

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

2. Amend section 52.232–10 by revising the date of the clause; by revising the last sentence or paragraph (a), and by revising paragraphs (b) and (c) to read as follows:

**52.232–10 Payments under Fixed-Price Architect-Engineer Contracts.**

\* \* \* \* \*

**PAYMENTS UNDER FIXED-PRICE ARCHITECT-ENGINEER CONTRACTS (DATE)**

(a) \* \* \* The estimates, along with any supporting data required by the Contracting Officer, shall be prepared by the Contractor and submitted along with its voucher.

(b) After receipt of each substantiated voucher the Government shall pay the voucher as approved by the Contracting Officer or authorized representative. The Contracting Officer may require a withhold of up to 10 percent of the amounts due under paragraph (a) of this clause in order to protect the Government's interest and ensure satisfactory completion of the contract. The amount of withhold shall be determined based upon the contractor's performance record under this contract. Whenever the Contracting Officer determines that the work is substantially complete and that the amount retained is in excess of the amount adequate for the protection of the Government, the Contracting Officer may release the excess amount to the Contractor.

(c) Upon satisfactory completion by the Contractor and final acceptance by the Contracting Officer of all design work done by the Contractor under the "Statement of Architect-Engineer Services", the Contractor will be paid the unpaid balance of any money due for design work under the statement, including all withheld amounts.

\* \* \* \* \*

(End of clause)

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Parts 222 and 223**

[Docket No. 0809121212–81515–01]

**RIN 0648–AX20**

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

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

Atmospheric Administration (NOAA), Commerce.

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

**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 (ESA). This proposed action would make minor modifications to the current requirements by clarifying where on the dredge the chain mat should be hung; by excluding 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 by adding 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. NMFS is requesting public comment on this action, the focus of which is the minor modifications described here. NMFS is not accepting public comment on the existing chain mat requirements through this proposed rule.

**DATES:** Comments on the proposed rule must be received by 5 p.m. EST on June 4, 2009.

**ADDRESSES:** Written comments on this action, identified by RIN 0648–AX20, may be submitted by any one of the following methods:

- *Electronic submissions:* Submit all electronic public comments via the Federal eRulemaking portal at <http://www.regulations.gov>.
- *Fax:* 978–281–9394, ATTN: Sea Turtle Conservation Measures, Proposed Rule.
- *Mail:* Mary A. Colligan, Assistant Regional Administrator for Protected Resources, NMFS, Northeast Region, 55 Great Republic Drive, Gloucester, MA 01930, Attn: Sea Turtle Conservation Measures, Proposed Rule.

*Instructions:* All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All personal identifying information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not

submit confidential business information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Copies of the Draft Supplemental Environmental Assessment/Regulatory Impact Review can be obtained from <http://www.nero.noaa.gov/nero/regs/com.html> listed under the Electronic Access portion of this document or by writing to Pasquale Scida, NMFS, Northeast Region, 55 Great Republic Drive, Gloucester, MA 01930.

**FOR FURTHER INFORMATION CONTACT:**

Pasquale Scida (ph. 978–281–9208, fax 978–281–9394, e-mail [pasquale.scida@noaa.gov](mailto:pasquale.scida@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. 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's 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 mouth 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).

In 2008, 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. Only a single photograph was analyzed in this analysis. The analysis showed that the lengths of the sides of the openings were both greater than and less than 14 inches and that 14 inches was within the range of openings tested in the experimental fishery. Based on this information, NMFS re-evaluated the chain mat requirements and the analysis conducted for the April 2008 rule. NMFS found that the available information continues to support an opening of 14 inches or less and that the conclusions of the analysis conducted for the April 2008 rule are still valid.

This proposed rule would modify the existing chain mat regulations that apply to chain-mat modified dredges in the Atlantic sea scallop fishery. This proposed rule, if implemented, would (1) more clearly define where on the dredge gear the chain mat must be hung; (2) exclude the sweep from the requirement that each side of the opening must 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. This rule is being proposed under the ESA provisions authorizing the issuance of regulations to conserve threatened species and for enforcement purposes (sections 4(d) and 11(f), respectively).

#### Configuration of the Gear

The current regulations define a chain mat as “\* \* \* a device designed to be installed in a scallop dredge forward of the sweep, as described in 50 CFR 223.206, for the purpose of excluding sea turtles from the dredge.” The regulations at 50 CFR 223.206 state, in

part, 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 length of each side of the openings formed by the intersecting chains, including the sweep, must be less than or equal to 14 inches (35.5 cm).” NMFS has determined that “forward of the sweep” does not fully describe the configuration and that more specificity would ensure that the requirements are met consistently in the manner NMFS intends. Therefore, this proposed rule would clarify that the chain mat must cover the entire opening of the dredge bag by specifying that “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) \* \* \*” These changes simply clarify the existing requirements and would not result in any additional or different biological, physical, or socio-economic impacts.

#### Exclusion of the Sweep

Second, NMFS proposes to exclude the sweep from the requirement that each side of the openings formed by the intersecting chains be less than or equal to 14 inches (35.5 cm). For those openings adjacent to the sweep, the sweep chain will create one side of the opening. Under the current requirements, the length of the side created by the sweep chain must be 14 inches (35.5 cm) or less. However, NMFS has re-examined this requirement and has found that except in rare cases, the size of the openings along the sweep will be smaller (even if the length of the side created by the sweep exceeds 14 inches (35.5 cm)) than the size of the openings created by a square with 14 inches (35.5 cm) per side, the maximum opening allowed throughout the chain mat. Given the configuration of the dredge gear, it is possible that one opening at the bottom of the arc created by the sweep could be greater than the opening created by a square with 14

inches (35.5 cm) per side if the vertical chains forming the two sides of this opening were at or near 14 inches (35.5 cm) in length.

There are several reasons why this proposed change would result in inconsequential impacts on the conservation benefit of the chain mats. First, along the sweep, the openings are irregularly shaped and may be three- or four-sided (see EA for figure), generally resulting in a smaller opening than throughout the rest of the chain mat. Given the configuration of the gear and the area of the openings along the sweep, the number of openings that may be larger than the opening created by a square with 14 inches (35.5 cm) per side is limited to a single opening in the chain mat. Second, the increase in size of the one opening is only a small fraction of the size of the openings allowed throughout the chain mat due to the arc in the sweep. This increase is further limited by the fact that the sweep chain is generally a heavier chain, which would take up some of the space within the opening. Third, this slightly larger opening would only be present on a subset of the dredges used in the fishery and, where present on a dredge, would be limited to only one of the chain mat openings. In some cases, fishermen are configuring the gear such that the sides of the openings created by the intersecting chains are less than 14 inches (35.5 cm) to allow for chain stretch and wear. In these cases, the opening at the bottom of the arc created by the sweep would likely be smaller than that created by a square with 14 inches (35.5 cm) per side, and all of the openings in the chain mat would be consistent with the openings allowed under the current regulations.

Given that the slightly larger opening is limited to one opening on a subset of the dredges used in the fishery and that the increase in the size of the opening is small due to the way the gear is configured, the conservation benefit to sea turtles under this requirement is essentially the same as the current requirements. While possible, it is highly 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 that may be present on some dredges.

Chain mats are currently required in certain areas and times. This rule would not change the spatial or temporal extent of the requirements. It would make minor modifications to how the gear is configured. However, given that the modifications are minor and that the gear would continue to be required in the same areas and times, this action

would not result in any additional impacts to the physical environment or to habitat. This change would also not result in any additional economic costs (*see* Classification section).

### Definition of the Sweep and the Diamonds

As the modifications above specifically exclude the sweep from the requirement that the openings in the chain mat be 14 inches (35.5 cm) per side, NMFS would add a definition of the sweep to the regulations. NMFS is proposing to define the sweep as “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.” NMFS would also add a definition of the “diamonds” to the regulations. NMFS is proposing to define the diamonds as “the triangular shaped portions of the ring bag on the ‘dredge bottom’ as defined at 50 CFR 648.2.” This definition is necessary as the term diamonds is used to define the sweep.

### Classification

This proposed rule has been determined to be not significant for purposes of Executive Order 12866. A description of the action, why it is being considered, and the legal basis for this action are contained in the preamble. No reporting, recordkeeping, or other compliance requirements are proposed. No duplicative, overlapping, or conflicting Federal rules have been identified.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

The small entities affected by the chain mat regulations are Atlantic sea scallop fishermen entering waters south of 41° 9.0' N. latitude from the shoreline to the outer boundary of the Exclusive Economic Zone. These regulations apply to all vessels with a sea scallop dredge(s) and required to have a Federal Atlantic sea scallop fishery permit, regardless of the dredge size or vessel permit category.

The final rule (73 FR 18984, April 8, 2008) and Final Environmental Assessment/Final Regulatory Flexibility Act Analysis/Regulatory Impact Review (EA/FRFA/RIR) (NMFS 2008) implementing the chain-mat modified dredge requirements identified 314

vessels that would be affected by the chain mat requirements. The economic impacts of the minor changes proposed here are described below.

Under the current requirements, the length of each side of the opening created by the intersecting chains, including the side created by the sweep chain, must be 14 inches (35.5 cm) or less. NMFS has identified two alternate ways to configure the gear to comply with the regulation as currently written. Fishermen could create smaller openings (approximately 9–10 inches (27.9–25.4 cm) per side) throughout the mat to ensure that the length of the side created by the sweep was less than or equal to 14 inches (35.5 cm). However, it was never the intention that the requirement result in openings in the chain mat of 9–10 inches (27.9–25.4 cm) per side. Alternatively, fishermen could add a small piece of chain to any opening where the length of the side created by the sweep is greater than 14 inches (35.5 cm). The number of openings that would require a piece of additional chain is expected to be limited to that area along the sweep that is curved. This short piece of chain would divide the sweep, creating two smaller openings. The pieces of chain would be no more than 14 inches (35.5 cm), and in many cases, the segments are likely to be much less than 14 inches (35.5 cm). As described in the EA (NMFS 2008) for the final rule (73 FR 18984, April 8, 2008) requiring the use of chain-mat modified dredge gear, a 15-ft (4.57-m) dredge with frame, bag, and club stick weighs approximately 4500 pounds (2041 kg). The weight of the chain mat was estimated to be between 67 pounds (30.1 kg) for a 10-ft (3.05-m) dredge and 176 pounds (79.8 kg) for a 15-ft (4.57-m) dredge (NMFS 2008). In the economic analysis for the 2008 regulations, a conservative estimate (20 percent) of the additional chain required to comply with the 14-inch (35.5-cm) requirement was used. Therefore, it is likely that the costs of these additional small segments were subsumed in that analysis. However, some additional information on the amount of chain required to divide these openings is provided here. The estimated cost for the chain was \$2.00 to \$3.00 per foot. Therefore, given that the additional chain required is only a short segment added to a limited number of openings, it is expected that the economic costs would be minimal. This amount of chain is also not expected to affect the weight of the gear or its efficiency.

The proposed action would not result in any additional costs, and, under this action, the vessel would not incur the costs associated with adding small

lengths of additional chain to ensure that the sweep segments do not exceed 14 inches (35.5 cm). Therefore, the differences in cost between a chain mat configured under the current requirements and one configured as proposed here are minimal. This action would not affect the profitability of the vessel. As this action is not expected to result in any additional costs or to affect the profitability of the vessel, it will not contribute to cumulative economic impacts.

With the exception of the rare cases described in the preamble, the size of the openings along the sweep will be smaller (even if the length of the side created by the sweep exceeds 14 inches (35.5 cm)) than the size of the openings created by a square with 14 inches (35.5 cm) per side, the maximum opening allowed throughout the chain mat. Therefore, the proposed action would only result in inconsequential impacts on the conservation benefit of the chain mats (*see* preamble). In addition, the clarification as to the configuration of the gear and the additional definitions would not result in any socio-economic impacts.

### Literature Cited

DuPaul, W.D., D.B. Rudders, and R.J. Smolowitz. 2004a. 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. 152 pp.

Dated: April 29, 2009.

**Samuel D. Rauch III,**

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

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

Endangered and threatened species.

For the reasons set forth in the preamble, 50 CFR parts 222 and 223 are proposed to be 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.

\* \* \* \* \*

(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.

\* \* \* \* \*