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Our practice is to make comments, including names and addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials or organizations or businesses, available for public inspection in their entirety.

#### List of Subjects in 36 CFR Part 7

District of Columbia, National Parks, Reporting and recordkeeping requirements.

In consideration of the foregoing, the National Park Service proposes to amend 36 CFR part 7 as follows:

#### PART 7—SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM

1. The authority for Part 7 continues to read as follows:

**Authority:** 16 U.S.C. 1, 3, 9a, 460(q), 462(k); Sec. 7.96 also issued under D.C. Code 8-137 (1981) and D.C. Code 40-721 (1981).

2. Amend § 7.55 by revising the section title and adding new paragraph (c) to read as follows:

#### § 7.55 Lake Roosevelt National Recreation Area.

\* \* \* \* \*

(c) Personal Watercraft (PWC). (1) PWCs are allowed on the waters within Lake Roosevelt National Recreation Area except in the following areas:

- (i) Crescent Bay Lake.
- (ii) Kettle River above the Hedlund Bridge.
- (2) Launch and retrieval of PWC are permitted only at designated launch ramps. Launching of PWC at Napoleon Bridge launch ramp is prohibited.
- (3) PWC may land anywhere along the shoreline except in designated swimming areas.
- (4) PWC may not be operated at greater than flat-wake speeds in the following locations:
  - (i) Upper Hawk Creek from the waterfall near the campground through the area known as the "narrows" to the confluence of the lake, marked by "flat wake" buoy(s).
  - (ii) Within 200 feet of launch ramps, marina facilities, campground areas,

water skiers, beaches occupied by swimmers or other persons in the water.

(iii) The stretch of the Spokane Arm from 100 feet west of the Two Rivers Marina on the downstream end, to 100 feet east of the Fort Spokane launch ramp on the upstream end, above the vehicle bridge.

(5) The Superintendent may temporarily limit, restrict or terminate access to the areas designated for PWC use after taking into consideration public health and safety, natural and cultural resource protection, and other management activities and objectives.

Dated: January 20, 2004.

**Craig Manson,**

*Assistant Secretary, Fish and Wildlife and Parks.*

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#### DEPARTMENT OF COMMERCE

#### National Oceanic and Atmospheric Administration

#### 50 CFR Part 223

[Docket No. 040127028-4028-01; I.D 012104B]

RIN 0648-AR69

#### Sea Turtle Conservation; Restrictions to Fishing Activities

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS proposes to prohibit the use of all pound net leaders from May 6 to July 15 each year in the Virginia waters of the mainstem Chesapeake Bay, south of 37° 19.0' N. lat. and west of 76° 13.0' W. long., and all waters south of 37° 13.0' N. lat. to the Chesapeake Bay Bridge Tunnel at the mouth of the Chesapeake Bay, and the James and York Rivers downstream of the first bridge in each tributary. Additionally, NMFS proposes to prohibit the use of all leaders with stretched mesh greater than or equal to 8 inches (20.3 cm) and leaders with stringers from May 6 to July 15 each year in the Virginia waters of the Chesapeake Bay outside the aforementioned area, extending to the Maryland-Virginia State line and the Rappahannock River downstream of the first bridge, and from the Chesapeake Bay Bridge Tunnel to the COLREGS line at the mouth of the Chesapeake Bay. This action, taken under the Endangered

Species Act of 1973 (ESA), is necessary to conserve sea turtles listed as threatened or endangered.

**DATES:** Comments on this action are requested, and must be received at the appropriate address or fax number (*see ADDRESSES*) by no later than 5 p.m., eastern daylight time, on March 8, 2004.

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

**FOR FURTHER INFORMATION CONTACT:** Carrie Upite (ph. 978-281-9328 x6525, fax 978-281-9394), or Barbara Schroeder (ph. 301-713-1401, fax 301-713-0376).

#### SUPPLEMENTARY INFORMATION:

#### Background

All sea turtles that occur in U.S. waters are listed as either endangered or threatened under the ESA. Kemp's ridley (*Lepidochelys kempii*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*) sea turtles are listed as endangered. Loggerhead (*Caretta caretta*) and green (*Chelonia mydas*) sea turtles are listed as threatened, except for populations of green turtles in Florida and on the Pacific coast of Mexico, which are listed as endangered. Under the ESA and its implementing regulations, taking listed sea turtles—even incidentally—is prohibited, with exceptions identified in 50 CFR 223.206 for threatened sea turtles. The incidental take of endangered species may only legally be authorized by an incidental take statement or an incidental take permit issued pursuant to section 7 or 10 of the ESA.

On June 17, 2002, based upon the best available information on sea turtle and pound net interactions at the time, NMFS issued an interim final rule that prohibited the use of all pound net leaders measuring 12 inches (30.5 cm) and greater stretched mesh and all pound net leaders with stringers in the Virginia waters of the mainstem Chesapeake Bay and portions of the Virginia tributaries from May 8 to June 30 each year (67 FR 41196). Included in this interim final rule was a year-round requirement for fishermen to report all interactions with sea turtles in their

pound net gear to NMFS within 24 hours of returning from a trip, and a year-round requirement for pound net fishing operations to be observed by a NMFS-approved observer if requested by the Northeast Regional Administrator. The interim final rule also established a framework mechanism by which NMFS may make changes to the restrictions and/or their effective dates on an expedited basis in order to respond to new information and protect sea turtles. Under this framework mechanism, if NMFS believes that sea turtles may still be vulnerable to entanglement in pound net leaders after June 30 of any given year, the Assistant Administrator, NOAA, (AA) may extend the effective dates of the restrictions established by the regulations. Additionally, if monitoring of pound net leaders during the time frame of the gear restriction, May 8 through June 30 of each year, reveals that one sea turtle is entangled alive in a pound net leader less than 12 inches (30.5 cm) stretched mesh or that one sea turtle is entangled dead and NMFS determines that the entanglement contributed to its death, then NMFS may determine that additional restrictions are necessary to conserve sea turtles and prevent entanglements. As a result of sea turtle entanglements observed during the spring of 2003, NMFS issued a temporary final rule restricting all pound net leaders throughout the Virginia Chesapeake Bay and portions of the tributaries from July 16 to July 30, 2003, pursuant to the framework mechanism of the 2002 interim final rule (68 FR 41942, July 16, 2003).

### Sea Turtle and Pound Net Interactions

Sea turtles have been documented entangled in pound net leaders. Data collected in 1983 and 1984 found turtle entanglement in pound nets with small mesh leaders (defined as 8 to 12 inch (20.3 to 30.5 cm) stretched mesh) to be insignificant, but in 173 of the pound nets examined with large mesh leaders (defined as >12 to 16 inch (>30.5 to 40.6 cm) stretched mesh), 30 turtles were found entangled (0.2 turtles per net; Bellmund *et al.*, 1987). This study also found that in 38 nets examined with stringer mesh, 27 turtles were documented entangled (0.7 turtles per net). The sampling area was concentrated in the western Chesapeake Bay, with some sampling occurring in other portions of the Virginia Chesapeake Bay. Surveys in 1979 and 1980 also found that most of the pound net leaders that captured sea turtles consisted of large mesh (12 to 16 inches

(30.5 to 40.6 cm)) and were found in the lower Chesapeake Bay (Lutcavage 1981).

In recent years, pound nets have been observed, and sea turtles have been documented in the leaders. During the spring of 2001, with limited monitoring effort, a NMFS observer reported finding five moderately to severely decomposed loggerhead turtles against four different large mesh pound net leaders (approximately 13 inch (33 cm) mesh) along the Eastern shore of Virginia in early June. Given the decomposition state and lack of multiple wrapped, entangling line around the turtles, these turtles were determined to be not entangled in the leaders, and the cause of death was uncertain. Virginia Marine Resources Commission (VMRC) law enforcement agents also documented one live and three dead sea turtles in pound net leaders along the Eastern shore during the spring of 2001. The live turtle was entangled in a leader with greater than 12 inches (30.5 cm) stretched mesh, but the leader mesh size of the other entanglements was not recorded. Additionally, during June of 2000, VMRC law enforcement agents reported disentangling two live sea turtles from two Eastern shore leaders with greater than 12 inches (30.5 cm) stretched mesh.

To better understand the interactions between sea turtles and pound net gear, NMFS conducted pound net monitoring during the spring of 2002 and 2003. In 2002, NMFS monitored the active pound nets (n=70) throughout the Virginia Chesapeake Bay from April 25 to June 1. As the 2002 interim final rule was not yet in place, approximately 8 of the leaders surveyed had stretched mesh greater than or equal to 12 inches (30.5 cm) or leaders with stringers. Eleven sea turtles were found in pound net gear, but not all of the mortalities could be directly attributed to interactions with pound nets. Four sea turtles were found entangled in leaders, including two dead Kemp's ridley and two dead loggerhead sea turtles. One of the Kemp's rидleys was found in a leader with 8 inch (20.3 cm) stretched mesh, one loggerhead was found in a leader with stringers, and the other two animals were found in leaders with 14 inch (35.6 cm) stretched mesh. Based upon necropsy reports, constriction wounds, and the magnitude of entanglement, entrapment in pound net leaders was determined to be the cause of death of these animals. Two additional loggerhead sea turtles were found alive in pound net leaders, impinged on the leaders with their head and front flippers through the mesh. These two animals were observed as not being able to swim off of the leaders

under their own ability. One moderately decomposed loggerhead was found in the top line of a leader, but given the lack of tight multiple wraps of line around the turtle, it was inconclusive as to whether it was entangled before death or whether it washed into the net after having died elsewhere. Four moderately to severely decomposed loggerheads were found in leaders, but due to their decomposition state and lack of entanglement in the mesh, it appeared that the animals floated into the nets. These four sea turtles were not considered as entangled in or impinged on the pound net leaders.

From April 21 to June 11, 2003, NMFS monitored the active pound net leaders (n=56) with stretched mesh measuring less than 12 inches (30.5 cm). This monitoring effort resulted in the documentation of 17 sea turtles found in pound net leaders. Of the 17 sea turtles, five sea turtles were entangled in pound net leaders, of which two were loggerheads (one dead) and three were Kemp's rидleys (two dead). There is sufficient information to conclude that the death of these turtles was attributable to entanglement in the pound net leaders given the degree of entanglement and multiple wrapping of line around their flippers, their decomposition state (fresh dead to moderately decomposed), and their buoyancy (negatively buoyant, which typically suggests recent mortality). Additionally, 12 sea turtles were found held against, or impinged on, pound net leaders by the current. Of these 12 impingements, 10 were loggerhead sea turtles (one dead), one was an alive Kemp's rидley sea turtle, and one alive sea turtle's species identification was unable to be determined. Two of these live animals had their head and/or flipper through the leader mesh, but when observed, the line was not wrapped multiple times around the turtle. As the impinged turtles were not observed being able to move vertically on the net, if a turtle could not breathe from the position where it was impinged, it would have a low likelihood of survival if it remained on the net for longer than approximately an hour. Of the 11 live impingements, approximately 7 were found underwater, unable to reach the surface to breathe, with an average of 3 hours until slack tide. Eleven of the 17 incidents involved leaders measuring 11.5 inches (29.2 cm) stretched mesh, while six of the sea turtles were entangled in or impinged on 8 inch (20.3 cm) stretched mesh leaders. In 2002 and 2003, most of the observed sea turtles were found in nets along the

Eastern shore of Virginia, but three turtles were found in leaders in the Western Chesapeake Bay.

Sea turtle entanglements in pound net leaders are difficult to detect. The sea turtles previously observed in leaders were found at depths ranging from the surface to approximately 6 feet (1.8 m) under the surface. The ability to observe a turtle below the surface depends on a number of variables, including water clarity, sea state, and weather conditions. Generally, turtles entangled more than a few feet below the surface cannot be observed due to the poor water clarity in the Chesapeake Bay. In 2001 and 2002, side scan sonar was used to attempt to detect sub-surface sea turtle entanglements; no verified sea turtle acoustical signatures were observed during these surveys (Mansfield *et al.*, 2002a; Mansfield *et al.*, 2002b). However, the effectiveness of side scan sonar surveys are limited by weather and sea conditions (*e.g.*, suspended sediments are reflected by the sonar and monitoring is only successful in calm seas), and the acoustical signature may vary with the sea turtle's orientation and location in the net, size, and decomposition state (Mansfield *et al.* 2002a; Mansfield *et al.* 2002b). Sonar surveys have potential in detecting sub-surface turtle entanglements and impingements, but given the caveats, the results obtained to date must be treated cautiously. While most of the previously observed sea turtles were found near the surface, it remains unclear whether the visual surface monitoring biased the location of the take results. Sea turtles may be found throughout the water column given their preferences for water temperature (*e.g.*, generally greater than 11° C) and foraging (*e.g.*, loggerheads and Kemp's ridleys in Virginia are primarily benthic foragers). Mansfield and Musick (2003) found that 7 sea turtles (6 loggerheads and 1 Kemp's ridley) tracked in the Virginia Chesapeake Bay from May 22 to July 17, 2002, dove to maximum depths ranging from approximately 13.1 ft (4 m) to 41 ft (12.5 m). While the percentage of time sea turtles spend at the surface compared to at depth is still being clarified, sea turtles may be found throughout the water column. As pound net leader characteristics are generally consistent from top to bottom, it is probable that more sea turtles are in pound net leaders than are observed or reported and the previous monitoring efforts represent a minimum record of sea turtle entanglement and impingement.

The 2002 and 2003 monitoring results documenting the entanglement of sea

turtles in leaders with less than 12 inches (30.5 cm) stretched mesh represents new information not previously considered in prior assessments of the Virginia pound net fishery, and entanglements in and impingements on these leaders appear to be more of a significant problem than originally believed. As such, additional restrictions are warranted to prevent sea turtle entanglement in and impingement on pound net gear.

#### Spring Sea Turtle Stranding Event

High strandings of threatened and endangered sea turtles are documented on Virginia beaches each spring. The magnitude of this stranding event has increased in recent years. During May and June, total reported Virginia sea turtle strandings were 84 in 1995, 85 in 1996, 164 in 1997, 183 in 1998, 129 in 1999, 161 in 2000, 256 in 2001, and 180 in 2002. In 2003, preliminary data indicate that 312 dead sea turtles stranded on Virginia beaches during May and June, with most of these occurring during the latter half of June. Strandings have also been elevated in July, generally the first half of the month. For instance, in 2003, the stranding peak occurred during the last two weeks of June, but strandings remained consistent through the second week of July, with a preliminary total of 48 turtles stranding from July 1 to 15. Furthermore, from 1996 to 2003, strandings were generally elevated during the first half of July, with an average of 23 strandings documented from July 1 to 15. In the latter half of July, strandings typically decrease; from 1996 to 2003, an average of 11 strandings were documented from July 16 to 31.

Most of the stranded sea turtles in Virginia have been threatened loggerheads, but endangered Kemp's ridley, green and leatherback sea turtles have also stranded. Out of 1,559 total strandings in May and June from 1995 to 2003, 1,372 loggerheads, 108 Kemp's ridleys, 28 leatherbacks, 1 green, and 50 unidentified turtles were found in Virginia. The majority of stranded turtles have been of the juvenile/immature life stage. Most of the stranded turtles reported in Virginia during the spring have been moderately to severely decomposed. For instance, in the spring of 2003, approximately 85 percent of the strandings were either moderately to severely decomposed, compared to approximately 6 percent that were fresh dead. The ability to conduct necropsies is compromised by the condition of the stranded animals, and severely decomposed turtles are not usually necropsied. The majority of the

stranded turtles that were examined by necropsy in the spring of previous years had relatively good fat stores and full stomachs/digestive tracts, suggesting that the animals were in good health prior to their death.

From mid-May to mid-July 2003, approximately 47 percent of the stranded animals were found along the Chesapeake Bay side of the Eastern shore of Virginia, 23 percent were found in the Virginia Beach ocean area, 15 percent in the Western Bay, 8 percent along the oceanside of the Eastern shore, and 7 percent in the southern Chesapeake Bay areas. While the distribution of sea turtle strandings in Virginia varies slightly from year to year, there has been a high concentration of stranded sea turtles found along the Eastern shore in recent years. It is possible that some Virginia Chesapeake Bay turtle strandings are swept into the Chesapeake Bay from elsewhere, as the water patterns and currents entering the Chesapeake Bay could concentrate sea turtle strandings around the mouth with certain wind conditions (Valle-Levinson *et al.*, 2001). Similarly, southwesterly winds result in surface water outflows throughout the entrance to the Chesapeake Bay, which could result in sea turtles being carried out of the Chesapeake Bay. However, it is likely that in the Virginia Chesapeake Bay, most mortalities have occurred relatively close to the stranding location (Lutcavage 1981). A NMFS observer tagged 6 floating dead sea turtles during the spring of 2003, and 2 sea turtles were recovered the next day - one stranded approximately 500 yards (457 m) away on the Eastern shore and another was found 6-7 nautical miles (11.1-13 km) south of the Western Bay tagging location.

NMFS has evaluated the potential sea turtle mortality sources in Virginia waters, and will continue to do so in the future. While some turtles with traumatic carapace injuries, propeller-like wounds or imbedded fish hooks have been documented each year, no cause of mortality is obvious for the majority of turtles that strand. Determining the cause of death in stranded sea turtles is difficult, given the level of decomposition of most stranded turtles and the lack of evidence, due in part to sea turtles' anatomy (*e.g.*, hard carapace, scaly skin). However, the circumstances surrounding the spring strandings are consistent with fishery interactions as a likely cause of some perhaps a significant number of sea turtles deaths and, therefore, strandings. These circumstances include relatively healthy turtles prior to the time of their death,

a large number of strandings in a short time period, no external wounds on the majority of the turtles, no common characteristic among stranded turtles that would suggest disease as the main cause of death, and turtles with finfish in their stomachs (which has been believed to indicate interactions with fishing gear (Bellmund *et al.*, 1987) or bycatch discarded from vessels (Shoop and Ruckdeschel, 1982)).

While a concentration of strandings has been consistently found in the vicinity of pound nets, and a number of dead floating sea turtles were documented around pound nets in recent years, a cause and effect relationship between pound net interactions and high spring strandings cannot be statistically derived based on the available data. However, NMFS has documented that fishing with pound net leaders results in lethal and non-lethal take of sea turtles. NMFS concludes that this constitutes sufficient evidence to form the basis for these proposed restrictions on pound net leaders.

#### **Impact of High Mortality on Sea Turtle Populations**

Sea turtles have been documented entangled in and impinged on pound net leaders, and the purpose of this proposed action is to prevent sea turtle entanglements in and impingements on Virginia pound net gear. The documented interactions between sea turtles and pound net leaders, as well as the annual Virginia spring strandings, are of concern for the following reasons: (1) All of the entangled, impinged and stranded animals are listed as either endangered or threatened under the ESA which means these species are in danger of extinction or likely to become endangered; (2) the level of strandings in Virginia has been elevated the last seven years, and there is no reason to believe that high spring strandings will abate in future years without regulatory action; (3) sea turtles have been observed entangled in leader mesh sizes smaller than what is currently restricted; (4) sea turtles have been observed impinged on leaders by the current, a phenomenon not previously believed to occur with such frequency, and impingements are likely to continue to occur on small mesh leaders in areas where impingements have been documented; (5) the greatest percentage of Virginia spring strandings in recent years has been along the southern tip of the Eastern shore, where a large number of pound nets are located; (6) approximately 50 percent of the Chesapeake Bay loggerhead foraging population is composed of the northern subpopulation, a subpopulation that

may be declining; and (7) most of the stranded turtles have been juveniles, a life stage found to be critical to the long term survival of the species.

Most loggerheads in U.S. waters come from one of five genetically distinct nesting subpopulations. The largest loggerhead subpopulation occurs from 29° N. lat. on the east coast of Florida to Sarasota on the west coast and shows recent increases in numbers of nesting females based upon an analysis of annual surveys of all nesting beaches. However, a more recent analysis limited to nesting data from the Index Nesting Beach Survey program from 1989 to 2002, a period encompassing index surveys that are more consistent and more accurate than surveys in previous years, has shown no detectable trend (B. Witherington, Florida Fish and Wildlife Conservation Commission, pers. comm., 2002). Thus, it is unclear whether the increase in documented sea turtle mortalities in Virginia could partly be a function of the status of the South Florida subpopulation of loggerheads, which make up approximately 50 percent of the loggerheads found in the Chesapeake Bay. The northern subpopulation that nests from northeast Florida through North Carolina is much smaller, and nesting numbers are stable or declining. Genetic studies indicate that approximately one-half of the juvenile loggerheads inhabiting Chesapeake Bay during the spring and summer are from the smaller, northern subpopulation (TEWG, 2000; Bass *et al.*, 1998; Norrgard, 1995). Approximately 3,800 nesting females are estimated for the northern subpopulation of loggerhead sea turtles (TEWG, 2000). The impact of the high level of mortality experienced by loggerhead turtles each spring off Virginia on the population's ability to recover is of significant concern. The northern subpopulation produces 65 percent males, while the South Florida subpopulation is estimated to produce 20 percent males (NMFS SEFSC, 2001). As males do not appear to show the same degree of site fidelity as females, the high proportion of males produced in the northern subpopulation may be an important source of males for all loggerheads inhabiting the Atlantic. The loss of the male contribution from the northern subpopulation may restrict gene flow and result in a loss of genetic diversity to the loggerhead population as a whole. The loss of females from the northern subpopulation may preclude future reproduction, reducing the likelihood of both future survival and recovery of the northern subpopulation of loggerheads. Given the vulnerability of these

subpopulations to chronic impacts from human-related activities, the high level of spring sea turtle mortality in Virginia must be reduced to help ensure that these subpopulations of loggerheads will recover.

Most of the turtles stranding in Virginia waters during the spring are of the juvenile/immature life stages. The specific age at maturity for most sea turtles is unknown; the age of maturity for loggerheads occurs from approximately 21–35 years (TEWG, 2000). Studies have concluded that sea turtles must have high annual survival as juveniles and adults to ensure that sufficient numbers of animals survive to reproductive maturity to maintain stable populations (Crouse *et al.*, 1987; Crowder *et al.*, 1994; Crouse, 1999). Given their long maturation period, relatively small decreases in annual survival rates of both juvenile and adult loggerhead sea turtles may destabilize the population, thereby potentially reducing the likelihood of survival and recovery of the population. As such, the historical high level of mortality in Virginia plus the increase in loggerhead mortality documented during the last several years may negatively affect the recovery of the loggerhead population.

#### **Restrictions on Pound Net Leaders**

To conserve sea turtles, the AA proposes to prohibit the use of all pound net leaders from May 6 to July 15 each year in the Virginia waters of the mainstem Chesapeake Bay, south of 37° 19.0' N. lat. and west of 76° 13.0' W. long., and all waters south of 37° 13.0' N. lat. to the Chesapeake Bay Bridge Tunnel (extending from approximately 37° 05' N. lat., 75° 59' W. long. to 36° 55' N. lat., 76° 08' W. long.) at the mouth of the Chesapeake Bay, and the portion of the James River downstream of the Hampton Roads Bridge Tunnel (I-64; approximately 36° 59.55' N. lat., 76° 18.64' W. long.) and the York River downstream of the Coleman Memorial Bridge (Route 17; approximately 37° 14.55' N. lat, 76° 30.40' W. long.). Additionally, the AA proposes to prohibit the use of all leaders with stretched mesh greater than or equal to 8 inches (20.3 cm) and leaders with stringers from May 6 to July 15 each year in the Virginia waters of the Chesapeake Bay outside the aforementioned closed area, extending to the Maryland-Virginia State line (approximately 37° 55' N. lat., 75° 55' W. long.) and the Rappahannock River downstream of the Robert Opie Norris Jr. Bridge (Route 3; approximately 37° 37.44' N. lat, 76° 25.40' W. long.), and from the Chesapeake Bay Bridge Tunnel

to the COLREGS line at the mouth of the Chesapeake Bay.

This prohibition of pound net leaders would be effective from 12:01 a.m. local time on May 6 through 11:59 p.m. local time on July 15 each year. For the duration of this proposed gear restriction, fishermen would be required to stop fishing with pound net leaders altogether or pound net leaders measuring 8 inches (20.3 cm) or greater stretched mesh and pound net leaders with stringers, depending upon the location of their pound net site as indicated above.

NMFS has sufficient evidence to conclude that there is a localized interaction between sea turtles and pound nets along the Eastern shore of Virginia and in the Western Chesapeake Bay. Sea turtles have been observed in pound net gear along the Eastern shore in recent years. Sea turtles have also been found impinged on and entangled in leaders in the Western Bay, during recent monitoring studies as well as surveys in the 1980s. Entanglements in and impingements on pound net leaders have been documented in leaders with as small as 8 inch (20.3 cm) stretched mesh and in leaders with stringers. Impingements occur when the sea turtles are held against the net by the current, which could happen with any mesh size (*i.e.*, on leaders smaller than 8 inches (20.3 cm) stretched mesh) in areas where impingements were previously documented (*e.g.*, the southern portion of the Eastern shore, where currents appear to be strong). At this time, NMFS cannot determine the current strength that results in impingements, but available data show that impingements have only occurred in certain areas, locations where observer reports and anecdotal information suggest currents are "strong". During 2003 monitoring efforts, there were few active pound nets found in the southern Chesapeake Bay outside the Eastern shore and Mobjack Bay (in the Western Chesapeake Bay) areas. The area where leaders would be prohibited was defined to exclude those pound nets in locations where sea turtles have never been found entangled or impinged, despite monitoring efforts. To prevent entanglements and impingements (leading to the potential subsequent drowning of sea turtles), NMFS proposes to prohibit all pound net leaders in a portion of the southern Chesapeake Bay.

While there have not been any documented entanglements or impingements outside the southern Chesapeake Bay area where all pound net leaders would be prohibited, NMFS is proposing to restrict leader mesh size

in the remainder of the Virginia Chesapeake Bay to less than 8 inches (20.3 cm) stretched mesh and prohibit the use of stringers, because the best available information shows that sea turtles have been entangled in pound net leaders with stretched mesh 8 inches (20.3 cm) and greater and in leaders with stringers. Given that gillnets with less than 8 inches (20.3 cm) stretched mesh have been found to entangle sea turtles (Gearhart, 2002), there is the possibility that entanglements in leader mesh smaller than 8 inches (20.3 cm) stretched mesh could occur. However, given the differences between gillnet gear and pound net leaders (*e.g.*, monofilament versus multifilament material; drift, set, and runaround versus fixed stationary gear; gilling vs. herding fishing method), the lack of reported entanglements in pound net leaders with stretched mesh less than 8 inches (20.3 cm), and the lack of reported impingements in the area in which leader mesh size would be restricted, NMFS believes that allowing the use of leaders but restricting the stretched mesh size to less than 8 inches (20.3 cm) is protective of sea turtles. NMFS does not expect sea turtle impingements on pound net leaders to occur outside the leader prohibited area given the lack of observed impingements on pound net leaders, which appears to be related to geographical location and current strength. No sea turtles have been found entangled in or impinged on the pound or heart of pound net gear to date, and as such, the use of those components of the pound net gear is not restricted.

From 1994 to 2003, the average date of the first reported stranding in Virginia was May 13. However, sea turtle mortality would have occurred before the animals stranded on Virginia beaches. In order for the proposed pound net restrictions to reduce sea turtle interactions with pound net leaders, the proposed measures should go into effect at least one week prior to the stranding commencement date, or on May 6 each year. Implementing restrictions on this date would ensure protective measures would be in place at the time when sea turtles are expected to be in the Chesapeake Bay and are becoming vulnerable to mortality sources. Note that this is two days earlier than the date of the restrictions enacted in the 2002 interim final rule, as the date was modified based upon updated stranding information. Additionally, water temperature data support implementation of the proposed measures on May 6. Mansfield *et al.*

(2001) and Mansfield and Musick (2003) state that analyses by the Virginia Institute of Marine Science have estimated that sea turtles migrate into the Chesapeake Bay when water temperatures warm to approximately 16 to 18° C. However, sea turtles do frequent waters as cool as 11° C (Epperly *et al.*, 1995). From 1999 to 2003, the average water temperature on May 6 at the NOAA National Ocean Service Kiptopeke, Virginia station was 15.7° C, with average water temperatures increasing to 16.3° C on May 7 and 17.1° C on May 8. An additional analysis conducted by the NMFS Southeast Fisheries Science Center found that in week 18 (April 30 to May 6) and week 19 (May 7 to May 13), approximately 85 percent and 90 percent, respectively, of the area encompassing the mouth of the Chesapeake Bay (from the COLREGS line to the 20 m (65.6 ft) depth contour) contained sea surface temperatures of 11° C and warmer (NMFS, unpub. data, 2003). This indicates that water temperatures around the mouth of the Chesapeake Bay are within sea turtles' preferred temperature range in early May and, therefore, supports the effective date of the proposed regulations.

A previous study in 1983 and 1984 found that sea turtle entanglements in pound net gear increased slowly until early June, then increased sharply and reached a plateau by late June, with few entanglements occurring after June (Bellmund *et al.*, 1987). Since the early 1980s, there has not been a directed pound net monitoring effort from mid-June to July, but monitoring for sea turtle strandings has continued during this time frame. As mentioned, typically the peak of Virginia strandings has been from mid-May to mid-June. However, strandings data show that the peak can occur earlier and later. For instance, in 2003, the stranding peak occurred during the last two weeks of June and strandings remained consistent through the second week of July (*e.g.*, 48 sea turtles stranded from July 1–15, 2003). The 2003 stranding peak was 10–15 days later than in 2001 and 2002 (Swingle and Barco, 2003). Given that sea turtle presence in the Chesapeake Bay is dependent upon water temperature, which makes the stranding peak somewhat variable, it is important to ensure sea turtles are protected during the period of apparent vulnerability (as indicated by elevated strandings). While there is some concern that entanglements could continue until the end of July or throughout the sea turtle residency

period in the Chesapeake Bay, based upon the available data on sea turtle entanglements, impingements, and stranding patterns, the greatest potential for sea turtles to interact with pound net leaders would occur during May and June, and extend into the first half of July.

The time frame of the 2002 interim final rule extended until June 30. This end date was based on the previous Bellmund *et al.* (1987) study and the historical stranding patterns, showing that documented sea turtle entanglements and strandings, respectively, taper off at the end of June. The 2002 interim final rule also contained a framework mechanism that enabled NMFS to extend the regulations for up to 30 days, but that measure was not included in this proposed action due to difficulties experienced with enacting regulations on a real time basis. Given the variability in the stranding peak, the elimination of the framework mechanism, and the need to be protective of these listed species, the proposed measures would extend to July 15. Implementation of the proposed measures during this time period is expected to prevent sea turtle entanglement in and impingement on pound net leaders in the spring. Note that NMFS is seeking public comments not only on the measures included in this proposed rule (*e.g.*, the closure to the use of all pound net leaders, its geographical extent, the restrictions on leader mesh size and stringers, and their geographical extent), but also on the suitability of the time frame of the proposed measures. NMFS will consider comments on those topics as well as new developments in the scientific information base during the preparation of the final rule for this action.

NMFS plans to continue analyzing the potential natural and anthropogenic mortality sources in Virginia inshore, nearshore, and offshore waters. As part of this larger initiative, NMFS intends to continue to closely monitor sea turtle stranding levels and other fisheries active in the Chesapeake Bay and nearshore and offshore Virginia waters. Further, NMFS is beginning to implement a coordinated research program with pound net industry participants and other interested parties to develop and test pound net leader modifications with the goal of eliminating or reducing sea turtle interactions while retaining an acceptable level of fish catch. Additionally, in the near future, NMFS plans to holistically evaluate the impacts of pound nets (as well as other fishing gear types) on sea turtles throughout the Atlantic and Gulf of

Mexico, as part of the Strategy for Sea Turtle Conservation and Recovery in Relation to Atlantic Ocean and Gulf of Mexico Fisheries (NMFS 2001).

The year-round reporting and monitoring requirements for this fishery established by the 2002 interim final rule remain in effect. For instance, all Virginia pound net fishermen are still required to report all sea turtle interactions (*e.g.*, dead or alive; entangled, impinged, or floated into their net) in any part of their pound net gear (*e.g.*, pound, heart, or leader) to NMFS within 24 hours of returning from the trip in which the take was documented. To date, NMFS has not received any reports from fishermen of sea turtles in their pound net leaders, but NMFS observers have documented these interactions. In 2003, several live sea turtle captures in pounds were reported to NMFS. Note that this action would change the telephone number to which to report sea turtle interactions from the telephone number previously included in the 2002 interim final rule.

NMFS is also proposing to modify the titles of adjacent sections of regulatory text for sea turtles and fishery interactions, in order to make the appropriate sections of regulatory text more easily identifiable to readers.

#### Classification

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

NMFS has prepared an initial regulatory flexibility analysis that describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of the preamble and in the SUMMARY section. A summary of the analysis follows:

The fishery affected by this proposed rule is the Virginia pound net fishery in the Chesapeake Bay. The proposed action prohibits all pound net leaders in a portion of the southern Chesapeake Bay, and prohibits leaders with stretched mesh greater than or equal to 8 inches (20.3 cm) and leaders with stringers in the remainder of the Virginia Chesapeake Bay, from May 6 to July 15 each year. Non-preferred alternative 1 is the same as the proposed action, but the time period of the restrictions is from May 6 to June 30. Non-preferred alternative 2 prohibits pound net leaders with 8 inches (20.3 cm) and greater stretched mesh, as well as leaders with stringers, in the Virginia Chesapeake Bay from May 6 to July 15. Non-preferred alternative 3 is the same

as the proposed action, but the pound and heart, in addition to the leader, must also be removed in a portion of the southern Chesapeake Bay. Non-preferred alternative 4 prohibits all pound net leaders from May 6 to July 15 in the Virginia Chesapeake Bay. Finally, in addition to the mesh size restrictions in a portion of the Virginia Chesapeake Bay, non-preferred alternative 5 modifies the pound net leader configuration in a portion of the southern Chesapeake Bay (*i.e.*, the area where all leaders are proposed to be prohibited in the proposed action) so that the mesh height is restricted to one-third the depth of the water, the mesh must be less than 8 inches (20.3 cm) and held with ropes 3/8 inches (0.95 cm) or greater in diameter strung vertically a minimum of every 2 feet (61 cm) and attached to a top line.

According to the 2002 VMRC data, there are 31 harvesters actively fishing pound nets from May 6 to July 15, with 10 harvesters located in the lower portion of the Virginia Chesapeake Bay and 21 harvesters located in the upper portion of the Virginia Chesapeake Bay. These 31 harvesters fish approximately 40 pound nets in the upper portion of the Virginia Chesapeake Bay (=21 harvesters x 1.9 pound nets/harvester) and 30 pound nets in the lower portion of the Virginia Chesapeake Bay (=10 harvesters x 3.0 pound nets/harvester). Based on 2000 to 2002 data, annual landings per harvester were 280,996 pounds (127,457 kg) in the upper portion of the Virginia Chesapeake Bay and 257,491 pounds (116,795 kg) in the lower portion of the Virginia Chesapeake Bay. Annual revenues per harvester were \$64,483 and \$105,298 in the upper and lower region, respectively. From May 6 to July 15, landings per harvester were 96,946 pounds (43,973 kg) in the upper region and 95,380 pounds (43,263 kg) in the lower region. Estimated revenues per harvester were \$18,102 and \$40,474 in the upper and lower region, respectively.

Of the 31 harvesters, 45 percent of the harvesters (=4 located in the upper region +10 located in the lower region)/31 total harvesters) fishing from May 6 to July 15 would be affected by this proposed action. Approximately 34 pound nets in total would be affected by this proposed action, with 4 in the upper portion of the Virginia Chesapeake Bay and 30 in the lower portion of the Virginia Chesapeake Bay.

In the upper portion of the Virginia Chesapeake Bay, two potential responses to the leader mesh size restrictions would be either choosing to not fish or switching to a smaller leader

mesh size during the restricted period. If a harvester chooses not to fish, their revenues decrease by 17.1 percent, since they incur revenue losses and the cost of removing their gear. If a harvester switches to a smaller mesh leader, his or her revenues would be reduced by 8.4 percent. For purposes of this analysis, we assumed the harvester will modify their gear since they want to minimize their economic loss. Therefore, in the upper bay region, annual revenues may be reduced by 8.4 percent per harvester under the proposed action. In the upper bay region, five of the six alternatives, not counting the "no action" alternative, are the same. The proposed action and non-preferred alternatives 1, 2, 3, and 5 require the leader mesh to be less than 8 inches (20.3 cm). As such, the impacts of those non-preferred alternatives would be the same as those for the proposed action in the upper bay area; annual revenues would be reduced by a low of 8.4 percent per harvester and 4 harvesters would be affected. Under non-preferred alternative 4, all leaders must be removed from the Virginia Chesapeake Bay. This alternative impacts all 21 harvesters in the upper region, and annual revenues per harvester would be reduced by 33.5 percent.

In the lower portion of the Virginia Chesapeake Bay where all leaders are prohibited under the proposed action, management actions vary between alternatives. Under all of the alternatives, all 10 harvesters would be impacted. With the proposed action, annual revenues per harvester would be reduced by a high of 43.2 percent. The proposed action and non-preferred alternative 4 are the same, and annual revenues per harvester would be reduced by 43.2 percent. The economic impact under non-preferred alternative 1 would be less compared to the proposed action (34.5 percent reduction in annual revenues versus 43.2 percent), because the restricted time period is shorter. The impact under the non-preferred alternative 3 would be greater than the proposed action (50.3 percent reduction in annual revenues versus 43.2 percent), because additional labor costs are incurred to remove the heart and pound in addition to the leader. Reductions in annual revenues per harvester would be less under non-preferred alternatives 2 and 5 in comparison to the proposed action, since these non-preferred alternatives allow a harvester to modify their gear and continue to fish. In the lower bay area, the non-preferred alternative 2 would reduce annual revenues per

harvester by 8.6 percent to 12.1 percent, depending on how many nets they set. Under non-preferred alternative 5, annual revenues per harvester would be reduced by 12.1 percent. Taking no action would not have economic consequences, at least in the short term.

Annual industry revenues are \$2.6 million for the pound net fishery. Under the proposed action, industry revenues would be reduced by 18.3 percent (= \$0.476M/\$2.6M). Under non-preferred alternatives 1, 2, 3, and 5, industry revenues would be reduced by 14.8 percent, 4.9 percent, 21.2 percent, and 5.8 percent, respectively. With the preceding five alternatives, 14 of 31 harvesters would be affected by the management actions. Under non-preferred alternative 4, all harvesters would be affected and forgone industry revenues would be reduced by 34.9 percent. Again, these numbers assume fishermen will switch to a smaller mesh leader and continue to fish in those areas with leader mesh size restrictions, instead of removing their leaders entirely.

This action does not proposed new reporting or record keeping requirements.

This proposed rule does not duplicate, overlap or conflict with other Federal rules.

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

February 2, 2004.

**Rebecca Lent,**

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

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

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

For the reasons set forth in the preamble, 50 CFR part 223 is proposed to be amended as follows:

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

1. In § 223.205, paragraph (b)(15) is revised to read as follows:

##### § 223.205 Sea turtles.

\* \* \* \* \*

(b) \* \* \*

(15) Fail to comply with the restrictions set forth in § 223.206(d)(9) regarding pound net leaders; or

\* \* \* \* \*

2. In § 223.206, paragraph (d) (2)(iv) is removed; (d) introductory text and (d)(2) paragraph heading are revised; and paragraph (d)(9) is added to read as follows:

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

\* \* \* \* \*

(d) Exception for incidental taking. The prohibitions against taking in § 223.205(a) do not apply to the incidental take of any member of a threatened species of sea turtle (i.e., a take not directed towards such member) during fishing or scientific research activities, to the extent that those involved are in compliance with all applicable requirements of paragraphs (d)(1) through (d)(9) of this section, or in compliance with the terms and conditions of an incidental take permit issued pursuant to paragraph (a)(2) of this section.

\* \* \* \* \*

(2) Gear requirements for trawlers- \* \*

\* \* \* \* \*

(d) \* \* \*

(9) Restrictions applicable to pound nets in Virginia-(i) Area closed to use of pound net leaders. During the time period of May 6 through July 15 each year, any pound net leader in the Virginia waters of the mainstem Chesapeake Bay, south of 37° 19.0' N. lat. and west of 76° 13.0' W. long., and all waters south of 37° 13.0' N. lat. to the Chesapeake Bay Bridge Tunnel (extending from approximately 37° 05' N. lat., 75° 59' W. long. to 36° 55' N. lat., 76° 08' W. long.) at the mouth of the Chesapeake Bay, and the portion of the James River downstream of the Hampton Roads Bridge Tunnel (I-64; approximately 36° 59.55' N. lat., 76° 18.64' W. long.) and the York River downstream of the Coleman Memorial Bridge (Route 17; approximately 37° 14.55' N. lat., 76° 30.40' W. long.) must be removed from the water so that no part of the leader contacts the water. All pound net leaders must be removed from the waters described in this subparagraph prior to May 6 and may not be reset until July 16.

(ii) Area with pound net leader mesh size restrictions. During the time period of May 6 to July 15 each year, any pound net leader in the Virginia waters of the Chesapeake Bay outside the area described in (i), extending to the Maryland-Virginia State line (approximately 37° 55' N. lat., 75° 55' W. long.) and the Rappahannock River downstream of the Robert Opie Norris Jr. Bridge (Route 3; approximately 37° 37.44' N. lat., 76° 25.40' W. long.), and from the Chesapeake Bay Bridge Tunnel (extending from approximately 37° 05' N. lat., 75° 59' W. long. to 36° 55' N. lat., 76° 08' W. long.) to the COLREGS line at the mouth of the Chesapeake Bay, must have only mesh size less than 8

inches (20.3 cm) stretched mesh and may not employ stringers. Any pound net leader with stretched mesh measuring 8 inches (20.3 cm) or greater or any pound net leader with stringers must be removed from the waters described in this subparagraph prior to May 6 and may not be reset until July 16.

(iii) *Reporting requirement.* At any time during the year, if a turtle is taken

live and uninjured in a pound net operation, in the pound or in the leader, the operator of vessel must report the incident to the NMFS Northeast Regional Office, (978) 281-9328 or fax (978) 281-9394, within 24 hours of returning from the trip in which the incidental take was discovered.

(iv) *Monitoring.* Owners or operators of pound net fishing operations must allow access to the pound net gear so it

may be observed by a NMFS-approved observer if requested by the Northeast Regional Administrator. All NMFS-approved observers will report any violations of this section, or other applicable regulations and laws. Information collected by observers may be used for law enforcement purposes.

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