

has determined that the incidental take of loggerhead sea turtles by this fishery correlates to the area and season being fished during these oceanographic conditions. If implemented, this time and area closure will result in a reduction in the take of loggerhead turtles by the fishery and would be necessary to avoid the likelihood of the CA/OR drift gillnet fishery jeopardizing the continued existence of the loggerhead turtle population.

DATES: This final rule is effective January 15, 2004.

ADDRESSES: Copies of the Environmental Assessment/Regulatory Impact Review (EA/RIR) and biological opinion (BO) are available on the internet at <http://swr.nmfs.noaa.gov> or may be obtained from Cathy Campbell, Protected Resources Division, National Marine Fisheries Service, Southwest Region, 501 West Ocean Boulevard, Suite 4200, Long Beach, CA 90802-4213.

FOR FURTHER INFORMATION CONTACT: Cathy Campbell, NMFS, Southwest Region, Protected Resources Division, (562) 980-4060.

SUPPLEMENTARY INFORMATION: All sea turtles that occur in U.S. waters are listed as either endangered or threatened under the Endangered Species Act (ESA). The loggerhead turtle (*Caretta caretta*) is listed as threatened. Under the ESA and its implementing regulations (50 CFR 223.205), taking threatened sea turtles, even incidentally, is prohibited, with exceptions identified in 50 CFR 223.206. The incidental take of threatened species may only be legally authorized by an incidental take statement in a biological opinion issued pursuant to section 7 of the ESA, an incidental take permit issued pursuant to section 10 of the ESA, or regulations under section 4(d) of the ESA. In order for an incidental take statement to be issued, the incidental take must be not likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat.

On October 24, 2000 (65 FR 64670, October 30, 2000), NMFS issued a permit, for a period of 3 years, to authorize the incidental, but not intentional, taking of four stocks of threatened or endangered marine mammals (Fin whale, California/Oregon/Washington stock; Humpback whale, California/Oregon/Washington-Mexico stock; Steller sea lion, eastern stock; and Sperm whale, California/Oregon/Washington stock) by the CA/OR drift gillnet fishery under section 101(a)(5)(E) of the Marine Mammal

Protection Act (MMPA) (16 U.S.C. 1371(a)(5)(E)).

NMFS completed a formal consultation to authorize this incidental take of marine mammals listed under the ESA, as required by section 7 of the ESA. This consultation also included an analysis of the effects of the CA/OR drift gillnet fishery on loggerhead turtles. On October 23, 2000, NMFS issued a BO in which it determined that the then current operations of the CA/OR drift gillnet fishery were likely to jeopardize the continued existence of loggerhead turtles.

Measure to Reduce Loggerhead Turtle Entanglements

To avoid the likelihood of the CA/OR drift gillnet fishery jeopardizing the continued existence of loggerhead turtles, NMFS developed a Reasonable and Prudent Alternative (RPA) in the BO that consists of prohibiting CA/OR drift gillnet vessels from fishing in U.S. waters off southern California east of the 120°W. (in the area bounded by the California coastline to the north and east, the U.S.- Mexico border to the south, and the 120° W to the west), from August 15 through August 31, and January 1 through January 31, during a forecasted, or occurring, El Nino event. This measure would reduce the likelihood of the CA/OR drift gillnet fishery incidentally entangling loggerhead turtles by 71 percent. On September 20, 2002, NMFS published a proposed rule (67 FR 59243) to implement this RPA to protect loggerhead turtles. On December 24, 2002, NMFS published an interim final rule (67 FR 78388) that implemented the RPA to protect loggerhead turtles and solicited public comment on an alternative closure during the months of June, July, and August. In response to a request from the public to provide more time to review the loggerhead turtle entanglement data and the sea surface temperature data, NMFS extended the comment period from February 7, 2003, to March 24, 2003 (68 FR 7080, February 12, 2003).

Responses to Comments

The measures in this final rule are based in part on comments received on the proposed (see 67 FR 78388 December 24, 2002, for comments and responses) and interim final rules. NMFS received ten comments on the interim final rule. NMFS reviewed and considered all comments received in the development of this rule.

Comment 1: Several commenters believe that the CA/OR thresher shark/swordfish drift gillnet fishery, which has a very low take of loggerhead

turtles, is not the cause of the decline in the population of loggerhead sea turtles and that closures in this fishery are not necessary.

Response: While NMFS recognizes that the CA/OR thresher shark/swordfish drift gillnet fishery has a low level of take of loggerhead turtles, the status of the loggerhead turtle population is sufficiently depleted that the impact of this fishery in addition to existing impacts resulted in a finding that the current operations of the CA/OR drift gillnet fishery were likely to jeopardize the continued existence of loggerhead turtles.

Comment 2: Several commenters supported a closure during June through August rather than in January and August 15 through 31 during El Nino conditions. They noted that the closure in June through August provided greater protection to loggerhead turtles than the RPA in the October 2000 BO, while causing less economic burden to the CA/OR thresher shark/swordfish drift gillnet fishery.

Response: NMFS agrees and is implementing an alternate closure during the months of June, July, and August during El Nino conditions. As explained in the following section, NMFS conducted an analysis of observer data and recent fishing effort data and determined that a closure during June, July, and August during El Nino conditions provides greater protection for loggerhead turtles than the RPA in the October 2000 BO while causing less economic burden to the CA/OR thresher shark/swordfish drift gillnet fishery.

Comment 3: One commenter suggested moving the northern boundary of the closed area south to 32°45'N. and the western boundary east to 119°30'W because there have been no loggerhead turtles observed taken outside this area.

Response: Although there have been no observed loggerhead turtles taken in ocean waters north of 32°45'N. during El Nino events or west of 119°30'W., this does not mean that loggerhead turtles are not present in this area. During El Nino events, NMFS has limited observer data for this area, with only 77 observed sets in the area east of 120°W. and north of 32°45'N. and 14 sets between 120°W. and 119°30'W. south of 32°45'N. Therefore, the lack of an observed take in this area may be the result of fewer observations in this area during the summer months of El Nino events. Sea surface temperatures show that the area east of the 120°W during El Nino conditions are comparable to the sea surface temperatures where loggerhead turtle entanglements were observed. In