

the loggerheads in the Atlantic that encounter a shrimp trawl are too large to escape the current minimum openings. The implementation of this rule, however, is expected to allow all size classes of loggerhead and leatherback turtles to escape. The Opinion estimated that implementation of this rule will decrease shrimp trawl related mortality by 94 percent for loggerheads and 96 percent for leatherbacks.

To protect large green, loggerhead and leatherback turtles NMFS proposed modifying the TED regulations to ensure that TEDs are capable of releasing these large turtles (66 FR 17852, April 5, 2000; 66 FR 50148, October 2, 2001). The proposed changes would have been applicable in all inshore and offshore waters of the Southeast United States as follows: (1) Require all hard TEDs to have a grid with a minimum inside measurement of 32 inch (81 cm) by 32 inch (81 cm); (2) require the use of either the double cover flap TED, a TED with a minimum opening of 71-inch (180-cm) straight-line stretched mesh, or the Parker soft TED with a 96-inch (244-cm) opening; (3) disallow the use of the hooped hard TED; (4) disallow the use of weedless TEDs and the Jones TED; (5) disallow the use of accelerator funnels; (6) require bait shrimpers to use TEDs in states where a state-issued bait shrimp license holder can also fish for food shrimp from the same vessel; and (7) require the use of tow times on small try nets.

Public Comments

The measures in this final rule are based, in part, on comments received on the Advanced Notice of Proposed Rule Making (ANPR) (65 FR 17852, April 5, 2000), the proposed rule (66 FR 50148, October 2, 2001) and eight public hearings held throughout the southeastern United States. NMFS received 23 comments as a result of the ANPR and 8,273 comments as a result of the proposed rule and public hearings; of the 8,273 responses, 7,714 were letters from the public which were similar in content. NMFS reviewed all of the comments received. Where appropriate, comments are grouped according to general subject matter, and references are made only to some groups or individuals, and not to all groups or individuals who may have made similar comments.

Comment 1: Some fishermen believe that the economic analysis that NMFS completed for the proposed rule is flawed in the following ways: (1) The cost to retrofit TEDs is far too low; (2) the 20 percent profit margin used is too high; (3) the cumulative loss of shrimp

as a result of the proposed changes in addition to existing requirements is not considered; (4) an analysis of possible shrimp loss due to the prohibition of accelerator funnels is lacking; (5) the analysis of the economic impact to small businesses is inadequate; (6) the percentage of shrimp loss is too low and should be 15 to 20 percent; (7) information on gear replacement frequency is inaccurate; and (8) the economic analysis does not consider the effects the rule will have on fishermen in combination with depressed shrimp prices.

Response: NMFS has completed a Final Regulatory Flexibility Analysis (FRFA) and Regulatory Impact Review (RIR), in conjunction with an environmental assessment, on this final rule's effects in accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and Executive Order (E.O.) 12866. This EA/RIR/FRFA analyzes this final rule's effects on the shrimp fishery in combination with past TED and Bycatch Reduction Devices (BRD) rules. It also analyzes this final rule's effects on the shrimp fishery in light of current shrimp price information as well as the best available information from existing databases on profit margins, gear costs, and the durability of and cost to replace equipment. The average replacement cost for a leatherback TED was assumed to be \$220, 4 TEDs were assumed necessary for small vessels and 8–10 TEDs for large vessels, and the average useful life of a TED was assumed to be 3 years. In the assessment of the proposed rule NOAA Fisheries assumed a 1-year life span for the equipment and used a cost of \$45 dollars for replacement. Because the equipment was only expected to last 1 year NOAA Fisheries felt that replacement costs would be low because the fishermen would have to replace the gear anyway so the only actual cost increase would be from the difference in cost of a leatherback TED verses the current TEDs. The assumption of a 20-percent profit margin was eliminated and, instead, vessel profits were internally calculated based on expected revenues and variable costs. Shrimp loss under current regulations as well as the proposed regulations was considered and discussed in the analysis. Estimates of shrimp loss under different TED requirements were derived from test data and provided by the NMFS Southeast Fisheries Science Center (SEFSC). Testing methods are described in the responses to comments 11 and 12 of this section. The tests used currently authorized TEDs which include the use of accelerator funnels.

To incorporate the effects of the depressed shrimp prices, 2001 prices were utilized throughout the assessment. The results of the analysis indicate that, under status quo conditions including depressed shrimp prices, while profits (defined as average revenue minus average variable costs) per vessel in the Southeast shrimp trawl fishery, are expected to increase over the next 5 years, this will be accomplished due to contraction of the fishery in terms of total effort, which is expected to decline by approximately 5.4 percent. The effort contraction is comprised of growth in the small vessel fleet, coupled with reductions in the large vessel fleet. Since large vessels are more costly to operate, the resultant physical profile of the fleet is, on average, smaller with lower variable costs. The net effect is that shrimp landings per vessel increase, while variable costs per vessel decline, resulting in an increase in profits, as defined, per vessel. Revenues remain, however, on the average, insufficient to cover both operating and fixed costs. The net impact of the proposed rule is not expected to significantly adversely affect this outcome, with the change in average profits per vessel ranging from a gain of 0.5 percent to a loss of 2.4 percent from the status quo.

Comment 2: Some fishermen believe that the shrimp fishery is bearing the majority of the burden for the recovery of sea turtles. They feel the government should help them out by implementing such things as: (1) a TED buy-back program; (2) tax incentives for using TEDs; and (3) price controls and subsidies on shrimp, similar to what corn, soybean, and wheat farmers receive. Fishermen also believe that the government should provide better enforcement of Public Law 101–162 section 609(b). *Response:* Only Congress can authorize programs such as equipment buy-backs, tax incentives, and price controls and subsidies.

Public Law 101–162 section 609(b) prohibits the importation of shrimp harvested with fishing technology that may adversely affect such species of sea turtles. Under section 609, shrimp may be imported from a harvesting nation for which the U.S. government has certified that the nation has demonstrated that its regulatory program governing the incidental taking of sea turtles is comparable to that of the United States. The Court of Appeals for the Federal Circuit recently upheld the government's interpretation of section 609 allowing import of shrimp from countries that are not certified if the exporter and an official of the harvesting nation attest that the individual