

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 223

[Docket No. 010926236-2199-02; I.D. 081202B]

RIN 0648-AP63

Sea Turtle Conservation; Restrictions to Fishing Activities

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

ACTION: Final rule.

SUMMARY: NOAA Fisheries is closing the waters of Pamlico Sound, NC, to fishing with gillnets with a mesh size larger than 4 1/4 inch (10.8 cm) stretched mesh ("large-mesh gillnet"), on a seasonal basis, from September 1 through December 15 each year, to protect migrating sea turtles. The closed area includes all inshore waters of Pamlico Sound south of 35°46.3' N. lat., north of 35°00' N. lat., and east of 76°30' W. long.

DATES: This final rule is effective on [insert date of filing for public inspection at the Office of the Federal Register].

ADDRESSES: Copies of the Environmental Assessment (EA) prepared for this final rule may be obtained by writing to the Chief, Endangered Species Division, Office of Protected Resources, NOAA Fisheries, 1315 East-West Highway, Silver Spring, MD 20910. Requests may also be sent via fax to 301-713-0376, Attn: Chief, Endangered Species Division, Office of Protected Resources.

FOR FURTHER INFORMATION CONTACT: David M. Bernhart (phone, 727- 570-5312; fax 727-570-5517; e-mail, David.Bernhart@noaa.gov), or Barbara A. Schroeder (phone, 301-713-1401; fax 301-713-0376; e-mail, Barbara.Schroeder@noaa.gov).

SUPPLEMENTARY INFORMATION: 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) are listed as endangered. Loggerhead (Caretta caretta) and green (Chelonia mydas) 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 sea turtles-- even incidentally--is prohibited, with exceptions for threatened species identified in 50 CFR 223.206. The incidental take of endangered species may be authorized only by an incidental take statement or an incidental take permit issued pursuant to section 7 or 10 of the ESA.

#### Background

On September 27, 2001, NOAA Fisheries implemented an interim final rule (66 FR 50350, October 3, 2001) closing the waters of Pamlico Sound, NC, to fishing with gillnets with a mesh size larger than 4 1/4 inch (10.8 cm) stretched mesh. The closure was in effect from September 28 to December 15, 2001. The interim final rule, which expires on September 14, 2002, was published with the intent of issuing a permanent rule to go into effect September 15, 2002. Two comments were received on the interim final rule and are addressed under section Response to Comments.

Concurrent with implementing the interim final rule, NOAA Fisheries issued an Incidental Take Permit (ITP) pursuant to section 10 of the ESA to North Carolina Division of Marine Fisheries (NCDMF). The ITP authorized take of listed sea turtles as a result of the small- and large-mesh shallow water gillnet fisheries operating within designated areas of Pamlico Sound. The ITP required fishermen deploying gillnets in the shallow waters of southeastern Pamlico Sound to obtain permits from NCDMF. The ITP required a maximum limit of 2,000 yards (1,828 m) of net, a mandatory weekly report on sea turtle interactions, mandatory observer coverage, and fishery closures if the incidental take level specified in the ITP was exceeded. A limited

amount of deep-water, large-mesh gillnet gear testing was also allowed under the ITP. Estimated levels of sea turtle interactions remained below thresholds specified in the ITP and, therefore, additional closures were not required during the 2001 season (Gearhart 2002).

A detailed summary relating the events leading up to the promulgation of the interim final rule and NCDMF ITP can be found in the background section of the interim final rule (66 FR 50350, October 3, 2001).

#### Description of the Fishery

The Pamlico Sound large-mesh gillnet fishery can be divided into two components: shallow-water and deep-water, which are distinguished by their fishing areas, seasons, tactics, participants, and vessel characteristics.

The deep-water fishery operates from September through December with fishermen setting nets along a slope adjacent to the main basin of Pamlico Sound. Fishing depths in this area range from 10 to 20 feet (3.0 to 6.1 m). Vessels are typical ocean sink gillnet boats ranging from 25 to 45 feet (7.6 to 13.7 m) in length. Each vessel is operated by a two-man crew. Each vessel sets between 2,000 yards (1,828 m) and 10,000 yards (9,140 m) of large-mesh, most often 5.5 to 6.5 inch (14.0 to 16.5 cm), gillnet, which are soaked for up to 3 days and retrieved with the aid of net reels. Net depths range from 8 to 12 feet (2.4 m to 3.7 m) with tie-downs 2 to 4 feet (.61 to 1.2 m) long attached to the float and lead lines at 50 foot (15.2 m) intervals along the net. Tie-downs are used in this fishery to produce a bag or pocket of webbing, which is believed to increase the catch efficiency for bottom-dwelling flounder. There were 25 active participants in this fishery during the 2000 fishing season, with most trips originating from Engelhard or Swan Quarter, N.C., and a small portion leaving from Hatteras, N.C. The deep-water, large-mesh gillnet fishery was closed in 2001 as a result of the NOAA Fisheries interim final rule. This fishery has grown within the past 10 years from what was initially only a few fishermen setting a few thousand

yards of gillnet. Effort has steadily increased with more participants fishing more gear each year. During the past several years, gillnets have surpassed pound nets as the dominant gear for flounder in North Carolina's estuarine waters. Pound nets had long been the traditional means for harvesting flounder in North Carolina waters.

Monitoring of the deep-water fishery during the 2000 fishing season consisted of 13.1 percent observer coverage with 35 trips observed. Fourteen sea turtle interactions were observed involving four Kemp's ridleys, two greens, and eight loggerheads. Eight of these turtles were released alive; six were dead.

The shallow-water fishery operates from April through December in areas next to the barrier islands in Pamlico Sound, extending both north and southwest along the Outer Banks. Most fishing in these areas occurs in depths of less than 3 feet (0.9 m). Vessels are usually open skiffs ranging from 15 to 25 feet (4.6 to 7.6 m) in length with one- or two-man crews. Each fisherman typically sets 500 to 2000 yards (457 to 1,828 m) of large-mesh (5.5 to 7.0 inch (14.0 to 17.8 cm)) gillnet. The nets are soaked overnight and retrieved by hand. Tie-downs are not used in this fishery, but net depths range from 6 to 11 feet (1.8 to 3.4 m), with sets occurring in depths less than 3 feet (0.9 m). This combination of water depth and net depth provides the same bag effect as the tie-down in the deep-water fishery. There were 95 permitted, active participants during the 2001 fishing season. The shallow-water gillnet fishery is considered to be more traditional than the deep-water gillnet fishery.

Monitoring during the 2001 fishing season consisted of 9 percent observer coverage of the shallow-water, large-mesh fishery, with 131 trips observed. During these trips, five sea turtle interactions were observed, of which four were green turtles and one was a hawksbill. Three green turtles and the hawksbill were released alive; one green turtle was dead. The small

mesh fishery was observed on 8.4 percent of the trips prior to November 1 and 20 percent of the trips after that. Coverage was increased in November because fishermen no longer were required to tend their nets and the possibility of a lethal turtle take was greater. No turtle interactions were documented in the small mesh fishery.

#### NCDMF's Section 10 ITP

NOAA Fisheries issued the first ITP to NCDMF for the 2000 fall fishing season only. The exceeding of the authorized incidental take identified in the ITP resulted in a closure of the fishery in October 2000. Although section 10 ITPs are generally issued for multi-year periods, NOAA Fisheries and NCDMF believed that the newness of the fishery, the apparent high levels of turtle interaction, and the paucity of observer data for management decisions justified a single-year permit in 2000 to allow NCDMF to gather important information about bycatch issues in the fishery. NOAA Fisheries, in issuing the ITP, considered the effects of the fishery on listed species, pursuant to sections 7(a)(2) and 7(b) of the ESA. The resulting biological opinion concluded that, as a 1-year event, the issuance of the ITP and the fishery were not likely to jeopardize the continued existence of any listed species of sea turtle. The opinion did acknowledge, however, that additional future permits might be sought by NCDMF for large-mesh gillnetting in Pamlico Sound, perhaps modified based on the outcome of the 2000 permit. On September 27, 2001, NOAA Fisheries issued a second ITP to the NCDMF with similar review requirements. The ITP was again valid for 1 year. On July 18, 2002, NCDMF submitted an application for a 3-year ITP to reopen the shallow water areas under similar requirements as well as add the management of the shallow water fishery operating in an area of the mainland Hyde and Pamlico Counties (67 FR 49009, July 29, 2002). The 3-year ITP would allow for the gathering of substantial additional information on the fishery and its interactions with sea turtles. The ITP would allow portions of the

fishery to operate while requiring observer coverage to document sea turtle interactions and the conditions in which they occur. At the end of the ITP 3-year term, NCDMF may have substantial information to propose a means of reopening the fishery with management measures that would provide sufficient protection to sea turtles. In such an event, NOAA Fisheries would consider rescinding this closure rule and issuing an ITP with the proposed measures in its place.

#### Closure of Large-Mesh Gillnet Fishing in Pamlico Sound

Through this final rule, NOAA Fisheries is closing the waters of Pamlico Sound NC, on an annual basis, to fishing with gillnets with a mesh size larger than 4 1/4 inches (10.8 cm) stretched mesh, from September 1 through December 15. This closure date is earlier than that of the previous interim final rule, based upon discussions with and recommendations by NCDMF regarding the observed times of high gillnet effort and high turtle occurrence in Pamlico Sound. In 2000 and 2001, 88 percent of the sea turtle interactions in shallow water occurred during the first three weeks of the season. The closed area includes all inshore waters of Pamlico Sound south of 35°46.3' N. lat. (the south side of Oregon Inlet), north of 35°00' N. lat. (the south end of Portsmouth Island), and east of 76°30' W. long. (a line of longitude which crosses the mouths of the Neuse River, Bay River, and Pamlico River). The Outer Banks and the COLREGS line form the seaward boundary of the closed area. The closed area includes all contiguous tidal waters to Pamlico Sound, within the stated boundaries. The large-mesh gillnet fishery in Pamlico Sound has been shown to take, including to capture and kill, numerous endangered and threatened sea turtles during their fall migration. NOAA Fisheries is taking this action to prevent further takes of listed species in this fishery.

#### Response to Comments

NOAA Fisheries requested comments on the interim final rule in

anticipation of issuing this final rule. Two comments were received during the comment period.

Comment 1: The Ocean Conservancy commented that it supports a permanent, seasonal, September through December closure of all Pamlico Sound waters to large-mesh gillnets. It also commented that geographic and seasonal closures do not go far enough to protect listed sea turtles.

Response: We believe that stranding and observer data indicate that the rule covers a place and time in which the large-mesh gillnet fishery has a potentially detrimental impact upon listed sea turtles. If additional information or later events demonstrate a potential need for further restrictions, NOAA Fisheries will analyze the circumstances and act to provide the measures necessary to protect the sea turtles as required by the ESA.

Comment 2: A North Carolina resident commented that there are too many turtles, particularly loggerheads, in Pamlico Sound and that the measures to protect sea turtles are unwarranted and are burdensome to the fishing community.

Response: All species of sea turtles in U.S. waters are listed under the ESA because their populations have declined and protective measures are necessary in order for these species to recover. We cautiously anticipate that there are more loggerhead turtles in Pamlico Sound as a result of the use of such protective measures as the use of turtle excluder devices in shrimp trawl nets and others. However, the species is not recovered and additional measures are necessary to reduce interactions with fishing gear.

#### Classification

NOAA Fisheries prepared an Environmental Assessment (EA) for this final rule and concluded that these regulations and issuance of the permit would neither pose a significant adverse environmental impact nor have a significant effect on the quality

of the human environment.

The actions implemented by this final rule are expected to impact approximately 95 large-mesh, gillnet vessel owners and operators. Assuming that a shallow-water fishery will be managed by NCDMF and many of these vessels will participate in the shallow-water fishery, NOAA Fisheries anticipates, under a worst-case scenario, that 25 large-mesh, deep-water boats will not participate in the fishery in Pamlico Sound. The anticipated loss of revenue could be \$10,000 to \$20,000 per vessel per year, depending on fish prices, for a total loss to the deep-water fishery operations of \$250,000 to \$500,000. These vessels, however, are the largest in the fishery and have the greatest number of alternative fisheries, as they are essentially ocean-gillnet vessels. They are also the most recent entrants into the fishery and did not operate in Pamlico Sound in the fall of 2001. Many of these operations may have switched gear to the more traditional pound net operations or moved offshore. Thus, the revenue loss anticipated for these large mesh deep water operations, under a worst-case scenario, is likely an overestimate. The shallow-water vessels, on the other hand, are considered more traditional to the fishery, they are generally smaller, and many of them cannot safely work outside the sheltered waters of the Sound. The primary effect of this final rule will be a redistribution of catch from deep-water gillnet fishermen to shallow-water and small-mesh gillnet fishermen and to pound net fishermen. The overall fishing effort targeting southern flounder in Pamlico Sound is very high and capable of fully exploiting the resource. In 2000, gillnet landings exceeded the previous year's levels, halfway through the season, despite NCDMF's closure of the primary fishing grounds to gillnetting with gear greater than 5-inch (12.7-cm) mesh. In 2001, the landings of flounder by gillnet dropped significantly from those in previous years, but the landings by pound net, which had been in decline for a number of years, rebounded dramatically to high levels.



This final rule does not contain collection-of-information requirements subject to the Paperwork Reduction Act.

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

The Assistant Administrator for NOAA Fisheries has determined that there is good cause under 5 U.S.C. 553(d)(3) not to delay the effective date of this rule for 30 days. Delaying this action would be contrary to the public interest because large-mesh gillnet fishing is presently allowed without restriction throughout Pamlico Sound. Allowing continued large-mesh gillnet fishing in the deep water areas of Pamlico Sound would likely result in a high level of sea turtle take and mortality. The NCDMF observer program has documented that sea turtle interactions occur at a high rate in September and around the inlets of Pamlico Sound. Without action, large-mesh gillnet fishing effort is expected to increase greatly in September, as changing water temperatures cause flounder to move through Pamlico Sound. Sea turtles apparently respond similarly to the fall weather in Pamlico Sound, increasing their vulnerability to being captured and killed as the fishing effort also peaks. In 2000, strandings in North Carolina's coastal waters reached a new record level of 838 turtles. In 2001, concurrent with a prohibition on the use of large mesh gillnets in the deep water areas and around the inlets of Pamlico Sound, strandings decreased 67 percent from the 2000 level. The effectiveness of prohibiting large-mesh gillnet fishing in the deep water in reducing sea turtle mortality has been demonstrated. The sea turtle mortality resulting from the failure to implement a prohibition on fishing with large-mesh gillnets in deep water would seriously threaten sea turtle populations. This final rule is intended to address a major source of fishing-related sea turtle mortality.

In keeping with the intent of Executive Order 13132 to provide continuing and meaningful dialogue on issues of mutual state and Federal

interest, NOAA Fisheries has conferred with the State of North Carolina regarding the need for NOAA Fisheries to implement a closure to protect listed sea turtles. NOAA Fisheries is working with NCDMF on the issuance of an ESA section 10(a)(1)(B) permit, which would create a partial exemption to the closure in this action. NOAA Fisheries intends to continue to consult with the State of North Carolina during the implementation of this final rule and regarding NCDMF's management of state water fisheries bycatch of sea turtles.

List of Subjects in 50 CFR Part 223

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

Dated:

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William T. Hogarth, Ph.D.  
Assistant Administrator  
National Marine Fisheries Service

For the reasons set out in the preamble, 50 CFR part 223 is amended to read 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  $\square$  223.206, revise paragraph (d)(7) to read as follows:

$\square$  223.206 Exceptions to prohibitions relating to sea turtles.

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(d) \* \* \*

(7) Restrictions applicable to gillnet fisheries in North Carolina. No person may fish with gillnet fishing gear which has a stretched mesh size larger than 4 1/4 inches (10.8 cm), annually from September 1 through December 15, in the inshore waters of Pamlico Sound, North Carolina, and all contiguous tidal waters, bounded on the north by 35°46.3' N. lat., on the south by 35°00' N. lat., and on the west by 76°30' W. long.