Team (BDTRT) meeting summaries, progress reports, and complete citations for all references used in this rulemaking may be obtained from the persons listed under **FOR FURTHER INFORMATION CONTACT** or online at *http://www.nmfs.noaa.gov/pr/interactions/trt/bdtrp.htm*

FOR FURTHER INFORMATION CONTACT: Stacey Carlson, NMFS, Southeast Region, 727–824–5312, *Stacey.Carlson@noaa.gov*; Kristy Long, NMFS, Protected Resources, 301–713–2322, *Kristy.Long@noaa.gov*; or David Gouveia, NMFS, Northeast Region, 978–281–9280, *David.Gouveia@noaa.gov*. Individuals who use telecommunications devices for the deaf (TDD) may call the Federal Information Relay Service at 1–800–877–8339 between 8 a.m. and 4 p.m. eastern time, Monday through Friday, excluding Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

On November 10, 2004 (69 FR 65127), NMFS published a proposed rule (''the proposed rule'') to implement the Bottlenose Dolphin Take Reduction Plan (BDTRP), amend the mid-Atlantic large mesh gillnet rule published in the **Federal Register** on December 3, 2002 (67 FR 71895), and announce the availability of a draft EA on both actions. Two public hearings and a BDTRT meeting were conducted during the 90–day public comment period. The first public hearing was held on January 5, 2005, in New Bern, NC, and the second was held in conjunction with the January 13–14, 2005, BDTRT meeting in Virginia Beach, VA. Additionally, NMFS presented information on the proposed rule at meetings with the Commonwealth of Virginia and the Mid-Atlantic Fishery Management Council, Protected Resources Sub-Committee.

The proposed rule combined two actions under different statutory authorities, to: (1) implement the BDTRP under the Marine Mammal Protection Act (MMPA); and (2) amend the Endangered Species Act (ESA) mid-Atlantic large mesh gillnet rule by extending the existing seasonally-adjusted closures to North Carolina and Virginia State waters and revise the large mesh gillnet size restriction from 8–inch (20.3 cm) stretched mesh or larger to 7–inch (17.8 cm) stretched mesh or larger. The two actions were combined under one rulemaking process because the seasonally-adjusted closures for North Carolina and Virginia State waters were originally believed necessary to not only reduce the serious injury and mortality of ESA-listed sea turtles, but also to help lower dolphin bycatch below the PBR level in those areas. The actions were also combined to provide consistency in management measures and facilitate interpretation by commercial fishermen. Further, NMFS believed that combining these measures would assist the Agency with establishing conservation management measures for all protected species under one action, regardless of under which authority the species is managed.

NMFS reviewed the public comments received during the public comment period and analyzed additional information received after the proposed rule published. As a result, NMFS is finalizing the rule, with modifications from the proposed rule. The final rule includes the proposed take reduction measures to implement the BDTRP under the MMPA and the proposed amendment to the mid-Atlantic large mesh gillnet rule under the ESA by revising the large mesh gillnet size restriction to 7–inch (17.8 cm) stretched mesh or larger, but several individual requirements were deemed unnecessary at the present time. Please see the *Comments and Responses* section for further details on the public comments received and the *Changes from the Proposed Rule* section for a summary of modifications from the proposed to final rule.

BDTRP under the MMPA

Section 118(f)(1) of the MMPA (16 U.S.C. 1387(f)(1)) requires the preparation and implementation of take reduction plans (TRPs) for strategic marine mammal stocks that interact with Category I or II fisheries. The MMPA defines a strategic stock as a marine mammal stock: (1) for which the level of direct human-caused mortality exceeds the PBR level; (2) which, based on the best available scientific information, is declining and is likely to be listed as a threatened species under the ESA within the foreseeable future; or (3) which is listed as a threatened or endangered species under the ESA, or as depleted under the MMPA (16 U.S.C. 1362(19)). PBR, as defined by the MMPA, means the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (16 U.S.C. 1362(20)). NMFS regulations at 50 CFR 229.2 define a Category I fishery as a fishery that has frequent incidental mortality and serious injury of marine mammals; a Category II fishery as a fishery that has occasional incidental mortality and serious injury of marine mammals; and a Category III fishery as a fishery that has a remote likelihood of, or no known, incidental mortality and serious injury of marine mammals.

The western North Atlantic coastal bottlenose dolphin is a strategic stock because fishery-related incidental mortality and serious injury exceeds the stock's PBR, and it is designated as depleted under the MMPA (see 50 CFR 216.15). Because it is a strategic stock that interacts with Category I and II fisheries, a TRP is required under the

MMPA to reduce dolphin bycatch below PBR.

The short-term goal of a TRP is to reduce, within 6 months of its implementation, the incidental mortality or serious injury of marine mammals incidentally taken in the course of commercial fishing operations to levels less than the PBR established for that stock. The long-term goal of a TRP is to reduce, within 5 years of its implementation, the incidental mortality or serious injury of marine mammals incidentally taken in the course of commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate, taking into account the economics of the fishery, the availability of existing technology, and existing state or regional fishery management plans.

The BDTRT provided NMFS with Consensus Recommendations for a BDTRP, which included both regulatory and non-regulatory conservation measures to reduce incidental mortality and serious injury of coastal bottlenose dolphins, as mandated by the MMPA. The proposed rule outlined the BDTRT's regulatory and non-regulatory recommendations, with minor modifications, to implement the BDTRP. Discussions on modifications to the BDTRT's Consensus Recommendations as well as information regarding the history of the BDTRT and BDTRP development, biology of the western North Atlantic coastal bottlenose dolphin stock, and the alternatives considered in the EA are included in the preamble to the proposed rule and are not repeated here.

To fulfill requirements of section 118 of the MMPA, regulatory and non-regulatory conservation measures are finalized herein to implement the BDTRP. Through implementation of its regulatory and non-regulatory measures, the BDTRP is designed to meet the short-term goal of a TRP, which is to reduce serious injury and mortality of coastal bottlenose dolphins within 6 months of implementation, and provide a framework for meeting the long-term goal. To determine if the short-term goal is met, NMFS will continue to monitor bycatch of dolphins through observer programs, stranded animal reports, abundance and distribution surveys, and other means. Ultimately, NMFS will evaluate the effectiveness of the TRP by monitoring the rate of serious injury and mortality of dolphins relative to the short- and long-term goals of the TRP. The BDTRP may be amended in the future to account for new information, updated data, or fishery changes.

Geographic Scope and Fisheries Affected by the BDTRP

The geographic scope for the BDTRP is based on the range of the western North Atlantic coastal bottlenose dolphin stock. It includes all tidal and marine waters within 6.5 nautical miles (12 km) of shore from the New York-New Jersey border southward to Cape Hatteras, North Carolina, and within 14.6 nautical miles (27 km) of shore from Cape Hatteras southward to, and including, the east coast of Florida down to the fishery management council demarcation line between the Atlantic Ocean and the Gulf of Mexico (as described in § 600.105 of this title). Within this overall geographic scope, seven spatial and temporal Management Units (MUs) were created based on the biological complexity of the coastal stock. These MUs are depicted in Figure 1 and include:

1. Northern Migratory MU during the summer (May 1 – October 31), which is from the New York/New Jersey border to the Virginia/North Carolina border (north of36°33′N.). In the winter (November 1 – April 30), the Northern Migratory, Northern North Carolina, and Southern North Carolina MUs overlap along the coast of North Carolina and southern Virginia and are referred to as the Winter Mixed MU;

2. Northern North Carolina MU during the summer (May 1–October 31), which ranges from the Virginia/North Carolina border to Cape Lookout, North Carolina (36°33′N. – 34°35.4′N.). In the winter (November 1 – April 30), the Northern Migratory, Northern North Carolina, and Southern North Carolina MUs overlap along the coast of North Carolina and southern Virginia and are referred to as the Winter Mixed MU;

3. Southern North Carolina MU during the summer (May 1–October 31), which ranges from Cape Lookout, North Carolina to Murrell's Inlet, South Carolina (34°35.4′N. – 33°31.2′N.). In the winter (November 1 – April 30), the Northern Migratory, Northern North Carolina, and Southern North Carolina MUs overlap along the coast of North Carolina and southern Virginia and are referred to as the Winter Mixed MU;

4. South Carolina MU during the summer (May 1 – October 31) and winter (November 1 – April 30), which ranges from Murrell's Inlet, South Carolina to the South Carolina/Georgia border (33°31.2′N. – 32°03′N.);

5. Georgia MU during the summer (May 1 – October 31) and winter (November 1 – April 30), which ranges from the Georgia/South Carolina border to the Georgia/Florida border (32°03′N. – 30°43.2′N.);

6. Northern Florida MU during the summer (May 1 – October 31) and winter (November 1 – April 30), which ranges from the Georgia/Florida border to just north of Mosquito Lagoon, Florida (30°43.2′N. – 29°23.4′N.); and

7. Central Florida MU during the summer (May 1 – October 31) and winter (November 1 – April 30), which ranges from just north of Mosquito Lagoon, Florida south along the east coast of Florida (south of 29°23.4′N.).

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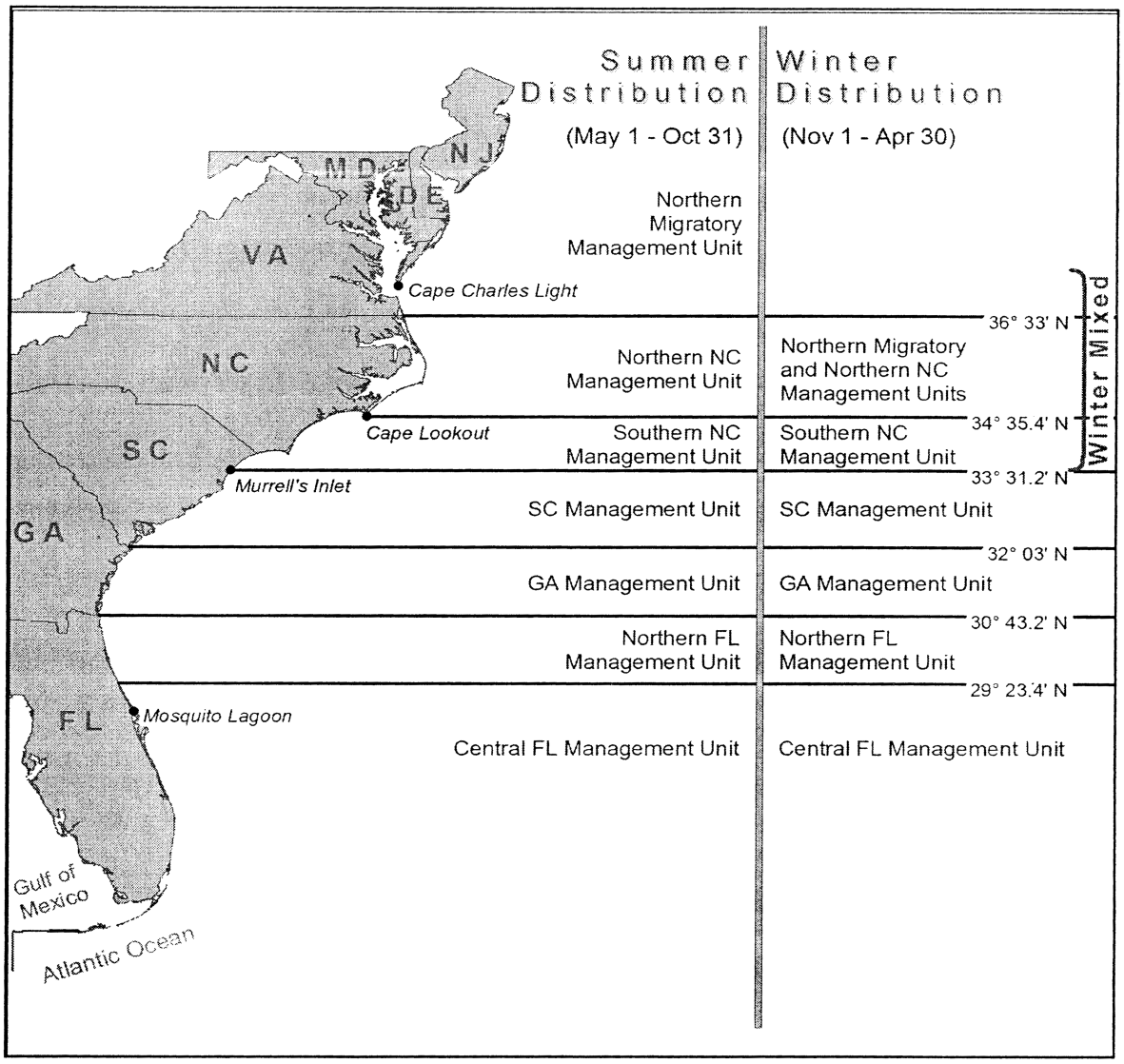
FIGURE 1: GEOGRAPHIC SCOPE AND MANAGEMENTS UNITS FOR THE BDTRP



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The management measures developed for each MU facilitate fishery management, as well as dolphin conservation, because the commercial fisheries affected by the BDTRP also have spatial and temporal components. The BDTRP affects the following Category I and II fisheries via regulatory or non-regulatory components: the mid-Atlantic coastal gillnet fishery, Virginia pound net fishery, mid-Atlantic haul/beach seine fishery, Atlantic blue crab trap/pot fishery, North Carolina inshore gillnet fishery, North Carolina roe mullet stop net fishery, North Carolina long haul seine fishery, Southeastern U.S. Atlantic shark gillnet fishery, and Southeast Atlantic gillnet fishery.

The BDTRP includes the regulatory management measures summarized in Table 1 for small, medium, and large mesh gillnets, which are organized by bottlenose dolphin MU and specific location, as well as non-regulatory conservation measures. The final rule, however, does not contain the beach gear operating requirements (beach seine, stop net, and nearshore gillnet fisheries) for North Carolina or gear marking requirements for all affected fisheries that were contained in the proposed rule.

TABLE 1: SUMMARY OF BDTRP REGULATIONS

Fishing Area	Management Unit	Gillnet Mesh Size Requirements (Stretched Mesh)		
		Small (≤5 inch)	Medium (>5 in to <7 in)	Large (≥7 inch)
NJ-VA	Summer Northern Migratory	None	Jun. 1–October 31: Anchored gillnets- fishermen must remain within 0.5 nmi (0.93 km) of the closest portion of each gear fished at night in State waters, and any gear fished at night must be removed from the water and stowed on board the vessel before the vessel returns to port.	Jun. 1–October 31: Anchored gillnets- fishermen must remain within 0.5 nmi (0.93 km) of the closest portion of each gear fished at night in State waters, and any gear fished at night must be removed from the water and stowed on board the vessel before the vessel returns to port.
Cape Charles Light, VA to VA/NC border	Winter Mixed - Virginia	None	None	November 1–December 31: No fishing at night in State waters, and, at night, gear must be removed from the water and stowed on board the vessel.
VA/NC border to Cape Lookout, NC	Summer Northern North Carolina AND Winter Mixed Northern North Carolina	May 1–October 31: In State waters, net length must be less than or equal to 1,000 feet (304.8 m).	November 1–April 30: No fishing at night in State waters; sunset clause of 3 years for this restriction.	April 15–December 15: No fishing in State waters[1]; December 16–April 14: No fishing at night in State waters without tie-downs.
Cape Lookout, NC to the North Carolina/South Carolina Border[2]	Summer Southern North Carolina AND Winter Mixed - Southern North Carolina	None	November 1–April 30: No fishing at night in State waters; sunset clause of 3 years for this restriction.	April 15–December 15: No fishing in State waters[1]; December 16–April 14: No fishing at night in State waters and, at night, gear must be removed from the water and stowed on board the vessel.
SC, GA, and FL	South Carolina, Georgia, Northern Florida, and Central Florida		Year-round for all gillnet gear: Fishermen must remain within 0.25 nautical mile (0.46 km) of the closest portion of their gear at all times in State and Federal waters within 14.6 nautical miles (27 km) from shore. Gear must be removed from the water and stowed on board the vessel before the vessel returns to port.	

[1] The dates for the large mesh prohibition codify current North Carolina state regulations, and therefore, slightly deviate from the BDTRP summer and winter dates in which other regulatory measures are applied.

[2] These prohibitions stop at the North Carolina/South Carolina border rather than extending to Murrels Inlet, South Carolina as defined by the Southern North Carolina MU because gillnet fishing activity is limited in South Carolina.

Non-Regulatory Elements of the BDTRP

The BDTRT noted that effective implementation of the BDTRP requires continued research and monitoring, enforcement of regulations, outreach to fishermen, and a collaborative effort with states to remove derelict crab trap/pot gear. Therefore, the BDTRT referred to these as the non-regulatory elements of the BDTRP and included them in their Consensus Recommendations to NMFS. NMFS agrees that the non-regulatory elements are important in achieving both the short- and long-term goals of the BDTRP and considers all non-regulatory elements as part of the Agency's final BDTRP (see the EA for additional information on non-regulatory recommendations).

Continued research and monitoring are necessary components of a TRP to ensure that the best available information continues to drive management decisions and to evaluate the effectiveness of the TRP. The following are general research and monitoring efforts that will be integral components of the BDTRP: (1) continued research on bottlenose dolphin stock structure; (2) design and execution of scientific surveys to provide reliable abundance estimates of the bottlenose dolphin stock; (3) review of available information on bottlenose dolphin stock size and structure to determine whether its depleted status under the MMPA has changed; (4) improved assessment of bottlenose dolphin serious injury and mortality by expanding observer coverage and improving the precision of serious injury and mortality estimates, expanding stranding networks to enhance data collection efforts, assessing the factors contributing to bottlenose dolphin serious injury and mortality, providing better assessment of fishery effort, and exploring alternative methods of monitoring serious injury and mortality; and (5) completion of various ongoing gear-modification-related research projects (i.e., comparing behavior of captive and wild dolphins around gillnets with and without acoustically reflective webbing, and investigating the effects of twine stiffness on dolphin serious injury and mortality).

The observer program and the Marine Mammal Stranding Network are vital programs for monitoring the effectiveness of the BDTRP and evaluating the plan's success at meeting the short- and long-term goals of the MMPA. NMFS intends to support both these programs by: (1) enhancing

current observer programs and coordinating with other states and researchers to provide statistically viable sample sizes for all fisheries interacting with dolphins; (2) implementing alternative monitoring programs (i.e., non-fishing vessel based observation platforms); (3) establishing dedicated beach surveys and employing observers in geographic areas and time frames during which observer coverage is currently lacking; (4) increasing stranding coverage and improving training for network participants; (5) improving post-mortem assessments to better determine sources of mortality; and (6) providing funding to organize and conduct workshops and training sessions to help foster communication between the observer program and stranding network, and assembling the information and staff necessary to accomplish these objectives.

Consistent enforcement is necessary to ensure the success of the BDTRP. NMFS will work to establish appropriate levels of enforcement of the BDTRP. NMFS enforcement agents will continue to participate in the BDTRT process to ensure implementation needs continue to be met.

NMFS will also formally request that Federal, state, and local fishery enforcement agents monitor inside waterways for serious injury and mortality of dolphins and fishery/human interactions to help enhance the stranding network and monitor for compliance of the BDTRP. Additionally, NMFS will provide training to agents on all aspects of the BDTRP, including how to respond to and assist with marine mammal strandings.

Therefore, this training will: (1) review all regulatory components of the BDTRP; (2) discuss the agent's role in stranding response and in educating fishermen and the public; (3) include training materials similar to those provided to fishermen; and (4) be conducted at regional law enforcement meetings.

Another necessary component of the BDTRP is to ensure that affected commercial fishermen understand the regulatory and non-regulatory elements of the plan and how they apply to each fishery and fishing area. Therefore, NMFS will conduct workshops and dockside visits to: (1) inform fishermen of new and existing regulations to reduce serious injury and mortality in their fisheries, as well as potential gear modifications developed via gear research; (2) supply contact information and protocols for responding to dolphin/fishery interactions or strandings; and (3) encourage best fishing practices to reduce serious injury and mortality. NMFS Fishery Liaisons intend to conduct these workshops and dockside visits in major ports from New Jersey through Florida. Pertinent information for commercial fishermen will also be available on NMFS' website.

The final non-regulatory element included in the BDTRP is for NMFS to encourage states to develop and implement a program to remove derelict blue crab traps/pots and associated lines. This program will help reduce impacts of the large blue crab fishery that exists throughout the coastal bottlenose dolphin's range. NMFS will continue to support state efforts in removing derelict crab traps/pots and will work with state partners and other stakeholders to develop such programs in states that currently do not actively remove derelict crab traps/pots.

NMFS will conduct an outreach program to encourage use of voluntary gear modifications in the crab trap/pot fishery. Modifications may include: (1) using sinking or negatively buoyant line; (2) limiting the line to the minimum length necessary; and (3) using inverted or modified bait wells for those areas where dolphins are tipping traps and stealing bait. NMFS recently funded a pilot project to determine if dolphins interact differently with blue crab traps/pots built with inverted or recessed opening bait wells versus blue crab traps/pots built with bottom opening bait wells. The results of this study will determine if these modified bait wells are feasible for use by the fishery and will sufficiently reduce bottlenose dolphin bycatch. NMFS also recently funded a study to examine the role of the buoy line in dolphin entanglements in the crab trap/pot fishery.

Revision to Large Mesh Gillnet Size Restriction in the Mid-Atlantic Large Mesh Gillnet Rule under the ESA

The purposes of the ESA, as stated in section 2(b), are to provide a means whereby the ecosystems upon which endangered or threatened species depend may be conserved; to provide a program for the conservation of such endangered or threatened species; and to take such steps as may be appropriate to achieve the treaties and conventions set forth in the ESA. All sea turtles found in U.S. waters are listed as either endangered or threatened under the ESA. The Kemp's ridley (*Lepidochelys kempii*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*) are listed as endangered. Loggerhead (*Caretta caretta*), green (*Chelonia mydas*), and olive ridley (*Lepidochelys olivacea*) turtles are listed as threatened, except for breeding populations of green turtles in Florida and on the Pacific Coast of Mexico and olive ridleys from the Pacific Coast of Mexico, which are listed as endangered.

To protect migrating sea turtles, NMFS published a final rule on December 3, 2002 (67 FR 71895), establishing seasonally-adjusted gear restrictions by closing portions of the mid-Atlantic exclusive economic zone (EEZ) to fishing with gillnets with a mesh size larger than 8–inch (20.3–cm) stretched mesh. In this final rule, NMFS is revising the large mesh size restriction from the current greater than 8–inch (20.3–cm) stretched mesh, as defined in the 2002 final rule, to 7–inch (17.8–cm) stretched mesh or greater.

Information regarding the history of the current mid-Atlantic large mesh gillnet rule and justification for its enactment were provided in the proposed rule (69 FR 65127) and are not repeated here.

Comments and Responses

NMFS received 4,140 public comments on the draft EA and proposed rule via letter, fax, E-mail, or participation at public hearings. Approximately, 4,085 letters of similar content were received via E-mail. NMFS received various petitions that expressed concern over certain topics in the proposed rule. Although each petition was counted as only one comment, the number of signatures on each petition was noted. NMFS also received 2 comments in support of various parts of the proposed rule.

Comments on the proposed rule were received from the States of North Carolina, Virginia, Georgia, and Maryland; Virginia state and local representatives from Accomack County, Chincoteague, and the House of Delegates, 100th District for Richmond; the mid-Atlantic Fishery Management Council; the South Atlantic Fishery Management Council; the North Carolina Marine Fishery Commission; the United States Coast Guard; conservation organizations, including the Ocean Conservancy, Oceana, and the Center for Biological Diversity; fishermen's organizations, including the Eastern Shore Watermen's Workers Association, the Garden State Seafood Association, and the Carteret County Fishermen's Association; Duke University; the BDTRT; and 35 individual commenters. Five petitions with a total of 563 signatures were received, representing commercial fishermen in Maryland, North Carolina, and Virginia, and numerous fishermen in North Carolina, including inshore

gillnet, runaround or strike gillnet, and beach seine fishermen.

The comments are summarized and grouped below by major subject headings. NMFS' response follows each comment.

Comments Regarding Proposed Regulatory Measures not Implemented in This Final Rule

NMFS received numerous comments on the proposed beach gear operating requirements and gear marking requirements under the BDTRP, and the seasonally-adjusted closures proposed under the mid-Atlantic large mesh gillnet rule to be extended into North Carolina and Virginia State waters. NMFS carefully reviewed and analyzed all comments and is not finalizing these three proposed regulatory measures in the final rule. The following comments and responses explain NMFS' decision not to finalize these proposed regulatory measures.

Comment 1: NMFS received 45 comments, including 302 petition signatures, regarding various aspects of the proposed beach gear (beach seine, stop net, and nearshore gillnet fisheries) operating requirements. Comments included: (1) concerns that decreasing mesh size in the roe mullet stop net fishery will cause bycatch of non-target species and undermine the compromise reached with pier owners in the early 1990's; (2) recommendations to increase observer coverage in the stop net fishery to further document entanglements of bottlenose dolphins and re-evaluate the need for regulating this fishery; (3) claims that the proposed beach gear operating requirements unintentionally included nearshore gillnets without justification and in contravention of the BDTRT's intent not to regulate this fishery; (4) petitions requesting exemptions for the beach anchored and nearshore gillnet fisheries; (5) questions regarding why the use of multifilament vs. monofilament webbing is proposed; and (6) concerns that multifilament webbing, as opposed to monofilament, will increase bycatch of bottlenose dolphins and juvenile and non-target species. BDTRT comments also recommended how to amend the proposed beach gear operating requirements in 50 CFR 229.35(e)(3)(i)(A) of the proposed rule to more accurately reflect the intent of BDTRT's 2002 and 2003 Consensus Recommendations. The proposed beach gear operating requirements stated that gillnet gear or seine gear within the first 300–feet (91.4 m) of the beach/water interface must be constructed of multi-fiber nylon that is 4–inches (10.2 cm) or less stretched mesh, and nets consisting of monofilament material would be prohibited in this area.

Response: NMFS is not finalizing the proposed beach gear operating measures at this time because: (1) the proposed measures for beach gear would inadvertently impact nearshore gillnet and other commercial fishermen that were not intended to be regulated by the BDTRT Consensus Recommendations; (2) a review of the most recent serious injury and mortality estimates provided by Palka and Rossman (2005) suggests that the proposed measures for beach gear are not currently necessary to reduce bottlenose dolphin serious injury and mortality to below PBR; and (3) NMFS believes additional information is necessary regarding the level of serious injury and mortality in both beach gear and nearshore gillnet fisheries and possible measures to reduce this serious injury and mortality.

NMFS is pursuing the following activities to further investigate appropriate measures to address beach gear and nearshore gillnet fisheries in the future.

(1) Research in the stop net fishery to compare bycatch rates of dolphin, fish and other marine species in current and proposed net configurations. NMFS funded a study that will be conducted during the 2005 fall stop net fishery season to accomplish this goal;

(2) Collection of additional information regarding the operation and level of effort in beach-based and nearshore gillnet fisheries and how these influence serious injury and mortality estimates. In North Carolina, many commercial fishermen appear to use gillnets in the same manner as beach seines but record their landings in the traditional beach seine fishery in the North Carolina Department of Marine Fisheries (NCDMF) Trip Ticket Program. This may negatively or positively bias the bycatch estimates for the nearshore gillnet and beach seine fisheries. This distinction is important to ensure management measures appropriately address the fisheries in which bycatch occurs. Therefore, NMFS will explore options under the List of Fisheries process in conjunction with NCDMF to identify these fisheries separately, as well as pursue outreach to commercial fishermen to improve the accuracy of recorded trip data. Additionally, NMFS plans to hire a field coordinator to collect demographic information from commercial fishermen in the mid-Atlantic, which will more readily distinguish effort in the beach-based and nearshore gillnet fisheries; and

(3) Collection of demographic data for the nearshore gillnet fisheries in the mid-Atlantic to help determine if bycatch reduction measures are necessary in nearshore gillnet fisheries. NMFS has difficulty maintaining representative observer coverage in the nearshore gillnet fishery because traditional methods used by the observer program to schedule trips are often not effective in North Carolina and, to a lesser extent, in Virginia. One difficulty arises because some of the fishermen who participate in the gillnet fishery in North Carolina use small vessels (less than 24 ft or 7.3 m) that cannot safely accommodate observers because of the boat's configuration. Additionally, fishermen often launch from private and public ramps rather than from established marinas or fishing ports, hindering an observer's ability to locate and request coverage of a gillnet trip. The demographic data collected by the field coordinator will help to identify where fishermen are launching their vessels, the size of their vessel, where they are fishing, gear type used, and species targeted, etc. These data will help: (a) NMFS determine the percentage of North Carolina gillnet fishermen who cannot be observed by traditional means based on boat size and for whom alternative vessel-based observation is necessary; (b) provide better contact information for the observer program to facilitate contacting fishermen to schedule trips; and (c) improve representative observer coverage in the nearshore gillnet fishery, thereby increasing the precision of bycatch estimates and determining the need for bycatch reduction measures.

When additional information is available, NMFS will re-evaluate all comments received regarding the proposed beach gear operating requirements and, in consultation with the BDTRT, develop bycatch reduction measures for these fisheries. If rulemaking is deemed necessary and pursued for these fisheries in the future, NMFS will consider these public comments in the development of management measures.

Comment 2: NMFS received 46 comments regarding various aspects of the proposal to extend the existing large mesh gillnet seasonally-adjusted closures into North Carolina and Virginia State waters under the ESA-based mid-Atlantic large mesh gillnet rule. Comments included both support for, and opposition to, the proposal. Other specific comments included: (1) requesting more information or additional research on sea turtle life history and distribution to better understand the appropriateness of the closures; (2) concerns about economic impacts, especially on fisheries with limited evidence of sea turtle

interactions, such as the striped bass and black drum gillnet fisheries; (3) concerns about combining ESA and MMPA regulatory processes; (4) claims that revising the large mesh gillnet size restriction to 7–inches (17.8–cm) or greater stretched mesh will cause increased finfish bycatch; and (5) requests for fishery exemptions beyond those proposed, based on economic impacts, specific fishery practices, or low observed bycatch rates.

Response: Under the ESA-based mid-Atlantic large mesh gillnet rule, NMFS is not finalizing the proposed extension of the existing large mesh gillnet seasonally-adjusted closures into State waters at this time. When the proposed rule was published, NMFS believed extending the existing closures would reduce the potential for incidental capture of sea turtles in state-managed, large mesh gillnet fisheries, as well as provide necessary conservation benefits for bottlenose dolphins. Following publication of the proposed rule, NMFS received additional information from the states of Virginia and North Carolina on the status and trends of effort in their gillnet fisheries, as well as recent and upcoming state fishery management measures not previously considered by NMFS.

Changes to the Federal monkfish fishery resulted in a number of North Carolina gillnetters obtaining permits to operate in Federal waters instead of being limited to State waters. Thus, NMFS expects that fishing in North Carolina State waters may decrease. Additionally, NCDMF began developing state management measures for large mesh gillnet fisheries that will provide protection to sea turtles similar to the proposed Federally-imposed closures of State waters. The Virginia Marine Resources Commission (VMRC) provided data showing that the state quota tag system implemented following the drafting of the proposed rule reduced striped bass large mesh gillnetting effort by approximately 70 percent. Additionally, following publication of the proposed rule, VMRC implemented regulations to further manage large mesh gillnets in State waters and to eliminate monkfish gillnetting, the fishery of primary concern in terms of sea turtle bycatch.

Therefore, upon review and analysis of the new information, NMFS determined that it is not currently necessary to extend the Federal closures into State waters, as the Federal regulations would be redundant to the newly developing state regulations without added conservation benefits. Furthermore, additional analysis was conducted that included updated state management measures, which indicated that the extension of the seasonally-adjusted closures as proposed was not necessary to reduce bycatch of dolphins to below PBR (Palka and Rossman, 2005).

Many of the comments, including those regarding economic and procedural concerns and exemption requests are no longer pertinent because the extension of the seasonally-adjusted closures into State waters is not being implemented. Additional research and data collection related to sea turtle life history, seasonal distribution, and sea turtle bycatch estimates are ongoing priorities for NMFS. Additional information is also contained in the responses to Comments 43 and 44. NMFS and the states will continue to monitor and evaluate the fisheries. If deemed necessary based on future information, including changes in the state fisheries or state management of the fisheries, NMFS will take appropriate actions to ensure adequate sea turtle conservation measures are in place.

Under this final action, NMFS will amend the mid-Atlantic large mesh gillnet rule (67 FR 71895) as proposed to revise the large mesh gillnet size restriction to include gillnets with a stretched mesh of 7 inches (17.8 cm) or greater, instead of the current limitation of greater than 8–inches stretched mesh (20.3 cm). Some comments expressed concern that this measure would require fisheries to change the mesh sizes used to below 7 inches (17.8 cm), and potentially increase finfish bycatch. However, commercial fishermen will not need to change their gillnet mesh size as a result of the revision. The revision does not mandate a change in gear for any fishery. Rather, this measure involves a nomenclature change, i.e., the size of mesh used that constitutes large mesh nets for purposes of the regulation. Additionally, based upon review of information on state and Federal fisheries, the revision will not bring any new fisheries under the regulations, as no fisheries currently use standard gear from 7 inch (17.8 cm) to 8 inch (20.3 cm) stretched mesh. This final action will merely align the existing Federal large mesh gillnet regulation with other state and Federal management definitions of ''large mesh gillnets,'' including that in the BDTRP. Furthermore, since the Federal seasonally-adjusted closure will not be extended into State waters, there is no practical impact to any state fisheries from this terminology clarification.

Comment 3: NMFS received approximately 30 comments and a petition with 113 signatures regarding various aspects of the proposed gear marking requirements in § 229.35(d)(1) and (2) of the proposed rule. Comments included: (1) claims that using 3–foot (0.91 m) flags on the ends of gillnets in shallow waters is not feasible; (2) assertions that identification tags will foul gear; (3) questions regarding the rationale for requiring identification tags every 100 feet (304.8 m) and using 3–foot flags (0.91 m) on the ends of gillnets in shallow waters; (4) concerns that the proposed gear marking requirements will create potential conflicts with current state gear marking requirements, as well as be redundant and overly burdensome; (5) requests to exclude gear marking requirements from exempted waters; (6) petitions requesting exemptions to the gear marking requirements for North Carolina beach seine fishermen; (7) concerns about the cost associated with the proposed gear marking requirements; and (8) recommendations for more feasible gear marking options. Recommendations were also received from the BDTRT during the public comment period on how to amend the gear marking requirements to address some of these concerns.

Response: The BDTRT recommended gear marking requirements primarily to aid in enforcement of time and area restrictions on gear types and tending requirements. A secondary objective was to allow for a better means to identify gear found on stranded or entangled dolphins and linking that gear back to a specific fishery to ensure that BDTRP regulations are applied accordingly.

After reviewing all received comments and recommendations and re-evaluating current gear marking requirements in each state affected by the BDTRP, NMFS determined that current state gear marking requirements are meeting the primary purpose for proposing the gear marking requirements. Although the states' gear marking requirements will not accomplish the secondary purpose for proposing the gear marking requirements, namely, requiring identification tags every 300 feet (91.4 m) along the floatline of Category I and II fishery nets to facilitate monitoring, NMFS does not believe it is necessary to duplicate gear marking requirements at this time. Duplicating gear marking will unnecessarily burden commercial fishermen and create confusion between state and Federal requirements. Bycatch objectives will still be met without finalizing these requirements because gear marking requirements would not directly reduce bycatch of bottlenose dolphins.

Each state affected by the BDTRP requires either a buoy and/or flag to be attached to the floatline of gillnets or crab traps/pots, or at the ends of gillnets and crab traps/pots, with a form of identification inscribed on the buoy or float. Some states also require these flags or buoys be of specific dimensions and color. Georgia is the only state that does not require gear marking, but they also prohibit the use of gillnets within State waters.

NMFS will continue to monitor the status of each state's gear marking requirements to ensure they continue to meet the objectives of the BDTRP. Additionally, NMFS recently funded a study to evaluate various forms of identification tags along the floatline of gillnets to assess their practicality. The objectives of the study were to deploy 6 different gear and identification tag markings, test each for longevity, and quantify burden and monetary costs of maintaining each under normal field operations (Hager, 2005). This and future studies will help to identify more effective and practical means of marking gear.

Comments in Support of the Rule

Comment 4: Over 4,000 letters of similar content urged NMFS to finalize all proposed regulations as soon as possible and supported inclusion of the proposed seasonally-adjusted closures in North Carolina and Virginia State waters for sea turtle protection.

Response: NMFS is working expeditiously to finalize the regulations. However, the seasonally-adjusted closures for North Carolina and Virginia State waters, proposed as an amendment to the mid-Atlantic large mesh gillnet rule, were deemed unnecessary upon analysis of additional information and are not contained in this final rule (see Comment 2).

Comment 5: One commenter applauded NMFS for proposing to take a holistic view of commercial fisheries by combining the two proposed rules (BDTRP and amendments to the mid-Atlantic large mesh gillnet rule) to benefit protected species, which would streamline the regulatory structure for the affected commercial fishermen. The commenter supports NMFS' continued efforts in taking a holistic approach, including providing the TRT with the best available sea turtle data and access to sea turtle experts in order to assist them in their deliberations.

Response: NMFS agrees and will continue to work towards a holistic management approach, where possible, that will benefit all protected species while minimally impacting commercial fishermen. The Agency will also invite knowledgeable protected species experts to attend future BDTRT meetings and other TRT meetings as necessary.

Comment 6: One commenter concurred with the proposed recommendations for crab trap/pot-related non-regulatory actions. The commenter also agreed that additional gear marking requirements for the Atlantic Blue Crab Pot/Trap fishery are not necessary.

Response: NMFS recognizes the importance of non-regulatory measures for the crab trap/pot fishery. This fishery is known to incidentally take bottlenose dolphins but is a difficult fishery to formally observe. In 2004, NMFS provided funds for a study to investigate the effectiveness of using inverted crab trap/pot wells to prevent dolphins from tipping pots and entangling in the gear. Additionally, in 2005, NMFS provided funds for a study to examine the behavior of crab trap/pot buoy lines in the water with respect to various factors, such as water depth. The results will help NMFS and the BDTRT determine whether modifications to existing gear practices are necessary to reduce the potential for dolphin entanglement.

Comment 7: One commenter agreed with the proposed requirement for the Southeastern U.S. Atlantic shark gillnet fishery stating that NMFS should allow the fishery to continue in the EEZ and that gear should be removed from the water and stowed onboard the vessel before the vessel returns to port. The commenter noted the difficulty in enforcing the 0.25 nautical mile (0.46 km) proximity requirement but supported the requirement in absence of other bycatch reduction measures. The commenter also agreed with the gear marking requirements as proposed.

Response: NMFS generally agrees with the commenter. However, after review of the states' current gear marking requirements, NMFS believes finalizing additional gear marking requirements are redundant and not necessary (see Comment 3).

Comments in Opposition to the Rule

Comment 8: One commenter noted that NMFS maintains the authority to implement additional, more conservative measures than those recommended by the BDTRT, in order to meet the statutory requirements of the MMPA. However, there is no reason to deviate from the BDTRT's recommendations by decreasing conservation protection measures, which is the case by not implementing the recommendation for mandatory bycatch certification training or for small mesh fisheries in North Carolina to haul their gear once every 24–hours.

Response: When assessing the BDTRT's Consensus Recommendations, NMFS analyzed if the measures would reduce the bycatch of coastal bottlenose dolphins to below PBR under the MMPA and if they were feasible to enforce and implement without undue burden on the commercial fishermen and the Agency. NMFS also considered whether the Agency would have the ability to monitor and evaluate the effectiveness of the management measures implemented.

Regarding the two examples mentioned above, NMFS recognizes the importance of bycatch certification training for affected commercial fishermen, which is why workshops and dockside visits are included as non-regulatory measures in the BDTRP. However, NMFS determined that a mandatory bycatch certification program is not warranted at this time because of the immense effort required to ensure that all active commercial fishermen participate in the workshops. Instead of a mandatory bycatch certification program, NMFS will focus on outreach and education measures for the affected fishing industry. These measures include: (1) voluntary workshops conducted at major ports along the east coast of the United States to inform commercial fishermen about the requirements of the BDTRP; (2) dockside visits conducted by Fishery Liaisons; (3) a website dedicated to BDTRP-related information; and (4) educational materials (i.e., brochures, placards, decals, etc.) distributed by mail to all affected commercial fishermen. NMFS believes that conducting these various voluntary outreach and education opportunities, rather than mandatory certification training, will facilitate participation and understanding of the BDTRP and provide more educational opportunities for affected commercial fishermen.

NMFS did not support the requirement to haul small mesh gear once every 24 hours in the Winter Mixed and Summer Northern North Carolina MUs because fishery data revealed that 98 percent of the observed hauls soaked for less than 24 hours. This measure would also be difficult to enforce because it would be difficult to accurately ascertain the length of time the gear was in the water and if it was actually hauled once during the 24–hour period, unless enforcement agents monitored the gear for the 24–hour period. Therefore, it was determined that the minimal potential benefits would be far outweighed by the

potential costs related to monitoring and enforcing the restrictions.

Comment 9: One commenter stated that the combination of the proposed actions into one proposed rule to implement the BDTRP and amend the mid-Atlantic Large Mesh Gillnet rule alters the recommendations for the BDTRP, as agreed to by the BDTRT. It also creates confusion as to which rule should be followed and why.

Response: NMFS acknowledges that combining the proposed actions created some confusion, and this final rule attempts to clarify the regulatory requirements for each action. NMFS disagrees that the combination of the proposed rules altered the BDTRT's recommendations. As noted in the response to Comment 5, NMFS was working towards a holistic management approach by combining these two actions, as the BDTRT noted in their team deliberations that the extension of the mid-Atlantic large mesh gillnet rule into North Carolina State waters would provide conservation benefits for dolphins in this area. Also noted in Comment 2, the amendments to the mid-Atlantic large mesh gillnet rule to include seasonally-adjusted closures in North Carolina and Virginia State waters were deemed unnecessary after review of additional information and are not finalized herein.

Comment 10: NMFS inappropriately allowed members of the BDTRT to discuss altering ESA regulations. ESA regulations for sea turtles cannot be altered unless they have undergone an ESA section 7 consultation, and NMFS should not have allowed a stakeholder team to craft exemptions for particular fisheries without benefit of scientific evidence on how those exemptions might alter bycatch of listed sea turtles.

Response: As noted in Comment 2, the amendments to the mid-Atlantic large mesh gillnet rule to include seasonally-adjusted closures in North Carolina and Virginia State waters, including the striped bass exemptions, are not included in this final rulemaking. These proposed amendments were developed separately from the BDTRT process, and the requirements under the ESA were not altered by the BDTRT recommendations nor did NMFS delegate ESA authority to the BDTRT. The BDTRT discussed how amendments to the mid-Atlantic large mesh rule, specifically extending the seasonally-adjusted closures into North Carolina State waters, would contribute to dolphin conservation in that MU and made recommendations to include this conservation benefit in their Consensus Recommendations. The BDTRT recognized that including this amendment might have an incidental impact on the striped bass fishery, and therefore, recommended an exemption for this fishery. However, the need for this proposed exemption was also identified by NMFS staff working on the sea turtle conservation measures.

NMFS recognized that combining the two actions, the BDTRP and the amendments to the mid-Atlantic large mesh gillnet rule, into one proposed and final rule package would allow the agency to work towards a holistic management approach that would benefit all protected species, while providing consistency in management. A section 7 consultation under the EPA is required for all Federal actions. Consultation was completed for both the proposed and final rule (see Comment 65).

Comments Related to the BDTRT

Comment 11: One commenter stated that the BDTRT should allow for adaptive management and be reconvened in the event that there are changes in fishing effort.*Response:* NMFS agrees and will reconvene the BDTRT on a regular basis, as mandated by the MMPA.

Comments Related to Collaboration/ Cooperation

Comment 12: One commenter requested that NMFS consider acknowledging or exempting licensed or unlicensed legal gillnet research activities that may occur in State waters.

Response: NMFS agrees that some gear research activities should be exempt to allow for continued development of gear modifications. Exemptions for gear research are not included in this final rule to implement the BDTRP but may be included in future amendments to the BDTRP. Exemptions for research activities in State waters will be closely coordinated with state resource management agencies.

Comment 13: One commenter stated that NMFS should work more closely with all the state gillnet fisheries throughout the Mid-Atlantic region to significantly reduce sea turtle mortality.

Response: NMFS understands the importance and value of collaborative efforts with state agencies for the development of management measures. NMFS has been working and will continue to work cooperatively with VMRC and NCDMF to reduce sea turtle mortality in State waters. Specifically, NMFS worked closely with NCDMF and VMRC regarding the proposal to extend the seasonally-adjusted large mesh gillnet closures into State waters as a sea turtle conservation measure. As a result, new information not previously considered on the status and trends of the state gillnet fisheries was incorporated into the analyses. The cooperation between NMFS and the states also led VMRC to enact new gillnet fishery regulations and NCDMF to draft management measures for regulating gillnet fisheries, which will be implemented in the upcoming months. As a result of the new information, analyses, and developments that arose from the cooperation between NMFS and state agencies, it was determined that the proposed measures regarding seasonally-adjusted closures would not provide additional conservation benefit to sea turtles in North Carolina and Virginia State waters (see also Comment 2). Furthermore, through its Strategy for Sea Turtle Conservation and Recovery in relation to Atlantic and Gulf of Mexico Fisheries, NMFS is examining sea turtle interactions with fishing gear throughout the Atlantic coast.

Comment 14: One commenter urged NMFS to work with the states to find an equitable solution to conserve protected resources while making allowances for people who, in an economically disadvantaged area, seek to make a living working on the water.

Response: As noted in Comment 13, NMFS understands the importance and value of working cooperatively with state representatives to develop and implement management measures for protected species. In developing this final rule, NMFS worked cooperatively with several states to ensure sea turtles were not incidentally taken in commercial fisheries, while considering the economics of the fishery for specific areas. NMFS also worked with state representatives from New York, New Jersey, Maryland, Delaware, Virginia, North and South Carolina, Georgia, and Florida, as well as all active BDTRT members on bottlenose dolphin conservation measures. State representation on the TRT provides an opportunity for state agencies to bring to light specific issues of economic hardship that may arise from proposed management actions. Such issues are taken into consideration during the TRP process to help ensure that management measures are not placing undue economic hardship on fisheries, while still providing the resource protections mandated by the MMPA and other Federal laws. More in depth economic analyses are then considered in the EA.

NMFS also carefully reviews and considers any comments from state agencies during the proposed rule process. Based on comments received from the states, and others, NMFS is

modifying the final rule to: (1) omit the gear marking requirements because all the states affected by the BDTRP currently maintain their own gear marking requirements (see Comment 3); and (2) omit the beach gear operating requirements and conduct additional research on the North Carolina roe mullet stop net fishery (see Comment 1). Accounting for management measures the states already have in place and modifying the final rule accordingly reduces any additional economic hardship on commercial fisheries.

Economic Analysis

Comment 15: The prohibition of monofilament webbing 300 feet (91.4 m) from the beach/water interface was not a recommendation of the BDTRT but was proposed by NMFS. It is not clear that NMFS fully evaluated the economic impacts to all the commercial fisheries that would be impacted by this proposed measure, including North Carolina roe mullet stop net, striped bass, striped mullet, spot, croaker, etc.

Response: Review of the analyses of impacts of this proposed measure indicate that they indeed captured the impacts on those fisheries characterized as unintentionally impacted. However, as discussed in Comment 1, the beach gear operating requirements are not contained in this final rule.

Comment 16: The economic analysis does not contain information regarding the conditional exemption of the Virginia striped bass fishery and potential loss this will cause. The conditional exemption stipulates fishing practices that are not common to Virginia.

Response: As described in the draft EA, due to data limitations, large mesh fishing activity was identified based on species landed as reported in the trip ticket information. Striped bass dominated the large mesh gillnet trips in Virginia, accounting for 97 percent of the trips and harvests. Thus, the analysis concluded that a striped bass exemption would eliminate almost all negative impacts associated with this measure because 97 percent of the trips in Virginia were classified as large mesh gillnets harvesting striped bass. Because the proposed striped bass exemption did not reflect current fishing practices in Virginia, the economic analysis concluded that the estimated impacts for the proposed exemption were almost equal to the impacts if no striped bass exemption were proposed. However, the proposed seasonally-adjusted closures in which the striped bass fishery was offered an exemption is not finalized herein (see Comment 2). Therefore, there are no associated economic impacts.

Comment 17: There were some misleading statements about the economic loss in Virginia from the amendments to the mid-Atlantic large mesh gillnet rule by including the entire gillnet fishery in the revenue loss. Additionally, the 2002 data set used for economic analyses presents potential bias, as the Virginia catch, seaward of the COLREGS line, for 2002 was 20 percent less than 2001 and 2003 catches.

Response: The economic impact analysis of a regulatory action requires an examination of both the impact of the action on the economic performance of an entity in the specific fishery regulated, as well as the impact on the overall ability of the entity to continue operation as a commercial fishing entity. Thus, it is necessary to examine revenues from the specific sector being regulated; for instance, large mesh gillnet fishing, as well as all other gears fishermen use over the course of the entire year. While economic behavior in a given fishery or gear sector may be significantly impacted by a regulation, operation in that sector may not be significant relative to overall fishing activity due to diversification into multiple fisheries.

The data set used for the analysis encompassed portions of 2000 and 2001. It is recognized that variability in harvests occurs from year to year. However, the data set used was selected to be consistent with the biological analysis on which the required take reductions were based.

Additionally, NMFS is not finalizing the proposed extension of the existing large mesh gillnet seasonally-adjusted closures into State waters at this time. Therefore, the economic impacts evaluated for that proposed action will not occur.

Comment 18: Two commenters addressed the economic analysis in general stating that it was the last thing to be examined, and the economic impact analyses for small entities were flawed.

Response: The economic analysis was initiated and conducted upon development of the alternatives, as directed by the applicable law. NMFS did not select the alternatives contained in the final rule until all economic analyses were complete and public comments reviewed. The final rule, therefore, reflects consideration of both the economic analysis and public comments received on potential impacts of the proposed rule. Consistent with public comment, the economic analysis concluded that, while the rule was not expected to have an overall significant impact on a substantial number of small entities, certain measures were projected to significantly affect some individual participants and sub-sectors of the gillnet fishery.

Comments Related to Enforcement

Comment 19: Enforcement of the regulation is crucial to the success of the program.

Response: NMFS recognizes that enforcement is critical to the success of the BDTRP to reduce serious injury and mortality of bottlenose dolphins. NMFS will work with its Office of Law Enforcement, the U.S. Coast Guard, and state enforcement agents to ensure effective enforcement of the final rule.

Comment 20: One commenter stated that the biggest problem with the proposed rule is the ease with which fishermen will be able to circumvent the requirements.

Response: The combined efforts of Federal, state, and local enforcement agents will be instrumental in ensuring that commercial fishermen comply with these measures. Morever, commercial fishermen and industry representatives comprise approximately one-third of the BDTRT, and can assist NMFS with compliance via outreach to the fishermen they represent. Additionally, through the non-regulatory measures of the BDTRP, NMFS established mechanisms to help facilitate compliance with the regulatory measures. These will include several workshops and dockside visits to educate affected commercial fishermen on all aspects of the BDTRP, a website to facilitate dissemination of important compliance information to fishermen, and other outreach materials. NMFS also hired a Fishery Liaison to interact with the commercial fishing industry and help increase compliance with this final rule through these outreach endeavors.

Comment 21: Net length restrictions are currently used in the Harbor Porpoise Take Reduction Plan (HPTRP). However, they are difficult to determine at sea, inhibiting the ability of Coast Guard to actively enforce this measure.

Response: The use of net length restrictions is not a novel approach in fishery or marine mammal management and has been shown to be an effective management tool, especially when used in tandem with other management measures, such as area restrictions. NMFS Law Enforcement Agents and the U.S. Coast Guard have established protocols for measuring net lengths. While at sea enforcement of net length restrictions may be more difficult than other types of gear restrictions, the

difficulties do not outweigh their usefulness as an effective management tool.

Comment 22: One commenter stated that establishing one proximity distance for gillnets would facilitate enforcement. The proposed rule recommended a tending distance of 0.5 nautical mile (0.93 km) for medium and large mesh gillnets in New Jersey through Virginia during the summer and 0.25 nautical mile (0.46 km) tending distance for South Carolina, Georgia, and Florida year-round. Although previously considered and rejected, requiring the net to be attached to the vessel might be a better alternative for enforcement.

Response: NMFS believes the BDTRT's recommendations provide adequate reduction in serious injury and mortality of bottlenose dolphins while allowing flexibility in fishing technique per geographic area. The BDTRT did not recommend the same proximity distance for all MUs because of seasonal distributions of dolphins and different fishing techniques in those geographic areas. They did not recommend that the net be attached to the vessel because some fishermen use several nets at the same time, and requiring fishermen to attach the end of the net to their vessel would not allow flexibility in fishing technique.

Comment 23: One commenter referred to the Atlantic States Marine Fishery Commission's guidelines that recommend possession of restricted gear be prohibited, as it is easier to prove possession than it is to prove use.

Response: NMFS believes the rule will achieve necessary reduction in serious injury and mortalities for bottlenose dolphins, while allowing commercial fishermen the ability to stow and transport restricted gear for use during unrestricted times. The BDTRT did not discuss prohibiting such gear but recommended restricted gear be stowed on board the vessel before the vessel returns to port. Prohibiting possession of restricted gear altogether would unnecessarily restrict commercial fishermen. Furthermore, the states' gear marking requirements will enable enforcement officers to identify gear left in the water during restricted times.

Comment 24: Two commenters focused on the difficulty of adequately enforcing the requirements, specifically, gear tending and net length restrictions.

Response: NMFS believes that both gear tending and net lengths requirements are enforceable. These measures were recommended by the BDTRT, and were based on similar requirements used in other TRPs as management measures.

Comment 25: NMFS should initiate surprise boardings of vessels to ensure commercial fishermen are implementing these management measures.

Response: NMFS agrees, as is indicated by the fact that surprise boardings are a routine enforcement tool.

Comment 26: One commenter noted that the proposed rule only solicits state and local marine patrol aid in supporting the stranding network and does not address the recommendation to include requesting that Federal enforcement agents monitor inside waterways and Federal waters for bottlenose dolphin interactions with commercial fisheries to enhance geographic coverage and improve reporting/response of the stranding program. NMFS should modify the rule to address the recommendation to formally request that Federal, state, and local marine patrols monitor inside waterways for dolphin interactions with commercial fisheries.

Response: It is NMFS' intent to include Federal agents, in addition to state and local marine patrols, in this endeavor.

Comment 27: One commenter stated that no time frame is given as to when NMFS enforcement agents would attend future BDTRT meetings.

Response: NMFS enforcement agents will continue to participate in the BDTRT process.

Comments Related to Gear Research

Comment 28: NMFS should consider initiating a cooperative, volunteer research program.

Response: NMFS agrees that there is value in working cooperatively with other entities, and the Agency is currently working cooperatively with many academic institutions, state agencies, and other Federal agencies to conduct research. Within those cooperative working relationships, there are opportunities for interested individuals to volunteer their time to help accomplish NMFS' research endeavors.

Comment 29: Alternative gear technology should be explored as a way to reduce harmful interactions with marine animals. The proposed rule mentions gear modification research projects that were recommended by the BDTRT and will be implemented; however, there is no mention of who will implement these projects and how they will be funded.

Response: NMFS agrees and intends to continue funding gear research in the foreseeable future. NMFS allocated $100,000 for BDTRP-related gear research in both 2004 and 2005. NMFS is currently working cooperatively with North Carolina and Virginia Sea Grant Offices on various gear research projects. The BDTRT also recommended several gear research projects that are currently being investigated by state agencies and academia in cooperation with commercial fishermen. NMFS receives final reports at the conclusion of all research projects and research results will be presented to the BDTRT at future meetings.

Comment 30: NMFS should continue to evaluate specific gear characteristics with respect to their entanglement risk (i.e., mesh size compared to net material or net stiffness).

Response: The BDTRT recommended several gear research projects to evaluate the effects of changing gear mesh sizes, net material, twine stiffness, flotation, and bridle configuration to determine if modifying these characteristics would reduce the risk of dolphin entanglements while allowing the commercial fishermen to maintain their levels of catch. Members of academia, in collaboration with commercial fishermen, are currently investigating many of the BDTRT's recommended projects. Updates were presented to the BDTRT at the January 2005 meeting on gear research projects funded to that date. Results on projects that were funded after the BDTRT meeting will be forwarded to the BDTRT once the final results are provided to NMFS.

Comment 31: One of the proposed gear research projects for the BDTRP is to investigate lowering float lines in shark gillnets, which was estimated to cost $100,000. This money would be better spent buying out this fishery instead of conducting gear research projects, as there are so few participants in the fishery.

Response: NMFS does not agree that a buyout of the Southeast Atlantic shark gillnet fishery is a viable option for reducing bottlenose dolphin mortality to below PBR as required by the MMPA. The BDTRT recommended several gear research projects in their May 2002 Consensus Recommendations, including lowering float lines in the Southeast Atlantic shark gillnet fishery. NMFS aims to fulfill the gear research recommendations of the BDTRT and may explore other options for this fishery given the few participants.

Comments Related to Implementation Delay

Comment 32: NMFS provided updated data at the January 2005 BDTRT meeting. Therefore, NMFS should delay the rulemaking process to

allow for additional BDTRT meetings in which further updates are provided and for the BDTRT to make conservation recommendations, based on any updates, in the same manner they were invited to previously.

Response: The BDTRT provided Consensus Recommendations to NMFS based on a comprehensive 5–year dataset (1995–2000) that was thoroughly reviewed throughout the course of six meetings. At the January 2005 BDTRT meeting, NMFS provided the BDTRT with an update on mortality estimates for coastal bottlenose dolphins in each MU based on a two-year dataset (2001–2002). However, abundance estimates for this new time frame are still not available. NMFS does not believe reconvening the BDTRT for a full review of data, without updated abundance estimates, is warranted at this time. NMFS intends to reconvene the BDTRT once this final rule has been effective for at least 6 months. At that time, NMFS will provide the BDTRT with updated information on both abundance and mortality. This will allow the BDTRT to evaluate the effectiveness of the BDTRP in meeting its objectives and determining whether modifications are warranted.

Comment 33: Six commenters suggested that NMFS account for the time needed to acquire new gear when finalizing the rule and to delay components of the rule, as necessary, based upon the need to acquire new gear. NMFS should consider delaying the effective date of the rule 6 months to a year to allow fishermen time to acquire any new gear or webbing necessary to comply with the final rule, specifically for the gear marking and beach gear operating requirements as proposed.

Response: NMFS will not delay implementation of any portions of this final rule, beyond the usual 30–day delay (see Comment 34), because the beach gear and gear marking requirements are not included in this final rulemaking (see Comments 1 and 3, respectively). These were the only two requirements in the proposed rule that required the purchase of new gear or equipment.

Comment 34: These new measures should be delayed to allow adequate time for the affected commercial fishermen and states to review them.

Response: Following publication of the final rule in the **Federal Register**, there is an automatic 30–day implementation delay to allow time for affected commercial fishermen to review and comply with the requirements. During this time, NMFS will advise affected commercial fishermen on the components of the final BDTRP through workshops, dockside visits, and written informational materials.

Comments Related to Management Approach

Comment 35: One commenter stated that under the Marine Mammal Authorization Program (MMAP), which allows the incidental take of marine mammals while commercial fishing, fishermen should be exempt from regulations during severe weather conditions.

Response: The MMAP allows for the taking of marine mammals during commercial fishing operations as long as the fishermen have registered under the Program, report all injuries and mortalities, carry an observer when requested to do so, and comply with applicable TRPs and emergency regulations. The safety of commercial fishermen is a priority to NMFS. In severe weather conditions, NMFS understands that concerns for human safety are more important than fishing gear, and that fishermen may be unable to retrieve gear in certain conditions. However, fishing gear is the fishermen's responsibility and fishermen should try to anticipate future weather patterns and plan accordingly to the extent practicable.

Comment 36: One commenter stated that the proposed measures would prevent most interactions with dolphins and sea turtles as both are in the area at the same time and questioned why NMFS was proposing to close areas at times when neither species is around.

Response: The management measures contained in this final rule are based on the best available scientific data. NMFS is not closing areas or regulating fisheries in which there was no observed serious injury and mortality of bottlenose dolphins. Additionally, this final rule is not implementing the proposal to extend the seasonally-adjusted closures for sea turtles into North Carolina and Virginia State waters (see Comment 2).

Comment 37: One commenter recommended NMFS prohibit the use of shark gillnet gear in EEZ waters off the Southeastern U.S. coast or, at a minimum, off Georgia, because this fishery only consists of approximately six vessels, several of which are part-time.

Response: Although there is limited participation in this fishery and the fishery is known to incidentally take bottlenose dolphins and sea turtles, NMFS does not believe prohibiting this fishery is warranted at this time. Under the BDTRP, bottlenose dolphin mortalities are currently at or below PBR levels in the South Carolina, Georgia, and Florida MUs, and therefore, do not require further management measures than what are implemented in this final rule to achieve the short-term requirement of the MMPA to reduce serious injury and mortality. Regarding takes of sea turtles, the Biological Opinion for the Highly Migratory Species Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks (HMS FMP) determined that the continuation of this fishery will not jeopardize sea turtle species. Additionally, this fishery is actively managed under the Atlantic Large Whale Take Reduction Plan (ALWTRP), and the HMS FMP requires a high level of observer coverage for all fishery participants.

Comment 38: NMFS should prohibit all gillnet, driftnet, trawling, and longline gear.

Response: Prohibiting driftnet, trawling, and longline gear is not within the scope of this final rule. NMFS evaluated all fisheries that interact with the coastal bottlenose dolphin stock and will continue to do so each year under the List of Fisheries process. These final management measures were developed to offer regulatory and non-regulatory measures for only those Category I and II fisheries that are causing incidental mortality and serious injury of coastal bottlenose dolphins above PBR levels.

Comment 39: One commenter requested that NMFS extend the public comment period in order to give sufficient time for fishermen to comment due to their demanding schedules.

Response: While NMFS understands the demands and limitations of commercial fishing, NMFS believes it has provided the public ample time to review, attend public hearings, and submit public comments on the proposed rule. The public comment period was open for 90 days, which is the maximum time allowed under the MMPA, and NMFS conducted two public hearings during the public comment period. NMFS also contracted with a Fishery Liaison who conducted several group meetings during the public comment period to answer commercial fishermen's questions on the proposed rule and advise them on the procedure for submitting comments. NMFS received extensive and constructive comments on the proposed rule from fishermen and fishery organizations.

Comments Related to Mortality and Abundance

Comment 40: Several comments addressed abundance surveys of coastal bottlenose dolphins. Approximately 1,085 comments received via an E-mail letter of similar content urged NMFS to seek the necessary funding to improve bottlenose dolphin and sea turtle abundance surveys, as well as bycatch estimates, to ensure that the regulations provide sufficient protection. One commenter recommended that research initiatives prioritize bottlenose dolphin abundance surveys in waters southward of North Carolina and in bay and estuarine waters. Another commenter questioned whether and how efforts are made to determine if populations are increasing or decreasing, specifically in the Pamlico Sound area.

Response: NMFS recognizes the importance of providing sufficient funds to improve abundance and bycatch estimates for coastal bottlenose dolphins and sea turtles and will allocate such funding as available. For coastal bottlenose dolphins, NMFS places priority in conducting abundance surveys for all MUs within the range of the stock, including waters south of North Carolina and in bay and estuarine waters. Therefore, continued research on bottlenose dolphin stock structure and refinements of abundance estimation techniques are specifically included as non-regulatory components of this final rule.

NMFS recently conducted its summer (July 1 – August 15, 2004) and winter aerial (January 27 – February 28, 2005) surveys of coastal bottlenose dolphins to update abundance and distribution patterns between the areas of Cape Canaveral, Florida, and Delaware Bay, Delaware. Techniques to further refine stock structure were used in conjunction with the aerial surveys, including genetic and stable isotope analyses, telemetry studies, and photo identification. The results from these efforts are not yet available but NMFS will provide them to the BDTRT at future meetings and will also include them in updates to the Marine Mammal Stock Assessment Reports (*http://www.nmfs.noaa.gov/pr/PR2/Stock_Assessment_Program/sars.html*).

Aerial survey efforts for the coastal bottlenose dolphin stock were originally conducted in 1995 and updated in 2002. The survey methods are detailed in Garrison et al. (2003) and results of both efforts are reported in the final EA and the 2002 Stock Assessment Report (NMFS, 2002). The data from these surveys were used by the BDTRT to develop their 2002 and 2003 Consensus Recommendations on which NMFS based this final rule to implement the BDTRP.

Estuarine waters were not included in the 2002 abundance estimates. Other studies, however, were conducted to measure bottlenose dolphin abundance in estuarine waters, specifically Pamlico Sound, and were reviewed by the BDTRT. Read et al. (2003) conducted a mark-recapture study of bottlenose dolphins in Pamlico Sound and identified 306 individual dolphins.

Regarding sea turtle abundance estimates, NMFS, along with state resource agencies, have continuing programs that provide information to determine seasonal abundance, migratory routes, and important sea turtle habitats. Observer program data from fisheries and research conducted and/or funded by NMFS, as well as other information, are used to better understand sea turtle use of nearshore waters. Further research will continue to enhance our understanding of sea turtle ecology.

Comment 41: It is unclear whether bottlenose dolphins or sea turtles are present in the waters north of Cape Charles, Virginia from late November through January. These data are essential to evaluate bycatch reduction for both bottlenose dolphins and sea turtles from large mesh fisheries, such as striped bass, that may occur in State waters during that time.

Response: NMFS agrees that abundance data are necessary for evaluating whether bycatch reduction of bottlenose dolphins and sea turtles in affected fisheries is occurring at various times of the year. Bottlenose dolphin and sea turtle occurrence are known to be correlated with sea surface temperatures (Barco *et al.*, 1999; Coles, 1999; Epperly *et al.*, 1995; Garrison *et al.*, 2003; and Lutcavage & Musick, 1985). However, interannual variability in sea surface temperatures hinders NMFS' ability to conclusively determine abundance levels in northern areas during the winter. Therefore, aerial surveys and continuing observer coverage of fisheries operating at that time are the best ways to assess the potential risk to these species. Bottlenose dolphin bycatch in large mesh fisheries is recorded in observer reports for this area during winter. Three separate bottlenose dolphins entanglements were observed in the striped bass fishery off Virginia Beach during the months of November and March. There were no observed takes of sea turtles during this time.

The conservation measures implemented in this final rule are designed to aid in reducing interactions in these areas. Additionally, the VMRC instituted a striped bass quota system in 2003 that will also aid in decreasing interactions with protected species, as the striped bass fishery effort was reduced by about 70 percent. VMRC also enacted a regulation in May 2005 to further reduce the presence of large mesh gear in State waters by restricting the monkfish fishery. NMFS is confident that these conservation measures will reduce takes of coastal bottlenose dolphins and sea turtles despite the uncertainty in their northern distribution during the winter.

Comment 42: The Winter Mixed MU (which includes the Northern Migratory, Northern and Southern North Carolina MUs) has an estimated bycatch of 151 with a PBR level of 67.8. Why is the estimated bycatch in this MU so high and are all 151 animals a result of commercial fishing effort?

Response: Data presented to the BDTRT by Rossman and Palka (2001) indicate that total bottlenose dolphin bycatch rates were highest in the Winter Mixed MU, which includes the coast of North Carolina and southern Virginia. Bycatch rates for this MU ranged from 211 dolphins per year in 1997 to 146 dolphins in 2000. Most of these takes occurred in North Carolina with fewer takes in Virginia waters.

As discussed in Comment 43, estimating bycatch is based on observed takes, as well as other variables, such as seasonal MU, distance from shore, and gillnet mesh size. Also noted in Comment 46 was Palka and Rossman's (2001) determination that distance from shore and gillnet mesh size were the two factors exhibiting the strongest correlation to increased bycatch estimates. Based on Palka and Rossman's (2001) analyses, estimated bycatch was highest in the Winter Mixed MU because large mesh landings (an indicator of effort) were increased in State waters during the winter, and observed takes were highest in this MU. [This doesn't really answer the question of why the bycatch was so high.] The data used to estimate bycatch came directly from commercial fisheries and were based on both observer and landings data. Of the 151 bycaught animals, almost half (45 percent) were from the large mesh fishery targeting monkfish, striped bass, or black drum. One-third (36 percent) of the 151 bycaught animals were from the medium mesh fishery targeting dogfish, shad, king Mackerel, sharks, or fluke.

Comment 43: Several commenters suggested that the data on bottlenose dolphin serious injury and mortality from commercial fisheries are biased because NMFS presumes that

commercial fisheries cause all mortalities in which cause of death is not conclusive.

Response: The data used to calculate total mortality of coastal bottlenose dolphins per MU were based on the best available information. Information from observer coverage data are the only data used to estimate mortality rates of coastal bottlenose dolphins per fishery. The observer program randomly selects vessels to reduce the potential for bias. Further, the statistical method applied to the observer data to generate total bycatch estimates has a lower statistical bias in comparison to other methods, such as the ratio-estimator (Cochrane, 1977) and Delta Method (Pennington, 1996).

Rossman and Palka (2001) used a standard statistical model, called a generalized linear model (GLM), to estimate total bottlenose dolphin bycatch. The GLM quantifies the relationship between the number of observed takes and several variables, which include observed landings, seasonal MU, body of water (Federal or State waters), and mesh size (small, medium, and large). Landings and observer data from November 1995 through October 2000 were used to estimate bycatch. Two data sources were used to determine landings: (1) the NMFS Northeast Region dealer-reported commercial landings database; and (2) the NCDMF trip ticket program database (Palka and Rossman, 2001). Although limitations exist in using landings as a measure of effort, landings, as recorded on trip tickets, are the best available information to quantify effort. NMFS plans to explore other measures of effort in order to reduce these limitations.

Comment 44: One commenter asked why NMFS is proposing to regulate small mesh gillnets under the BDTRP when large mesh gillnets are the problem.

Response: Based on information from observed takes, NMFS believes it is necessary to regulate the small mesh gillnet fishery through this final rule to achieve the objectives of the BDTRP. The only regulation for the small mesh gillnet fishery included in this final rule is a requirement that net lengths be less than or equal to 1,000 ft (304.8 m) to reduce bycatch of the Summer Northern North Carolina MU. The proposed rule to implement the BDTRP also included measures to regulate small mesh gillnets and beach seines within the first 300 ft (91.4 m) of the beach/water interface. As stated in the response to Comment 1, NMFS is not including regulations for beach gear in this final rule.

Regulations for small mesh gear are necessary because estimated serious injury and mortality are above PBR for the Summer Northern North Carolina MU. The bycatch rates were highest for the large mesh fisheries and lowest for the small mesh fisheries. However, fishing effort for the small mesh fishery was higher than those for medium and large mesh fisheries. Combining lower bycatch rates and higher fishing effort results in an estimated bycatch for the small mesh fisheries nearly equal that of the large mesh fisheries.

Specifically, there were three observed takes of coastal bottlenose dolphin in the Spanish mackerel fishery (mesh sizes approximately 3–4 inches (7.62 - 10.46 cm)) in North Carolina during the summer. These takes occurred in nets longer than 1,000 ft (304.8 m) that were set from the beach. The net length restriction is based on the determination that the potential for interactions with small mesh gear will be reduced if less gear is in the water.

Comments Related to the NC Monkfish Fishery

Comment 45: One commenter believes the North Carolina inshore monkfish fishery is being regulated without cause, as there is little to no observer data to support the proposed regulations, especially regarding why this fishery cannot operate from late February through early April. The commenter noted that observed trips have indicated no interactions with sea turtles and marine mammals, and data in general does not support closing down this fishery. Specifically, there was one trip out of 56 that reported a take of a loggerhead turtle during a 4–year period.

Response: NMFS disagrees that there is little data to support regulating this fishery. From 1995 through 2004, 16 sea turtles and two small cetaceans interactions were recorded as bycatch in the North Carolina monkfish fishery in Federal waters between March and April. Although all takes occurred in Federal waters, only 28 hauls were observed in State waters versus 279 hauls in Federal waters. NMFS believes these restrictions are warranted in North Carolina due to the bycatch history and because of the increased effort in State waters (see Comment 46).

Data for 1996 through 2000 show 164 monkfish gillnet hauls observed in Virginia and North Carolina. During this time, 13 loggerhead takes (12 in North Carolina) and one Kemp's Ridley take in North Carolina were recorded. In 2001, 438 monkfish gillnet hauls were observed with 4 loggerhead takes recorded (1 in North Carolina), as well as one bottlenose dolphin interaction in North Carolina. Finally, between 2002 and 2004, 188 monkfish gillnet hauls were observed in which two harbor porpoise and one gray seal interaction were recorded in Virginia.

However, as detailed in the response to Comment 2, NMFS is not finalizing changes to the existing mid-Atlantic large mesh gillnet rule as a result of new information and forthcoming state fishery restrictions in Virginia and North Carolina.

Comment 46: The North Carolina inshore monkfish fishery should be exempt from the prohibition of large mesh gillnets with tie-downs for North Carolina from December 16–April 15 in the waters of the Atlantic Ocean from Cape Hatteras, North Carolina to the Virginia/North Carolina border from 2 nautical miles (3.7 km) to 3 nautical miles (5.6 km) seaward of the beach.

Response: Based on gear characteristics and observer data for this fishery, NMFS believes the North Carolina inshore monkfish fishery warrants the full regulatory measures identified in this final rule. The monkfish fishery in State waters uses large mesh gillnets with long soak times. As indicated in the response to Comment 45, in the monkfish fishery, there are 16 documented takes of sea turtles and two of small cetaceans, including a bottlenose dolphin.

Fisheries with large mesh gillnets and long soak times that operate in State waters are correlated with bottlenose dolphin bycatch (Palka and Rossman, 2001). However, distance from shore and gillnet mesh size were the two factors exhibiting the strongest relationship to bycatch estimates. Palka and Rossman (2001) found that the highest bycatch rates of coastal bottlenose dolphins in the mid-Atlantic gillnet fisheries occurred in large mesh fisheries and in hauls within State waters.

The regulation prohibiting large mesh gillnet gear in State waters with tie-downs from December 16 to April 14 is a conservation measure designed to prevent a further shift in effort of the monkfish fishery into State waters. Recent landings data indicate an increase in large mesh fishing effort in North Carolina during the winter. Landings information also shows an increase in the number of vessels monkfish fishing in North Carolina State waters since the enactment of the mid-Atlantic large mesh gillnet rule in 2002.

Comments Related to Night Fishing Restrictions

Comment 47: One commenter specifically noted the proposed large mesh restriction in the Winter Mixed MU for Virginia in which no person

may fish with, possess on board a vessel unless stowed, or fail to remove from the water, any large mesh gillnet gear at night. The commenter stated that fishermen would be entering dangerous inlets after sunset with a boat that is out of balance because of a higher center of gravity when the net reel has a net on it.

Response: NMFS believes that limiting fishing at night in State waters of the Winter Mixed MU is necessary to meet the objectives of the BDTRP. Several alternatives were analyzed to determine which management measures would meet the objectives of the BDTRP, while having the least hardship on commercial fishermen (Palka and Rossman, 2003). The regulation against night fishing in Virginia from November 1 to December 31 was the only alternative that would allow the objectives of the BDTRP to be met for this MU.

The BDTRT recommended this management measure taking into consideration input provided by the members of the BDTRT representing large mesh commercial fishermen in Virginia. Specific safety concerns were not mentioned during the BDTRT deliberations when discussing this alternative, beyond noting that sea state, winds, and visibility are always factored into decisions regarding fishermen's return time and how gear is stowed during the return. Recognizing that heavy net reels create a higher center of gravity, which may be a safety concern in severe weather, fishermen have the option of removing their nets from the reel to stow them below or in a hold if high seas are a concern. NMFS understands that some fishing practices may need to be altered to comply with this management measure and strongly recommends that fishermen take all precautions to stow gear appropriately to address human safety concerns.

Comment 48: Two commenters indicated that it would not be feasible to complete fishing operations before sunset, as it usually takes many hours to retrieve and sort the catch.

Response: Based on net retrieval information collected through the observer program, the average haul time for fishermen with large mesh gillnets for a 1,100 foot (335.28 m) net was less than 20 minutes. Data also indicate that fishermen have an average of six net strings per trip. Based on that data, there is an average of 1 hour deployment time with about 2 hours to haul gear per trip, leaving approximately 10 hours of fishing per day depending on the time of year. NMFS believes stowing large mesh gillnets before sunset is operationally feasible based on these data.

Comments Related to Observer Coverage

Comment 49: Seven commenters indicated that it is critical that the observer program be enhanced to provide adequate observer coverage because the probability of detection and the level of observer data are too low to determine whether the bycatch mitigation measures in the BDTRP are effective and if the bycatch rate will be reduced to below PBR as required by the MMPA. Suggestions to enhance the observer program included: (1) securing increased Federal appropriations to increase observer coverage; (2) using alternative observer platforms more widely to observe more hauls from small vessels in coastal waters, especially small and medium mesh gillnet fisheries to prevent an effort shift from large mesh closures in North Carolina; (3) working with other states and researchers who deploy observers to devise a consistent and complementary program that will allow NMFS to use this data for bycatch estimates; (4) improving the deployment of observers throughout a fishery rather than targeting only those fishermen consistently taking observers; (5) developing a good estimate of how many fishermen are in the different fisheries, what the gear characteristics are and where they are fished; (6) improving cooperation between the NMFS Southeast and Northeast Regions; (7) creating a prioritization of fisheries that need coverage, by (a) identifying specific areas for increased coverage, such as: southern North Carolina gillnets, inshore gillnets, near shore gillnets, and (b) identifying holes in data needed for assessments; and (8) assessing bycatch of other finfish, sea turtles, and sea birds to allow for an evaluation of actual dolphin bycatch reduction versus the cost to other resources.

Response: NMFS agrees with the above comments and suggestions and is exploring all of these options for enhancing the observer program. In 2005, NMFS allocated additional funding to enhance the observer program. These funds were used to hire a field coordinator and an assistant in North Carolina to better characterize fisheries and explore the use of alternative platforms, especially in nearshore waters. The information provided by these observers will specifically address comments two through seven. To clarify, the observer program does not distribute the observed trips based on pre-specified fishery characteristics, such as mesh size. The observed trips are distributed by ports, based on landings, and the trip schedule attempts to capture a representative sample of vessels departing from each port. The information collected by the North Carolina-based field coordinator will aid in distributing trips where observer gaps may exist due to real-time effort shifts.

NMFS initiated discussions with state agencies to explore developing a cooperative monitoring program and is planning to conduct workshops to: (1) identify gaps in observer coverage; (2) develop cooperative programs with states and other researchers; and (3) increase coverage to increase statistical reliability of bycatch estimates. Finally, working cooperatively with state agencies and increasing observer coverage through alternative platforms will help assess bycatch of other marine species and sea birds to evaluate whether dolphin bycatch reduction measures are increasing bycatch of these species.

Comment 50: Several commenters expressed the need to increase observer coverage for fisheries affected by the proposed beach gear operating requirements to determine exactly which gear types are responsible for bottlenose dolphin entanglements.

Response: NMFS is exploring many options for increasing observer coverage in North Carolina nearshore waters. These include efforts outlined in the response to Comment 49.

Comment 51: Two commenters expressed concern that the data from the observer program are not being used properly in management decisions. When there is justification that regulations can provide necessary protection for species of concern and this justification is supported by the NMFS observer program, regulations should be supported and implemented. However, when there are well-documented data from the observer program to verify that a fishery can be conducted in a specific time and area without protected species interactions, these data cannot and should not be ignored.

Response: NMFS only uses observer data to direct the development and implementation of management measures and monitor the effectiveness of those management measures. Based on observer data, regulations are being implemented to reduce bottlenose dolphin serious injury and mortality below PBR for relevant MUs. The short-term goal of the MMPA requires NMFS to reduce serious injury and mortality below PBR within 6 months of implementation of the BDTRP. The management measures implemented in

the BDTRP achieve this goal without creating undue burden on the commercial fishermen and are justified through observer data. See Comment 43 for discussion on how bycatch estimates are derived.

Regarding concerns about observer data not justifying the proposed extension of seasonally-adjusted closures into North Carolina and Virginia State waters, which included the black drum fishery, NMFS is not finalizing this proposed extension as noted in Comment 2.

Comment 52: One commenter questioned how many interactions there had been between bottlenose dolphins and small mesh fisheries off the beach.

Response: The BDTRT examined observer data collected on ocean gillnet trips from 1995 to 2000, during which 12 incidental takes of bottlenose dolphins occurred across all mesh size categories. Five of these observed interactions were in small mesh gillnets (less than or equal to 5–inches (12.7 cm) stretched mesh). For the North Carolina beach seine fishery, the BDTRT examined observer data from 1998 through 2002. During this period, two bottlenose dolphin entanglements occurred, both in monofilament webbing. One of these was in small mesh webbing and the other was in large mesh webbing (greater than or equal to 7–inches (17.8 cm) stretched mesh). These interactions represent total bycatch observed; however, observer coverage in State waters was often less than 1 percent, which can result in negatively biased bycatch estimates.

Comments Related to the Proximity Requirement

Comment 53: Two commenters expressed concern over the difficulty of fishing with the proximity requirement, especially for overnight and deep sets. Two other commenters requested clarification as to why proximity requirements were necessary.

Response: Two separate proximity management measures are included in this final rule: (1) from June 1–October 31, in New Jersey through Maryland State waters for medium and large mesh gillnets, no person may fish with any medium or large mesh anchored gillnet gear at night unless such person remains within 0.5 nautical mile (0.93 km) of the closest portion of each gillnet and removes all such gear from the water and stows it on board the vessel before the vessels returns to port; and (2) year-round, for South Carolina, Georgia, and Florida waters, no person may fish with any gillnet gear unless such person remains within 0.25 nautical mile (0.46 km) of the closest portion of the gillnet. The BDTRT recommended these proximity requirements to meet the objectives of the BDTRP because it would limit soak times and the amount of net in the water, thereby reducing bycatch of bottlenose dolphins, as well as allow closer monitoring of the net to reduce the potential for serious injury and mortality should a dolphin become entangled. NMFS understands fishing practices may need to be altered to accommodate the proximity requirements in these MUs, but it is a necessary component of the BDTRP.

Comments Related to Regulatory Clarifications

Comment 54: The sunset clause for restrictions on medium mesh fisheries in Northern and Southern North Carolina MUs should be established 3 years from the effective date of the final rule, rather than the November 12, 2007, date specified in the proposed rule.

Response: The November 12, 2007, date printed in the proposed rule was an error. The intent of the BDTRT and of NMFS was to establish a 3–year sunset clause, which means that the management measures will expire and be revisited 3 years from the effective date of the final rule. The effective date of this final rule will be 30–days following publication in the **Federal Register**. The measures in 50 CFR 229.35(d)(4)(ii) and 229.35(d)(5)(i) will expire on May 26, 2009.

Comment 55: Proposed regulatory text in 50 CFR 223.206(d)(8)(ii) of the proposed rule states that no more than 1,000 feet (304.8 m) of net may be set, and the vessel must remain within 0.25 nautical mile (0.46 km) of the net at all times; however proposed regulatory text in 50 CFR 229.35 of the proposed rule does not provide a limitation to one net. The regulatory text in both sections should be aligned and clarified if only one net is allowed per fishermen.

Response: The regulatory text in § 223.206(d)(8)(ii) referenced above from the proposed rule is not included in this final rule (see Comment 2).

Comment 56: Without a maximum tie-down length, it is possible that bridles may be used to fulfill the letter of the regulations without fulfilling their intent. For ease of enforcement, tie-down language should be consistent with the HPTRP.

Response: Tie-down language was recommended by the BDTRT to be consistent with the tie-down system as described in the HPTRP (50 CFR 229.34(c)) and is intended to be as such under this final rule to implement the BDTRP. As described in 50 CFR 229.34(c), tie-downs may not be spaced more than 15 ft (4.6 m) apart along the float line, and each tie-down is not more than 48 inches (18.9 cm) in length from the point where it connects to the float line to the point where it connects to the lead line.

Comment 57: The proposed rule does not clearly state that the inshore shad fishery is not part of the larger Category II Southeast Atlantic gillnet fishery. This can lead to misinterpretation that the Georgia shad fishery is required to follow the proposed gear marking requirements in waters inside the 72 COLREGS line. The final rule and 2005 List of Fisheries should clearly state that the inshore shad fishery is not part of the Category II Southeast Atlantic gillnet fishery.

Response: Comments received in regards to the 2005 List of Fisheries must be addressed through the List of Fisheries rulemaking process. As noted in Comment 3, gear marking requirements are not included in this final rule and regulatory requirements for gillnets do not extend into waters landward of the 72 COLREGS line in Georgia. This should prevent any misinterpretation that the Georgia shad fishery is required to adhere to regulatory requirements under the BDTRP.

Comment 58: The seine definition does not capture the current fishing practice, as a tail bag is no longer used.

Response: The seine definition was developed to mirror the NCDMF definition of a seine, as the majority of the seine regulations were proposed for North Carolina. However, recognizing that the geographic area affected by this final rule ranges from New Jersey through the east coast of Florida, NMFS is clarifying the definition of seine gear by noting that, in some regions, the net may be constructed with a capture bag.

The seine definition is still included in this final rule even though regulatory measures affecting seines in North Carolina are not being implemented. This definition is included to aid in enforcement of the BDTRP and prevent confusion over what is considered a seine versus gillnet, as monofilament webbing is used is some geographic areas as a seine. A gillnet is currently defined in 50 CFR 229.9 and specifies that the nets are designed ''...to capture fish by entanglement, gilling, or wedging...'' A seine is defined in this final rule as a net that ''...captures fish by encirclement and confining fish within itself or against another net, the shore or bank...'' Therefore, any nets constructed of monofilament webbing that are entangling, gilling, or wedging fish are considered a gillnet and subject to the regulatory requirements in the BDTRP.

Comments Related to Regulated Waters

Comment 59: One commenter asked how the geographic areas were determined for the BDTRP and the mid-Atlantic large mesh gillnet rule proposed regulations, and why they were not combined to encompass larger areas.

Response: The coastal bottlenose dolphin stock is considered one migratory unit in its entire range from New Jersey to Florida. Because the stock was determined to be more structurally complex both spatially and temporally, the stock was separated into seven MUs based on these seasonal and geographic complexities. The BDTRP regulations are based on these MUs. For the mid-Atlantic large mesh gillnet rule, the geographic boundaries for the proposed rolling closures were the same as those in the EEZ closures, which were based on sea surface temperatures, as sea turtles migrate in and out of waters based on water temperatures. Therefore, even though the larger geographic area of coastal bottlenose dolphins and sea turtles coincide, management measures would not be appropriate for this larger geographic area because of the spatial and temporal complexities of each species. Furthermore, NMFS also chose not to align geographic boundaries between the two proposed rules in order to minimize impacts on commercial fishermen.

Comment 60: One commenter recommended that the 6.5 and 14.6 nautical mile (12 and 27 km) boundary lines for the geographic scope of the BDTRP be changed to 6.0 and 12.0 nautical miles (11.1 and 22.2 km), respectively, to align with existing nautical chart lines and for enforcement. Another commenter requested clarification of the term ''inside waterways.''

Response: The BDTRT recommended the geographic scope of the BDTRP be based on the range of the western North Atlantic coastal bottlenose dolphin stock, which is within 6.5 nautical miles (12 km) of shore between the New York-New Jersey border and Cape Hatteras, North Carolina, and within 14.6 nautical miles (27 km) of shore from Cape Hatteras southward through the east coast of Florida. Pertinent observer effort, abundance, and mortality data are derived using these boundaries, therefore, it makes sense to retain the current boundaries.

NMFS recognizes that the areas of application of the BDTRP and of specific regulatory requirements were difficult to understand in the proposed rule. Although the overall geographic scope of the BDTRP is the range of the coastal bottlenose dolphin as described above, the BDTRP does not include regulatory requirements in waters outside of 3 nautical miles (5.5 km), north of the North Carolina/South Carolina border. In South Carolina, Georgia, and Florida, regulatory requirements do extend out to 14.6 nautical miles (27 km). Therefore, in this final rule, NMFS is adding a description of the geographic scope of the BDTRP in 229.35(a) and clarifying regulated waters in § 229.35(c) by referring to and defining each area regulated in § 229.35(b).

To aid in this clarification, NMFS is omitting the term ''exempted waters'' from § 229.35(c), which was informally referred to by the BDTRT as ''inside waterways.'' These waters are any marine and tidal waters landward of the first bridge over any embayment, harbor, or inlet; or in cases where there is no bridge, waters that are landward of the 72 COLREGS line. In § 229.35(c) for regulated waters, NMFS is clarifying which areas are not regulated waters by excluding those inshore waters identified in § 229.34(a)(2), except from Chincoteague to Ship Shoal Inlet in Virginia, and South Carolina, Georgia, and Florida waters, where waters landward of the 72 COLREGS line are not regulated for the purposes of this rule.

Comment 61: NMFS needs to allow the states to regulate their own waters.

Response: NMFS is mandated to manage, conserve, and recover marine mammal stocks and listed species throughout their range regardless of the state/Federal jurisdictional lines. However, NMFS will work with the states in accomplishing these mandates where appropriate. NMFS collaborated with state agencies in developing this final rule to implement the BDTRP, as representatives from each state along the east coast participated as members of the BDTRT. Additionally, based upon new information, forthcoming state regulations, and NMFS collaboration with state agencies, NMFS is not proceeding with the proposed changes to the ESA mid-Atlantic large mesh gillnet regulation at this time.

Comments Related to Statutory Mandates

Comment 62: The final rule must meet all legal requirements including the MMP's statutory deadlines, the Magnuson-Stevens Fishery Conservation and Management Act's (Magnuson-Stevens Act) bycatch assessment and reduction mandates, and the safeguards of the ESA. The statutory deadlines for developing and promulgating MMPA section 118 of the MMPA have been exceeded.

Response: NMFS will endeavor to meet all legal requirements under each applicable statute. The Agency is aware of the statutory deadlines in section 118 of the MMPA and is working diligently to ensure this rule is implemented expeditiously and meets all other statutory requirements of the MMPA and is a product that reflects the BDTRT's recommendations and the public comments received.

Comment 63: Although elements of the BDTRP will contribute to achieving the zero rate mortality goal (ZRMG), there is not an apparent comprehensive strategy, plan and schedule to achieve ZMRG. A committee from the BDTRT should be convened to solely address meeting the long-term ZMRG.

Response: TRPs have short- and long-term goals for measuring success of the plan, which are, respectively, to reduce takes to below PBR within six months of implementation of the final plan and to reduce takes to an insignificant level approaching a zero mortality and serious injury rate taking into account the economics of the fishery, the availability of existing technology, and existing state or regional fishery management plans, within five years of implementation. The proposed BDTRP is expected to meet the short-term goal, which was the primary objective and first step for the BDTRT. This initial plan also provides a framework for reaching the long-term goal. NMFS intends to reconvene the BDTRT after the BDTRP has been in place for six months to evaluate the effectiveness of the BDTRP, to discuss new data, and to discuss the strategy for meeting ZMRG, which is the secondary objective of the BDTRP and the next step in this process.

Comment 64: If the take of a federally-protected species under the ESA is authorized by this final rule, then preparation of an Environmental Impact Statement (EIS) is required. Rather than authorizing take of federally-protected species, NMFS should impose the proposed regulations, monitor and observe for any take, and if such take occurs, require the appropriate state fisheries agencies to apply for an Incidental Take Permit pursuant to section 10 of the ESA. At such time, NMFS could produce the required EIS when issuing a section 10 permit.

Response: NMFS is not authorizing take of any ESA-listed species as a result of these actions. NMFS is implementing this final rule and will continue to observe and monitor the fisheries included under the BDTRP. If additional measures are required to address takes

of listed species, NMFS will pursue those, as appropriate, possibly under authority of the Magnuson-Stevens Act, MMPA, or ESA, including ESA section 10 provisions.

Comment 65: Two commenters reminded NMFS of the responsibility to develop a biological opinion to include in the NEPA analysis.

Response: ESA section 7 consultation analysis for this final rule concluded that the action was not likely to adversely affected listed species. Thus, no biological opinion was prepared.

Comment 66: NMFS should apply for a Migratory Bird Treaty Act (MBTA) permit and promulgate appropriate regulations to reduce or eliminate seabird bycatch.

Response: This final rule is intended to prevent the incidental take of bottlenose dolphins from commercial fisheries in tidal and marine waters within 6.5 nautical miles (12 km) of the New York/New Jersey border south to Cape Hatteras, North Carolina and within 14.6 nautical miles (27 km) of shore from Cape Hatteras south and including the east coast of Florida. However, the MBTA only applies to nearshore waters, and NMFS does not manage the fisheries affected by these regulations, except through the authority given under MMPA section 118, because they occur in State waters. Comments concerning compliance with the MBTA in these fisheries should be directed to appropriate state fishery management agencies.

Comments Related to Strandings and Disentanglements

Comment 67: There should be clear guidance given on protocols to disentangle small cetaceans and sea turtles.

Response: NMFS agrees and intends to develop guidance on disentanglement procedures and provide training in the form of workshops and educational materials for commercial fishermen, specifically for small cetaceans and sea turtles entangled in gillnet gear. One guideline is currently available for how to handle/release marine mammals entangled in pelagic longline gear and another guideline is also available for recreational fishermen on how to protect marine mammals and sea turtles, which includes techniques for releasing entangled sea turtles.

Comment 68: Providing training to stranding network participants on how to respond to strandings and entanglements is past due, as preventing entanglements should have been the first step.

Response: NMFS agrees that preventing entanglements of marine species is always the primary concern and goal. These proposed regulations are designed to reduce and prevent these entanglements.

Comment 69: Necropsies on stranded animals should be performed and these results should be provided to the public.

Response: Necropsies are conducted on all stranded and entangled marine mammals. The public may request and receive certain necropsy data maintained by NMFS. Additional necropsy data not collected or maintained by NMFS must be requested from the collector of the data.

Changes From the Proposed Rule

As explained in the *Comments and Responses* section above and the following section, NMFS is making four changes from the proposed rule published on November 10, 2004 (69 FR 65127) to this final rule. These changes are summarized here.

(1) The proposal to amend the current mid-Atlantic large mesh gillnet rule (67 FR 71895) in 50 CFR 223.206(d)(8)(i) and 223.206(d)(8)(ii) by extending the seasonally-adjusted closures into North Carolina and Virginia State waters is not being implemented in this final rule (see Comment 2). At the time the proposed rule was published, NMFS believed modifying the existing seasonally-adjusted closures would reduce the potential for incidental capture of sea turtles in state-managed, large mesh gillnet fisheries, as well as provide necessary conservation benefits to the coastal bottlenose dolphin stock. However, upon analysis of information received following the public comment period, NMFS determined that these measures are not necessary. NMFS will continue to monitor and evaluate on an annual basis all fishery interactions with protected species to ensure existing state and Federal conservation measures are adequate.

(2) The beach gear operating requirements proposed in 229.3 (s) and (t) and 229.35(3)(i)(A) of the proposed rule are not being implemented in this final rule (see Comment 1). NMFS will re-evaluate the need for these restrictions once further information on fisheries interactions and gear characteristics are assessed. Consequently, with the exception of the seine definition, all references to North Carolina long haul beach seine, North Carolina roe mullet stop net, and seines were omitted from the regulatory text as they appeared in the proposed rule.

(3) The proposed gear marking requirements under § 229.35(d)(1) and (2) are not implemented in this final rule (see Comment 3). These requirements are not included in this final rule because each state affected by the BDTRP currently maintains gear marking requirements sufficient to meet the Agency's enforcement needs for the BDTRP. Consequently, the above-referenced sections and any other regulatory text indicating the need to mark gear were omitted from the final rule.

(4) The proposed rule stated that waters landward of the lines identified in § 229.34(a)(2), and South Carolina, Georgia, and Florida waters landward of the 72 COLREGS demarcation line, will not be subject to the regulations in the rule. However, a technical error resulted from referring to all the lines noted in § 229.34(a)(2) as non-regulated waters, specifically from Chincoteague to Ship Shoal Inlet (37° 52′ N. 75° 24.30′ W. TO 37° 11.90′ N. 75° 48.30′ W) in Virginia state waters. Virginia state waters are included in the Summer Northern Migratory MU and corresponding regulations, as indicated by the BDTRT's Consensus Recommendations and the proposed rule, and were analyzed in the EA. Regulations for this MU are from June 1–October 31 in state waters (out to 3 nautical miles) from New Jersey through Virginia. However, the line referenced above from Chincoteague to Ship Shoal Inlet intersects the state waters line. Therefore, § 229.35(c) of this final rule now refers to waters landward of the 72 COLREGS demarcation line as non-regulated waters instead of referring to § 229.34(a)(2) for waters landward of the line from 37° 52′ N. 75° 24.30′ W. TO 37° 11.90′ N. 75° 48.30′ W (Chincoteague to Ship Shoal Inlet).

Therefore, this final rule contains two actions under the MMPA and ESA regulatory authorities, respectively, and include: (1) regulatory and non-regulatory management measures implementing a BDTRP for seven MUs within the western North Atlantic coastal bottlenose dolphin stock's geographic range. Implementing these management measures through this final rule constitutes the Agency's final BDTRP; and (2) a revision to the large mesh gillnet size restriction in the mid-Atlantic large mesh gillnet rule to protect endangered and threatened sea turtles. The management measures under the MMPA are designed to reduce serious injury and mortality of dolphins. The change in the large mesh size restriction under the ESA does not directly reduce the potential for incidental take of sea turtles; instead, it is intended to provide more consistency in Federal and state regulations for large mesh gillnets along the mid-Atlantic and facilitate commercial fishermen compliance of various large mesh

regulations in the mid-Atlantic. Specifically, revising the large mesh size restriction will align large mesh definitions amongst the existing HPTRP, NCDMF regulations, and this final rule implementing the BDTRP.

Classification

The proposed rule was determined significant for purposes of Executive Order 12866.

A draft EA was prepared for the proposed rule and was finalized based on the changes made from the proposed to final rule. The conclusion of the EA was that this action will not pose a significant impact on the human environment.

NMFS prepared a Final Regulatory Flexibility Act (FRFA), based on the Regulatory Impact Review (RIR), of the final rule. A statement of the need for and objectives of the final rule is stated elsewhere in the preamble and is not repeated here. A summary of the FRFA follows:

NMFS must reduce the incidental mortality and serious injury of marine mammals associated with commercial fisheries, as mandated by the MMPA. Coastal bottlenose dolphins continue to experience mortality incidental to commercial fishing activities at levels greater than are sustainable, as identified by serious injury and mortality levels of bottlenose dolphin in excess of the stock's PBR. The specific objectives of this final rule are to reduce bottlenose dolphin incidental mortality and serious injury in commercial fishing gear below PBR within six months of rule implementation and to provide consistency among state and Federal management measures by revising the large mesh size restriction under the mid-Atlantic large mesh gillnet rule while maintaining protections for listed sea turtles. The MMPA and ESA provide the legal bases for this final rule.

Significant issues were raised by the public in response to the expected impacts of the beach gear operating management measures, rolling closures of the large mesh gillnet fishery in North Carolina and Virginia State waters to protect sea turtles, and gear marking requirements contained in the proposed rule. In general, the issues raised were, respectively: (1) the economic assessment for the proposed beach seine measures did not fully encompass all entities affected; (2) the exemptions proposed to minimize the impacts of the large mesh rolling closures in Virginia did not reflect, as they were intended, the actual fishing methods used; (3) the gear marking requirements were excessive and not feasible.

Based on public comment and additional information received, NMFS determined that the proposed beach gear and gear marking requirements, as well as the proposed extension of seasonally-adjusted closures into North Carolina and Virginia State waters are not warranted at this time. New analyses indicate that the beach gear operating requirements are not currently necessary to achieve the short-term objectives of the BDTRP (Palka and Rossman, 2005). All states affected by the BDTRP already have sufficient gear marking requirements to fulfill NMFS' enforcement and gear identification objectives, with the exception of Georgia where gillnet fishing is prohibited in State waters. Additionally, NCDMF is developing state management measures for large mesh gillnet fisheries that will provide equal or greater protection to sea turtles than the proposed federally-imposed closures while allowing the state greater flexibility in managing their fisheries. Furthermore, following the publication of the proposed rule, VMRC enacted regulations to further manage large mesh gillnets in State waters and to eliminate monkfish gillnetting, the fishery of primary concern for incidental capture of sea turtles. The seasonally-adjusted closures for North Carolina and Virginia state waters were, therefore, deemed unnecessary. NMFS intends to conduct additional research to determine if the beach gear requirements, gear marking requirements, and seasonally-adjusted closures are necessary in the future. These measures are, therefore, not contained in the final rule.

A total of 3,079 entities were identified as having recorded landings in the 2001 fishing season using gillnet gear in North Carolina through New Jersey and will be affected by the fishing restrictions contained in this final rule. Total harvests from all fisheries by these entities are estimated to have an ex-vessel value of $98 million, or an average of approximately $32,000 per entity.

All commercial fishing operations in the respective gillnet fisheries that operate in the manner and location encompassed by the rule will be affected by this final rule. The benchmarks for a fish-harvesting business to be considered a small entity are whether the entity is independently owned and operated, not dominant in its field operation, and has annual receipts not in excess of $3.5 million. Given the average revenue information provided above, all operations in the gillnet fisheries are considered small entities.

The determination of significant economic impact can be ascertained by examining two issues: Disproportionality and profitability. Disproportionality refers to whether the regulations will place a substantial number of small entities at a significant competitive disadvantage to large entities. All entities participating in the respective gillnet fisheries are considered small entities, so the issue of disproportionality is not relevant to this rulemaking.

Profitability refers to whether the regulations significantly reduce profit for a substantial number of small entities. Information on the profit profile of participants in the respective gillnet fisheries covered by this final rule is not available. Inferences on the effects of this final rule on profitability of the impacted entities, however, may be drawn from examination of the expected impacts on ex-vessel revenues. Total costs associated with harvest reductions (lost ex-vessel revenue) across all gillnet fisheries are estimated at $1.009 million. This represents less than 2 percent of total ex-vessel revenues for the entities involved in these fisheries. From this perspective, this final rule would not appear to have a significant effect on fishermen. However, certain sub-sectors or fisheries are expected to be more severely impacted. Impacts range from no expected impacts on participants in the large mesh gillnet fishery in North Carolina State waters due to the night fishing restrictions, to an estimated 14 percent reduction in ex-vessel revenues for participants in the Winter Mixed Virginia oceanic large mesh gillnet fishery due to the night fishing restrictions. An estimated 11 percent reduction in ex-vessel revenues is expected for participants in the Delaware-Maryland-New Jersey Summer northern oceanic medium and large mesh gillnet fishery due to the fishing proximity and return to shore provisions of the final rule. In total, these two sub-sectors encompass approximately 13 percent of identified entities that will be affected by the rule.

Six alternatives to the final rule were considered. Alternative 1 would allow status quo operation of the fisheries, thereby eliminating all adverse economic impacts. This alternative would not, however, achieve the required reduction in the incidental mortality and serious injury of bottlenose dolphin by commercial fishing gear and would not meet the objectives of the BDTRP. The other five alternatives would achieve the objectives of the BDTRP.

Alternative 2 would impose additional restrictions on the beach seine fishery, require rolling closures of the large mesh gillnet fishery in North Carolina and Virginia, and specify gear marking requirements; thereby, resulting in greater adverse economic impacts than the final rule.

Alternatives 3 through 5 were analyzed to, respectively, prohibit all ocean gillnet fishing within 3 km from shore, limit all ocean gillnet fishing to at most 12 consecutive hours, and prohibit all ocean gillnet fishing in State waters. Each of these alternatives is projected to result in greater direct adverse economic impacts on small entities than the final rule. These three alternatives would also impose additional gear marking requirements, notably on participants in the Atlantic blue crab trap/pot fishery, and would substantially increase costs over those induced by the final rule.

Alternative 6 would add a daily hauling requirement and mandatory bycatch certification training to the measures in this final rule. This requirement would constitute a more restrictive action and would not reduce the adverse impacts of the final rule. This alternative would also impose additional, but unquantifiable, costs on fishery participants as a result of the mandatory bycatch certification training. These costs would include the direct costs for participation in the training, potential time taken away from fishing or other revenue generating activities in order to receive the training, and potential lost fishing revenues if fishing activities are restricted due to failure to receive the certification. This alternative would also impose additional gear marking requirements, notably on participants in the Atlantic blue crab trap/pot fishery, which would substantially increase costs over those induced by the final rule.

Among all the alternatives considered that achieve the required reduction in the incidental mortality and serious injury by commercial fishing gear of dolphins, the final rule minimizes the potential negative economic impacts.

This final rule does not impose any additional reporting, recordkeeping, or compliance requirements.

The proposed rule contained collection-of-information requirements subject to the Paperwork Reduction Act (PRA) because of the proposed gear marking requirements. The requirement was submitted to the Office of Management and Budget (OMB) for approval. However, because the final rule is not finalizing the gear marking requirements as proposed, this final rule no longer contains collection-of-information requirements subject to the PRA.

This final rule contains policies with federalism implications that were sufficient to warrant preparation of a federalism summary impact statement under Executive Order 13132. Accordingly, the Assistant Secretary for Legislative and Intergovernmental Affairs provided notice of the proposed action to the appropriate officials of the affected state and local governments through a letter mailed to those officials on November 23, 2004. Specifically, the letters were sent to the states of New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, and Florida. The letter described NMFS' position supporting the need to issue this regulation; specifically, it described the need to reduce serious injury and mortality of dolphins incidental to commercial fisheries. The state of Delaware raised concerns over the gear marking requirements, as proposed. However, since this final rule no longer includes the gear marking requirements, the stated concern was addressed.

An ESA section 7 consultation was conducted on the proposed rule. NMFS determined that the proposed measures may affect but are not likely to adversely affect listed species under NMFS' jurisdiction that may be present in the action area. Because this final rule differs from the proposed action, NMFS conducted a new section 7 consultation, and also found that this final action may affect but is not likely to adversely affect listed species under NMFS' jurisdiction. NMFS expects this rule to be beneficial to listed species because it is expected to keep fishing effort from increasing in some areas, and may even decrease fishing effort in some cases. Therefore, all the ESA requirements were addressed.

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List of Subjects

50 CFR Part 223

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

50 CFR Part 229

Administrative practice and procedure, Confidential businessinformation, Fisheries, Marine mammals, Reporting and recordkeeping requirements.

Dated: April 19, 2006.

William T. Hogarth,

Assistant Administrator for Fisheries, National marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR part 223 and 50 CFR part 229 are 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 *et seq.*

■ 2. In § 223.206, paragraph (d)(8) is revised to read as follows:

§ 223.206 Exceptions to prohibitions relating to sea turtles.

* * * * *

(d) * * *

(8) *Restrictions applicable to large mesh gillnet fisheries in the mid-Atlantic region.* No person may fish with or possess on board a boat, any gillnet with a stretched mesh size 7–inches (17.8 cm) or larger, unless such gillnets are covered with canvas or other similar material and lashed or otherwise securely fastened to the deck or the rail, and all buoys larger than 6–inches (15.2 cm) in diameter, high flyers, and anchors are disconnected. This restriction applies in the Atlantic Exclusive Economic Zone (as defined in 50 CFR 600.10) during the following time periods and in the following area:

(i) Waters north of 33° 51.0′ N. (North Carolina/South Carolina border at the coast) and south of 35° 46.0′ N. (Oregon Inlet) at any time;

(ii) Waters north of 35° 46.0′ N. (Oregon Inlet) and south of 3° 22.5′ N. (Currituck Beach Light, NC) from March 16 through January 14;

(iii) Waters north of 36° 22.5′ N. (Currituck Beach Light, NC) and south of 37° 34.6′ N. (Wachapreague Inlet, VA) from April 1 through January 14; and

(iv) Waters north of 37° 34.6′ N. (Wachapreague Inlet, VA) and south of 37° 56.0′ N. (Chincoteague, VA) from April 16 through January 14.

* * * * *

PART 229—AUTHORIZATION FOR COMMERCIAL FISHERIES UNDER THE MARINE MAMMAL PROTECTION ACT OF 1972

■ 1. The authority citation for part 229 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

■ 2. In § 229.2, the introductory paragraph is revised to read as follows, and the definitions ''Fishing or to fish,'' ''Seine,'' ''Sunrise,'' and ''Sunset'' are added in alphabetical order to read as follows:

§ 229.2 Definitions.

In addition to the definitions contained in the Act and § 216.3 of this chapter, and unless otherwise defined in this chapter, the terms in this chapter have the following meaning:

* * * * *

Fishing or to fish means any commercial fishing operation activity that involves:

(1) The catching, taking, or harvesting of fish;

(2) The attempted catching, taking, or harvesting of fish;

(3) Any other activity that can reasonably be expected to result in the catching, taking, or harvesting of fish; or

(4) Any operations at sea in support of, or in preparation for, any activity described in paragraphs (1), (2), or (3) of this definition.

* * * * *

Seine means a net that fishes vertically in the water, is pulled by hand or by power, and captures fish by encirclement and confining fish within itself or against another net, the shore or bank as a result of net design, construction, mesh size, webbing diameter, or method in which it is used. In some regions, the net is typically constructed with a capture bag in the center of the net which concentrates the fish as the net is closed.

* * * * *

Sunrise means the time of sunrise as determined for the date and location in The Nautical Almanac, prepared by the U.S. Naval Observatory.

Sunset means the time of sunset as determined for the date and location in The Nautical Almanac, prepared by the U.S. Naval Observatory.

* * * * *

■ 3. In § 229.3, paragraph (r) is added to read as follows:

§ 229.3 Prohibitions.

* * * * *

(r) It is prohibited to fish with, or possess on board a vessel unless stowed, or fail to remove, any gillnet gear from the areas specified in § 229.35(c) unless the gear complies with the specified restrictions set forth in § 229.35(d).

■ 4. In subpart C, § 229.35 is added to read as follows:

§ 229.35 Bottlenose Dolphin Take Reduction Plan.

(a) *Purpose and scope.* The purpose of this section is to implement the Bottlenose Dolphin Take Reduction Plan to reduce incidental mortality and serious injury of the western North Atlantic coastal bottlenose dolphin stock in specific Category I and Category II commercial fisheries from New Jersey through Florida. Specific Category I and II commercial fisheries within the scope of the BDTRP are identified and updated in the annual List of Fisheries. Gear restricted by this section includes small, medium, and large mesh gillnets. The geographic scope of the BDTRP is all tidal and marine waters within 6.5 nautical miles (12 km) of shore from the New York-New Jersey border southward to Cape Hatteras, North Carolina, and within 14.6 nautical miles (27 km) of shore from Cape Hatteras southward to, and including, the east coast of Florida down to the fishery management council demarcation line between the Atlantic Ocean and the Gulf of Mexico (as described in § 600.105 of this title).

(b) *Definitions.* In addition to the definitions contained in the Act, § 216.3 and § 229.2 of this chapter, the terms defined in this section shall have the following definitions, even if a contrary definition exists in the Act, § 216.3, or § 229.2:

Beach means landward of and including the mean low water line.

Beach/water interface means the mean low water line.

Large mesh gillnet means a gillnet constructed with a mesh size greater than or equal to 7–inches (17.8 cm) stretched mesh.

Medium mesh gillnet means a gillnet constructed with a mesh size of greater than 5–inches (12.7 cm) to less than 7–inches (17.8 cm) stretched mesh.

New Jersey, Delaware, and Maryland State waters means the area consisting of all marine and tidal waters, within 3 nautical miles (5.56 km) of shore, bounded on the north by 40o 30′ N. (New York/New Jersey border at the coast) and on the south by 38o 01.6′ N. (Maryland/Virginia border at the coast).

Night means any time between one hour after sunset and one hour prior to sunrise.

Northern North Carolina State waters means the area consisting of all marine and tidal waters, within 3 nautical miles (5.56 km) of shore, bounded on the north by 36° 33′ N. (Virginia/North Carolina border at the coast) and on the south by 34° 35.4′ N. (Cape Lookout, North Carolina).

Northern Virginia State waters means the area consisting of all marine and tidal waters, within 3 nautical miles

(5.56 km) of shore, bounded on the north by 38° 01.6′ N. (Virginia/Maryland border at the coast) and on the south by 37° 07.23′ N. (Cape Charles Light on Smith Island in the Chesapeake Bay mouth).

Small mesh gillnet means a gillnet constructed with a mesh size of less than or equal to 5–inches (12.7 cm) stretched mesh.

South Carolina, Georgia, and Florida waters means the area consisting of all marine and tidal waters, within 14.6 nautical miles (27 km) of shore, between 33° 52′ N. (North Carolina/South Carolina border at the coast) and the fishery management council demarcation line between the Atlantic Ocean and the Gulf of Mexico (as described in § 600.105 of this title).

Southern North Carolina State waters means the area consisting of all marine and tidal waters, within 3 nautical miles (5.56 km) of shore, bounded on the north by 34° 35.4′ N. (Cape Lookout, North Carolina) and on the south by 33° 52′ N. (North Carolina/South Carolina border at the coast).

Southern Virginia State waters means the area consisting of all marine and tidal waters, within 3 nautical miles (5.56 km) of shore, bounded on the north by 37° 07.23′ N. (Cape Charles Light on Smith Island in the Chesapeake Bay mouth) and on the south by 36° 33′ N. (Virginia/North Carolina border at the coast).

(c) *Regulated waters.* The regulations in this section apply to New Jersey, Delaware, and Maryland State waters; Northern North Carolina State waters; Northern Virginia State waters; South Carolina, Georgia, and Florida waters; Southern North Carolina State waters; and Southern Virginia State waters as defined in § 229.35(b), except for the waters identified in § 229.34(a)(2), with the following modification and addition. From Chincoteague to Ship Shoal Inlet in Virginia (37° 52′ N. 75° 24.30′ W. to 37° 11.90′ N. 75° 48.30′ W) and South Carolina, Georgia, and Florida waters, those waters landward of the 72 COLREGS demarcation line (International Regulations for Preventing Collisions at Sea, 1972), as depicted or noted on nautical charts published by the National Oceanic and Atmospheric Administration (Coast Charts 1:80,000 scale), and as described in 33 CFR part 80 are excluded from the regulations.

(d) *Regional management measures*—(1) *New Jersey, Delaware, and Maryland State waters*''(i) *Medium and large mesh.* From June 1 through October 31, in New Jersey, Delaware, and Maryland State waters, no person may fish with any medium or large mesh anchored gillnet gear at night unless such person remains within 0.5 nautical mile (0.93 km) of the closest portion of each gillnet and removes all such gear from the water and stows it on board the vessel before the vessel returns to port.

(ii) [Reserved]

(2) *Virginia state waters*—(i) *Medium and large mesh.* From June 1 through October 31, in Southern Virginia State waters and Northern Virginia State waters, no person may fish with any medium or large mesh anchored gillnet gear at night unless such person remains within 0.5 nautical mile (0.93 km) of the closest portion of each gillnet and removes all such gear from the water and stows it on board the vessel before the vessel returns to port.

(ii) [Reserved]

(3) *Southern Virginia State waters*—(i) *Large mesh gillnets.* From November 1 through December 31, in Southern Virginia State waters, no person may fish with, possess on board a vessel unless stowed, or fail to remove from the water, any large mesh gillnet gear at night.

(ii) [Reserved]

(4) *Northern North Carolina State waters*—(i) *Small mesh gillnets.* From May 1 through October 31, in Northern North Carolina State waters, no person may fish with any small mesh gillnet gear longer than 1,000 feet (304.8 m).

(ii) *Medium mesh gillnets.* From November 1 through April 30 of the following year, in Northern North Carolina State waters, no person may fish with any medium mesh gillnet at night. This provision expires on May 26, 2009.

(iii) *Large mesh gillnets.* (A) From April 15 through December 15, in Northern North Carolina State waters, no person may fish with any large mesh gillnet.

(B) From December 16 through April 14 of the following year, in Northern North Carolina State waters, no person may fish with any large mesh gillnet without tie-downs at night.

(5) *Southern North Carolina State waters*—(i) *Medium mesh gillnets.* From November 1 through April 30 of the following year, in Southern North Carolina State waters, no person may fish with any medium mesh gillnet at night. This provision expires on May 26, 2009.

(ii) *Large mesh gillnets.* (A) From April 15 through December 15, in Southern North Carolina State waters, no person may fish with any large mesh gillnet.

(B) From December 16 through April 14 of the following year, in Southern North Carolina State waters, no person may fish, possess on board unless stowed, or fail to remove from the water, any large mesh gillnet at night.

(6) *South Carolina, Georgia, and Florida waters*—(i) *Gillnets.* Year-round, in South Carolina, Georgia, and Florida waters, no person may fish with any gillnet gear unless such person remains within 0.25 nautical miles (0.46 km) of the closest portion of the gillnet. Gear shall be removed from the water and stowed on board the vessel before the vessel returns to port.

(ii) [Reserved]

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