

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 222, 223, and 229

[I.D. 030701A; Docket No. 010308058-1058-01]

RIN 0648-AP14

Sea Turtle Conservation; Limitations on Incidental Takings During Fishing Activities

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

ACTION: Temporary rule; request for comments.

SUMMARY: NMFS is prohibiting, for a 30-day period, any vessel that has a commercial shark fishing permit from fishing with any gillnet with a stretch mesh size of 5 inch (12.7 cm) and greater, with the exception of strikenets, in the waters from 32°00' N. lat. (near Savannah, GA) along the coast south to 26°46.5' N. lat. (near West Palm Beach, FL) and extending from the shore eastward out to 80°00' W. long. This action is necessary to reduce injury and mortality of endangered leatherback sea turtles incidentally captured in gillnets being fished for sharks.

DATES: This action is effective from March 9, 2001 through April 9, 2001. Comments on this action are requested, and must be received by April 9, 2001.

ADDRESSES: Comments on this action should be addressed to the Chief, Endangered Species Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: David Bernhart, 727-570-5312, or Barbara A. Schroeder, 301-713-1401.

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*) are listed as endangered. Loggerhead (*Caretta caretta*) and green turtle (*Chelonia mydas*) are listed as threatened, except for populations of green turtles in Florida and on the Pacific coast of Mexico, which are listed as endangered.

The incidental take of these species as a result of fishing activities has been documented in the Gulf of Mexico,

Caribbean, and in the Atlantic Ocean. Under the Endangered Species Act (ESA) and its implementing regulations, taking sea turtles is prohibited, with exceptions identified in 50 CFR 223.206. Existing sea turtle conservation regulations (50 CFR 223.206) provide a mechanism to implement further restrictions of fishing activities, if necessary to avoid unauthorized takings that may be likely to jeopardize the continued existence of listed turtles or that would violate the restrictions, terms or conditions of an incidental take statement or incidental take permit. Upon a determination that incidental takings of sea turtles during fishing activities are not authorized, additional restrictions may be imposed to conserve listed species and to avoid unauthorized takings. Restrictions may be effective for a period of up to 30 days and may be renewed for additional periods of up to 30 days each (50 CFR 223.206(d)(4)).

Background

Leatherback sea turtles are the largest species of sea turtle. They weigh between 600 and 1300 pounds (272 and 590 Kg) and have carapaces 5 to 6 ft (1.5 to 1.8 m) in length. Leatherbacks are widely distributed and can range from the tropics to sub-Arctic waters. Important nesting beaches in the U.S. are found in Puerto Rico, the U.S. Virgin Islands, and along the east coast of Florida. In coastal waters of the southeast U.S., leatherbacks occur year-round but are thought to be more abundant during their northern springtime migration, especially when high abundances of jellyfish occur nearshore. The number of leatherbacks documented to strand along the Atlantic coast generally increases in the spring as they are moving north. The strandings are the result of many causes, including capture or entanglement by shrimp nets, lobster pots, longlines, and gillnets.

The commercial fisheries for Atlantic sharks include bottom longline, shark drift gillnet, and rod and reel gear, and are located primarily in the southeastern United States and Gulf of Mexico. The shark fishery traditionally operates year round and is managed as five species groups: large coastal sharks (12 species), small coastal sharks (4 species), pelagic sharks (5 species), prohibited sharks (19 species) and deepwater/other sharks (33 species). The shark drift gillnet fishery component operates primarily off the southern tip of Georgia and down the Florida Atlantic coast to approximately the West Palm Beach area. This fishery is characterized by single day trips and smaller boats than other vessels targeting sharks.

Two types of gillnet operations are used to target sharks, strike netting and drift netting. The strikenet is deployed by encircling a concentration of sharks (similar to a purse seine). Strikenets are set approximately 70 ft (21.3 m) deep, are generally .5 mile (0.80 km) in length, and are set for short durations during daylight hours in conjunction with spotter planes used to locate the sharks. Driftnets are set approximately 30 ft (9.1 m) deep, are generally 1 mile (1.61 km) in length, and are set to fish passively with the currents for long soak times during the night hours.

Recent Events

All shark drift gillnet fishery vessels are required to carry NMFS observers aboard. Currently, there are 5 vessels operating mostly off Fort Pierce and south to West Palm Beach and 1 operating in the Key West area. Two of the vessels switch back and forth between strikenets and driftnets and the other four currently use driftnets. The large coastal shark component of the fishery will close under a quota on March 24 and will reopen on July 1, 2001 (65 FR 75867). NMFS began observer coverage for shark drift gillnet vessels on January 18, 2001. Between February 1 and March 1, 2001, 16 sea turtles and 4 bottlenose (*Tursiops truncatus*) and 3 spotted (*Stenella frontalis*) dolphins (2 released alive and 5 dead) were documented to be incidentally captured in 62 driftnet sets. Of these 16 turtles, 14 were leatherbacks (10 released alive, 2 released but condition unknown, and 2 dead), 1 was a hawksbill (dead), and 1 loggerhead (released alive). NMFS observers reported high densities of jellyfish, a prey source for leatherbacks, in the area. All of the observed takes occurred in driftnets, with a single vessel accounting for the majority of the takes. No interactions have been documented during 3 observed strikenet sets.

NMFS has been notified by the Florida Fish and Wildlife Conservation Commission of three leatherback strandings in the area of the shark drift gillnet fishery. One stranding was an adult male with abrasions around the shoulders. A necropsy concluded that the abrasions occurred prior to death. These injuries are consistent with entanglement in gillnet gear.

These strandings and the documented takes in the shark drift gillnet fishery are a serious concern. Leatherbacks begin nesting as early as February along the Florida east coast. In 2001, the first nest was documented on March 3 at Melbourne Beach. Considering the rarity of leatherbacks--an average of only 45-50 females nest in Florida each year--the

documented take in the shark drift gillnet fishery, especially during a time when reproductive females are present, represents a serious impact to the recovery and survival of the local population.

On November 19, 1999, NMFS reinstituted ESA section 7 consultation (opinion) on the Atlantic Highly Migratory Species (HMS) Fisheries for Swordfish, Tuna, Shark and Billfish in the U.S. Exclusive Economic Zone as a result of exceeding the incidental take of loggerhead sea turtles identified in the April 1, 1999, Incidental Take Statement. Subsequently, NMFS included a proposed regulatory amendment to the HMS to be considered in the consultation process. NMFS issued an opinion on June 30, 2000, which concluded that the operation of the pelagic longline fishery was likely to jeopardize the continued existence of loggerhead and leatherback sea turtles. In the Incidental Take Statement accompanying the opinion, NMFS identified anticipated take for all of the fisheries managed under the HMS, including an anticipated take of 2 leatherbacks each year as a result of the directed shark drift gillnet fishery. The recent documented take of 14 leatherbacks exceeds this anticipated take level for the shark drift gillnet fishery under the HMS.

Analysis of Other Factors

Other gillnet fisheries such as small mesh strike nets for mackerel are operating in the area. The shrimp fishery is active out of Port Canaveral to the north of the shark drift gillnet fishery. NMFS and state personnel will continue to investigate factors other than the shark drift gillnet fishery that may contribute to leatherback sea turtle mortality in Florida, including other fisheries and environmental factors.

Restrictions on Shark Drift Gillnet Fishing

Pursuant to 50 CFR 223.206(d)(4), the exemption for incidental taking of sea turtles in 50 CFR 223.206(d) does not authorize incidental takings during fishing activities if the takings would violate the restrictions, terms or conditions of an Incidental Take Statement or incidental take permit, or may be likely to jeopardize the continued existence of a species listed under the ESA. The observed take by the shark drift gillnet fishery operating in coastal waters where nesting females are present poses a serious risk to the population and would violate the Incidental Take Statement and result in unauthorized takings. Therefore, the Assistant Administrator for Fisheries,

NOAA (AA) issues this determination that further takings of leatherback turtles in Atlantic Ocean waters off Florida by the shark drift gillnet fishery are unauthorized and imposes this additional restriction to conserve endangered leatherback sea turtles. Specifically, the AA prohibits any vessel that has a commercial shark fishing permit from fishing with any gillnet with a 5 inch (12.7 cm) and greater stretched mesh in the waters from 32°00' N. lat. (near Savannah, GA) along the coast south to 26°46.5' N. lat. (near West Palm Beach, FL) and extending from the shore eastward out to 80°00' W. long. Fishing for sharks with strikenets will be allowed as specified at 50 CFR 229.32(f)(3)(iii). This restriction is effective from March 9, 2001 through 11:59 p.m. (local time) April 9, 2001.

This action could possibly effect the five vessels fishing off the east coast of Florida, slightly earlier than the closure of the large coastal shark quota. There are approximately 287 directed shark permits, however only 6 to 12 vessels have participated in the shark drift gillnet fishery each year since 1998. Thus, vessels that use shark gillnet gear comprise only a small portion of the entire directed shark fleet. Based on landings reported in logbooks and on average ex-vessel price information, the gross revenues for shark drift gillnet fishermen during the first large coastal shark season of 1999 ranged from \$3,000 to \$38,000 and averaged \$19,615. The average gross revenues per trip ranged from \$380 to \$9,000 and averaged \$3,700. The gross revenues from large and small coastal sharks ranged from 0 to 92 percent and averaged 37 percent of the gross revenues for these vessels and this time period. The first 1999 large coastal shark season closed on March 31 while the first large coastal shark season for 2001 is scheduled to close on March 24. Thus, these vessels could have already made the majority of the their gross revenues for this large coastal shark season.

As a result of this restriction, the five vessels have three options: Deploy strikenets only, fish outside of the restricted area, or stop fishing. Two of the five vessels already have the capability of fishing with strikenets as well as with drift gillnets. They would be required to only fish with strikenets. Alternatively, they may choose to fish outside of the restricted area in order to deploy both types of gear. The other three vessels would need to re-rig or fish outside of the closed area. It is unlikely that these vessels would invest in re-rigging their gear or relocate to distant

fishing grounds, since their fishing season ends on March 24, 2000.

The cost involved to those vessels that are only capable of fishing with driftnets to re-rig would include the purchase of a second, smaller vessel and paying a percentage of the proceeds from the trip to a spotter plane operator. Vessels with similar design specifications could cost between \$2,000 and \$14,000. This is more than the average gross revenue during the large coastal shark season of some of the current shark drift gillnet vessels. Additionally, because the second vessel has specific design specifications in order to hold the gillnet and quickly maneuver around a school of sharks, any vessel bought second-hand would most likely need to be modified at an additional one-time cost. Also, a second vessel will require additional costs per trip in terms of fuel and maintenance. Spotter planes in both the Atlantic mackerel and tunas fisheries are paid by the fishermen based on a percentage of the proceeds from the trip. Assuming spotter planes in the shark drift gillnet fishery charge fishermen on a similar scale, vessels that use spotter planes could lose between 10 and 25 percent of the gross revenues from the trip. Thus, if a vessel is not already capable of strikenetting, the additional cost of converting a vessel may be prohibitive during the effectiveness of this rule.

Vessels that choose to move to an area where strikenetting is not required, may have to pay for additional fuel, lodging, marina fees, and other miscellaneous fees depending on the range of the vessel, the length of the trip, and the location of the current home port in relation to the area restricted to strikenets only. While NMFS is unable to estimate these additional costs, these vessels could lose a large percentage of their gross revenues during the large coastal shark season as a result of this rule. Vessels can also choose to change their gillnet gear and fish for other species including Spanish mackerel. According to dealer reports in the general canvass program, these vessels may already land approximately \$127,000 worth of fish other than sharks annually.

This restriction has been announced on the NOAA weather channel, HMS facsimile network, in newspapers, and other media. Shark gillnetters may also call NMFS Southeast Protected Resource Office, (727)570-5312, or NMFS HMS 24 hour toll-free line, 1(800)894-5528, for updated area closure information.

Additional Conservation Measures

The AA may withdraw or modify a determination concerning unauthorized takings or any restriction on fishing activities if the AA determines that such action is warranted. Notification of any additional sea turtle conservation measures, including any extension of this 30-day action, will be published in the **Federal Register** pursuant to 50 CFR 223.206(d)(4).

NMFS will continue to monitor the shark drift gillnet fishery and sea turtle strandings to gauge the effectiveness of these conservation measures.

Classification

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

The AA has determined that this action is necessary to respond to the recent takes of leatherbacks to provide adequate protection pursuant to the ESA and other applicable law.

Pursuant to 5 U.S.C. 553(b)(B), the AA finds that there is good cause to waive prior notice and opportunity to comment on this action. It would be contrary to the public interest to provide prior notice and opportunity for comment because providing notice and comment would prevent the agency from implementing this action in a timely manner to protect endangered leatherback sea turtles. Notice and opportunity to comment was provided on the proposed rule (57 FR 18446, April 30, 1992) for the final rule establishing the procedures to take this action. Furthermore, the AA finds good cause also under 5 U.S.C. 553(d)(3) not to delay the effective date of this temporary rule for 30 days. Such delay would also prevent the agency from implementing this action in a timely manner to protect endangered leatherback sea turtles. Accordingly, the AA is making the rule effective March 9, 2001 through 11:59 p.m. April 9,

2001. This restriction has been announced on the NOAA weather channel, HMS facsimile network, in newspapers, and other media.

As prior notice and an opportunity for public comment are not required to be provided for this action by 5 U.S.C. 553, or by any other law, the analytical requirements of 5 U.S.C. 601 *et seq.*, are inapplicable.

The AA prepared an Environmental Assessment (EA) for the final rule (57 FR 57348, December 4, 1992) requiring turtle excluder device use in shrimp trawls and creating the regulatory framework for the issuance of notifications such as this. Copies of the EA are available (see **ADDRESSES**).

Dated: March 9, 2001.

Bruce C. Morehead.

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.
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