

and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This rule will not impose new recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

*National Environmental Policy Act*

We have determined that Environmental Assessments and Environmental Impact Statements, as defined under the authority of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), need not be prepared in connection with regulations adopted under section 4(a) of the Act. We published a notice outlining our reasons for this

determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

**References Cited**

A complete list of all references cited in this rule is available on the Internet at <http://www.regulations.gov> or upon request from the Branch of Listing, Endangered Species Program, U.S. Fish and Wildlife Service (see **ADDRESSES**).

**Author**

The primary authors of this final rule are staff members of the Division of Scientific Authority, U.S. Fish and Wildlife Service.

**List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

**Regulation Promulgation**

■ Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as follows:

**PART 17—[AMENDED]**

■ 1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Public Law 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. Amend § 17.11(h) by adding new entries for “Petrel, Chatham,” “Petrel, Fiji,” and “Petrel, magenta” in alphabetical order under “Birds” to the List of Endangered and Threatened Wildlife as follows:

**§ 17.11 Endangered and threatened wildlife.**

\* \* \* \* \*  
(h) \* \* \*

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
* * * * *							
BIRDS							
* * * * *							
Petrel, Chatham	<i>Pterodroma axillaris</i> .....	Pacific Ocean—New Zealand (Chatham Islands).	Entire .....	E .....	763	NA .....	NA
Petrel, Fiji .....	<i>Pseudobulweria macgillivrayi</i> ..	Pacific Ocean—Fiji (Gau Island).	Entire .....	E .....	763	NA .....	NA
* * * * *							
Petrel, magenta	<i>Pterodroma magentae</i> .....	Pacific Ocean—New Zealand (Chatham Islands).	Entire .....	E .....	763	NA .....	NA
* * * * *							

Dated: August 31, 2009.  
**Daniel M. Ashe,**  
*Deputy Director, U.S. Fish and Wildlife Service.*  
 [FR Doc. E9–22033 Filed 9–11–09; 8:45 am]  
**BILLING CODE 4310–55–P**

**DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**

**50 CFR Parts 222 and 223**  
**[Docket No. 0809121212–91160–02]**  
**RIN 0648–AX20**

**Endangered and Threatened Wildlife; Sea Turtle Conservation**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** The National Marine Fisheries Service (NMFS) currently requires the use of chain-mat modified dredge gear in the Atlantic sea scallop fishery south of 41° 9.0' North latitude from May 1 through November 30 each year. This gear is necessary to help reduce mortality and injury to endangered and threatened sea turtles captured in this fishery and to conserve sea turtles listed under the Endangered Species Act. NMFS issues this final rule to make minor modifications to these chain-mat requirements. This final rule clarifies where on the dredge the chain mat must be hung, excludes the sweep from the requirement that the side of each opening in the chain mat be less than or equal to 14 inches (35.5 cm);

and adds definitions of the sweep and the diamonds, which are terms used to describe parts of the scallop dredge gear. Any incidental take of threatened sea turtles in Atlantic sea scallop dredge gear in compliance with the gear modification requirements and all other applicable requirements will be exempted from the ESA prohibition against takes.

**DATES:** Effective October 14, 2009.

**ADDRESSES:** Copies of the Supplement to the Environmental Assessment/Regulatory Impact Review prepared for this final rule may be obtained by writing to Ellen Keane, NMFS, Northeast Region, 55 Great Republic Drive, Gloucester, MA 01930.

**FOR FURTHER INFORMATION CONTACT:** Ellen Keane (ph. 978–282–8476, fax 978–281–9394, email [ellen.keane@noaa.gov](mailto:ellen.keane@noaa.gov)).

**SUPPLEMENTARY INFORMATION:****Background**

All sea turtles that occur in U.S. waters are listed as either endangered or threatened under the Endangered Species Act of 1973 (ESA). The Kemp's ridley (*Lepidochelys kempii*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*) sea turtles are listed as endangered. The loggerhead (*Caretta caretta*) and green (*Chelonia mydas*) sea turtles are listed as threatened, except for breeding populations of green turtles in Florida and on the Pacific coast of Mexico that are listed as endangered. Due to the inability to distinguish between these populations of green turtles away from the nesting beach, NMFS considers green sea turtles endangered wherever they occur in U.S. waters. Kemp's ridley, hawksbill, loggerhead, and green sea turtles are hard-shelled sea turtles.

Under the ESA and its implementing regulations, taking sea turtles under NMFS' jurisdiction, even incidentally, is prohibited, with exceptions identified at 50 CFR 223.206. The incidental take, both lethal and non-lethal, of loggerhead, Kemp's ridley, and unidentified hard-shelled sea turtles as a result of scallop dredging has been observed in the Atlantic sea scallop fishery (Northeast Fisheries Science Center (NEFSC) Fisheries Sampling Branch (FSB), Observer Database). In addition, a non-lethal take of a green sea turtle has been observed in this fishery (NEFSC FSB, Observer Database) and one unconfirmed take of a leatherback sea turtle was reported during the experimental fishery to test the chain-mat modified gear (DuPaul *et al.*, 2004).

Sea turtles caught in scallop dredge gear often suffer injuries. The most commonly observed injury is damage to the carapace. The exact causes of these injuries are unknown, but most likely appear to be from being struck by the dredge (during a tow or upon emptying of the dredge bag on deck), crushed by debris (e.g., large rocks) that collects in the dredge bag, or as a result of a fall during hauling of the dredge. The chain mat is a grid of horizontal and vertical chains hung over the opening of the dredge bag to prevent sea turtles from entering the bag and to prevent injury and mortality that results from such capture (i.e., due to debris in the bag, a fall while emptying the bag, or dropping of the gear on the catch). A full description of the chain mat and the benefits to sea turtles can be found in the proposed and final rules implementing the regulations (72 FR 63537, November 9, 2007; 73 FR 18984, April 8, 2008) and the associated

Environmental Assessment (NMFS 2008). Additional information on the background, affected environment, and environmental consequences of this action is included in the preamble to the proposed rule (74 FR 20667, May 5, 2009) and in the Supplement to the Environmental Assessment (NMFS 2009).

This action is being taken under the ESA provisions authorizing the issuance of regulations to conserve threatened species and for enforcement purposes (sections 4(d) and 11(f), respectively). This final rule modifies the existing chain mat regulations that apply to chain-mat modified dredges in the Atlantic sea scallop fishery to: (1) more clearly define where on the dredge gear the chain mat must be hung; (2) exclude the sweep from the requirement that the each side of the opening be 14 inches (35.5 cm) or less; and (3) define the "sweep" and the "diamonds", which are terms used to describe parts of the scallop dredge gear.

Specifically, the chain-mat regulations now require that, during the time period of May 1 through November 30, any vessel with a sea scallop dredge and required to have a Federal Atlantic sea scallop fishery permit, regardless of dredge size or vessel permit category, that enters waters south of 41°9.0 N. latitude, from the shoreline to the outer boundary of the Exclusive Economic Zone must have on each dredge a chain mat described as follows. The chain mat must be composed of horizontal ("tickler") chains and vertical ("up-and-down") chains that are configured such that the openings formed by the intersecting chains have no more than 4 sides. The vertical and horizontal chains must be hung to cover the opening of the dredge bag such that the vertical chains extend from the back of the cutting bar to the sweep. The horizontal chains must intersect the vertical chains such that the length of each side of the openings formed by the intersecting chains is less than or equal to 14 inches (35.5 cm) with the exception of the side of any individual opening created by the sweep. The chains must be connected to each other with a shackle or link at each intersection point. The measurement must be taken along the chain, with the chain held taut, and include one shackle or link at the intersection point and all links in the chain up to, but excluding, the shackle or link at the other intersection point. The action does not change the requirement that any vessel that enters the waters described above and that is required to have a Federal Atlantic sea scallop fishery permit must have the chain mat configuration installed on all dredges for the duration

of the trip (50 CFR 223.206 (d)(11)(ii)) or the transiting provision (50 CFR 223.206 (d)(11)(iii)).

**Comments and Responses**

On May 5, 2009, NMFS published a proposed rule which would clarify where on the dredge the chain mat should be hung, exclude the sweep from the requirement that each side of the opening in the chain mat be less than or equal to 14 inches (35.5 cm), and add definitions of the sweep and diamonds (74 FR 20667). Comments on this proposed rule were requested through June 4, 2009. Four comment letters from individuals or organizations were received during the public comment period. One comment letter was related to the Hawaii shallow set longline fishery, and another letter was related to overfishing. These two comment letters are not relevant to the proposed action and are not discussed further. One commenter was generally supportive of the action but provided comments on particular aspects of the rule. One commenter expressed neither support for nor opposition to the action. A complete summary of the comments/issues raised in the relevant comment letters and NMFS' responses, grouped according to general subject matter in no particular order, is provided here.

*Comment 1:* The commenter supports the refinements. While the proposed changes stating that the chain mat must cover the entire opening of the dredge bag provide more clarity, the exclusion of the sweep from the 14-inch (35.5-cm) requirement is a significant improvement that helps insure the configuration of the chain mat more closely resembles the design that Fisheries Survival Fund developed and tested.

*Response:* The information available on the size and identification of sea turtles encountered in this fishery and the gear tested during the experimental fishery supports the 14-inch (35.5-cm) requirement. As described in the Supplement to the Environmental Assessment and the proposed rule (74 FR 20667, May 5, 2009), excluding the sweep from the 14-inch (35.5-cm) requirement will only have an inconsequential impact on the degree to which the modified gear provides protection to sea turtles. This change will result in only one slightly larger opening on a subset of dredges used in the fishery, and this increase in size of the opening is small due to the way the gear is configured. For these reasons, this action excludes the sweep from the 14-inch (35.5-cm) requirement.

*Comment 2:* Applying the 14-inch (35.5-cm) requirement to the sides of

the squares (or triangles) formed by the sweep would mean that the other squares in the mat would have to be significantly smaller than 14-inches (35.5-cm) per side because the sweep hangs in an arc. The commenter claims that the chain mat design, as tested, had openings with sides that exceeded 14 inches (35.5 cm) and yet the test results showed that the device was highly effective in protecting sea turtles by preventing them from entering the dredge bag. For this reason, the commenter agrees that the new rule "would result in inconsequential impacts on the conservation benefit of the chain mats."

*Response:* As described in the Supplement to the EA and the proposed rule (74 FR 20667, May 5, 2009), NMFS identified two alternate ways to configure the gear to comply with the 14-inch requirement throughout the chain mat, including the sweep. One of these would result in smaller openings (approximately 9–10 inches (22.9–25.4 cm) per side) throughout the chain mat. It was never the intention that the requirement result in openings in the chain mat of 9–10 inches (22.9–25.4 cm) per side. The second way fishermen could comply with the 14-inch requirement including the sweep would be to add a small piece of chain to any opening where the sweep side measured more than 14 inches, dividing the sweep and creating two smaller openings. The number of openings that would require modification with a small piece of chain would be limited to that area along the sweep that is curved.

An image analysis that calculated the length of the sides of the openings created by the intersecting horizontal and vertical chains for an 11-ft chain-mat equipped dredge was completed in 2008. Only a single photograph of one 11-ft dredge was analyzed. The analysis showed that the lengths of the sides of the openings on the image analyzed were both greater than and less than 14 inches (35.5 cm) and that 14 inches (35.5 cm) was within the range of openings tested in the experimental fishery. Based on this information, NMFS re-evaluated the chain mat requirements and found that the available information continues to support an opening of 14 inches (35.5 cm) or less and that the conclusions of the analysis conducted for the April 2008 rule are still valid.

The proposed rule describes the reasons why excluding the sweep from the 14-inch requirement would only result in inconsequential impacts on the conservation benefits of the chain mats. In general, there may only be one slightly larger opening on a subset of

dredges used in the fishery and the increase in the size of that opening is small due to the way the gear is configured. Therefore, the conservation benefits to sea turtles are essentially the same. It is unlikely that a sea turtle that would be excluded by a square with 14 inches (35.5 cm) per side would encounter and pass through the one slightly larger opening present on some dredges.

*Comment 3:* The commenter requests that NMFS consider that any vessel leaving a mid-Atlantic port for a Georges Bank access area trip would have to install the chains to transit the regulated area, uninstall them at sea to fish, and then reinstall them for the return voyage. The commenter claims that the alleged lack of a transit provision an exemption for vessels embarking on a declared access area trip outside the regulated area serves no purpose. All vessels have a Vessel Monitoring System (VMS), and it would be an easy matter to know if vessels were fishing in the mid-Atlantic. Enforcement officials would be able to confirm that the vessel was declared into an access program.

*Response:* The current chain-mat regulations have a transiting provision, allowing transiting vessels to be exempted from the requirements provided the dredge gear is stowed and there are no scallops on-board. A vessel leaving a port in the mid-Atlantic would not need to install the gear while transiting to the fishing grounds provided it met those conditions of the transiting provision. As a consequence of this provision, vessels fishing north of the line would need to either land the catch north of the line or install chain mats before transiting back through the regulated area with scallops on-board.

It is possible to determine if the vessel has declared into an access area. However, the northern boundary of the chain-mat regulation divides the Closed Area I (CAI) and Closed Area II (CAII) Scallop Access Areas. Therefore, vessels fishing in CAI or CAII may or may not be within the regulated area. The VMS regulations require scallop vessels to be responsible for position reports "at least twice per hour." Although speed and vessel tracklines might indicate fishing activity, half-hour polls alone do not provide a full picture of where the vessel was between polls. Therefore, increased polling would be necessary to determine where the vessel was fishing. At this time, increased polling is not possible because the current technology provided by the VMS vendors does not support changing the reporting rate by fishery declaration. Before a vessel starts a trip, it must declare whether the trip will be general category or limited

access and the area in which it will fish. The vendors do not have the capacity to sort through the declarations and target polling intervals accordingly. In addition, it is more enforceable during an at-sea boarding to have the requirement that the chain-mat gear be installed as the boarding officer would not need to make the determination whether the vessel is or recently has been fishing or is only transiting. For these reasons, NMFS is not modifying the transiting provision with this action.

*Comment 4:* There are no objectionable vessel safety or enforcement concerns with the proposed rule.

*Response:* NMFS concurs with this comment.

#### Changes From the Proposed Rule

No changes have been made from the proposed rule (74 FR 20667, May 5, 2009).

#### Classification

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

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this rule would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis is not required and none has been prepared.

#### Literature Cited

- DuPaul, W. D., D. B. Rudders, and R. J. Smolowitz. 2004. Industry trials of a modified sea scallop dredge to minimize the catch of sea turtles. Final Report. November 2004. VIMS Marine Resources Report, No. 2004 12. 35 pp.
- NMFS (National Marine Fisheries Service). 2008. Final Environmental Assessment and Regulatory Impact Review/Regulatory Flexibility Act Analysis of Sea Turtle Conservation Measures for the Atlantic Sea Scallop Dredge Fishery. NOAA, NMFS Northeast Regional Office. Gloucester, MA. 152 pp.
- NMFS (National Marine Fisheries Service). 2009. Final Supplement to the Environmental Assessment/Finding of No Significant Impact and Regulatory Impact Review for Sea Turtle Conservation Measures for the Atlantic Sea Scallop Dredge Fishery. NOAA, NMFS Northeast Regional Office. Gloucester, MA. 26 pp.

**List of Subjects in 50 CFR Parts 222 and 223**

Endangered and threatened species.

Dated: September 8, 2009.

**Samuel D. Rauch III,**

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

■ For the reasons set forth in the preamble, 50 CFR parts 222 and 223 are amended as follows:

**PART 222—GENERAL ENDANGERED AND THREATENED MARINE SPECIES**

■ 1. The authority citation for part 222 continues to read as follows:

**Authority:** 16 U.S.C. 1531 *et seq.*; 16 U.S.C. 742a *et seq.*; 31 U.S.C. 9701.

■ 2. In § 222.102, the definition of “Diamonds” and “Sweep” are added in alphabetical order to read as follows:

**§ 222.102 Definitions.**

\* \* \* \* \*

*Diamonds*, with respect to dredge or dredge gear as defined in this section, means the triangular shaped portions of the ring bag on the “dredge bottom” as defined in 50 CFR 648.2.

\* \* \* \* \*

*Sweep*, with respect to dredge or dredge gear as defined in this section,

means a chain extending, usually in an arc, from one end of the dredge frame to the other to which the ring bag, including the diamonds, is attached. The sweep forms the edge of the opening of the dredge bag.

\* \* \* \* \*

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

■ 3. The authority citation for part 223 continues to read as follows:

**Authority:** 16 U.S.C. 1531–1543; subpart B, § 223.12 also issued under 16 U.S.C. 1361 *et seq.*; 16 U.S.C. 5503(d) for § 223.206(d)(9).

■ 4. In § 223.206, paragraph (d)(11)(i) is revised to read as follows:

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

\* \* \* \* \*

(d) \* \* \*

(11) *Restrictions applicable to sea scallop dredges in the mid-Atlantic—(i) Gear Modification.* During the time period of May 1 through November 30, any vessel with a sea scallop dredge and required to have a Federal Atlantic sea scallop fishery permit, regardless of dredge size or vessel permit category, that enters waters south of 41° 9.0’ N. latitude, from the shoreline to the outer

boundary of the Exclusive Economic Zone must have on each dredge a chain mat described as follows. The chain mat must be composed of horizontal (“tickler”) chains and vertical (“up-and-down”) chains that are configured such that the openings formed by the intersecting chains have no more than 4 sides. The vertical and horizontal chains must be hung to cover the opening of the dredge bag such that the vertical chains extend from the back of the cutting bar to the sweep. The horizontal chains must intersect the vertical chains such that the length of each side of the openings formed by the intersecting chains is less than or equal to 14 inches (35.5 cm) with the exception of the side of any individual opening created by the sweep. The chains must be connected to each other with a shackle or link at each intersection point. The measurement must be taken along the chain, with the chain held taut, and include one shackle or link at the intersection point and all links in the chain up to, but excluding, the shackle or link at the other intersection point.

\* \* \* \* \*

[FR Doc. E9–22039 Filed 9–11–09; 8:45 am]

**BILLING CODE 3510–22–S**