

Comments on the Emergency Response Plan and Temporary Restrictions

As stated earlier, NMFS made the ERP available to all concerned parties, accepting comments, and is currently in the process of revising the ERP based on those comments. In addition, NMFS considered those comments in developing this proposed rule. One commenter objected to the possible restrictions on soft TEDs and asked that NMFS assess alternatives to flap restrictions. The required use of TEDs in try nets was stated to be acceptable and the commenter stated that many local fishermen already used TEDs in try nets. NMFS has also received proposals from several representatives of the shrimp fishery that set forth alternative restrictions that would limit nearshore fishing pressure and resulting levels of turtle capture, of which one has been submitted as a petition for rulemaking pursuant to section 553(e) of the Administrative Procedure Act (APA), and to which NOAA will respond. In addition, NMFS has received comments supporting the ERP and the imposition of additional restrictions on shrimp fishing.

NMFS received numerous comments on the temporary restrictions published on May 3, 1995 (60 FR 21741). These came primarily by telephone and at a meeting hosted by shrimp industry representatives and attended by NMFS personnel on May 5, 1995, as well as at additional meetings held between NMFS personnel and industry representatives on May 12 and May 19.

Many shrimpers stated that the prohibition on the use of all try nets without TEDs installed was unreasonable, because NMFS had not provided any alternative that would allow them to monitor their catch rates and catch composition, forcing them to fish inefficiently. NMFS subsequently modified the temporary restrictions (60 FR 26691, May 18, 1995) to allow certain small try nets to be used without TEDs installed.

NMFS also received many comments that both the ERP and the temporary requirements were developed and implemented without adequate notice and opportunity to comment, and without adequate time for the shrimpers to come into compliance with the temporary restrictions. In addition, several industry groups have recently filed suit against NMFS alleging failure to comply with sections 553(b) and 553(d) of the APA in promulgating of the ERP and the temporary restriction of May 3. The APA requirement does not apply to interpretative rules, general statements of policy, or rules of agency

organization, procedure or practice, and the delayed effective requirement does not apply to interpretative rules and statements of policy. Additionally, the APA provides that an agency may for good cause find that advance notice and opportunity for comment, as well as a delayed effective date, may be impracticable, unnecessary or contrary to the public interest. Nevertheless, NMFS recognizes the concerns of shrimpers that prior notice, opportunity for prior public comment, and delayed effective date should be provided to the greatest extent possible. The purpose of the ERP is to provide notice to the public as to when and what additional restrictions NMFS likely is to impose as strandings of listed sea turtles increased or non-compliance with requirements increased. This proposed rule likewise serves to give the prior public notice an opportunity for prior public comment on restrictions before the thresholds in the ERP are met.

Provisions of the Proposed Rule

This proposed rule would prohibit fishing by shrimp trawlers (as defined in 50 CFR 217.12), starting 12:01 a.m. (local time) on the day of the reopening of the waters off Texas to shrimp fishing and ending 11:59 p.m. (local time) 30 days after the reopening, in offshore waters, seaward to 10 nm (18.5 km) from the COLREGS line, bounded between the line along 27° N. lat. and the line along 93°50.3' W. long. (the Texas-Louisiana border), unless they are in compliance with the following prohibitions and all other applicable provisions in 50 CFR 227.72(e):

1. The use of soft TEDs described in 50 CFR is prohibited.
2. The use of hard TEDs with bottom escape openings and special hard TEDs with bottom escape openings is prohibited. Approved hard TEDs and special hard TEDs must be configured with the slope of the deflector bars upward from forward to aft and with the escape opening at the top of the trawl.
3. The use of try nets with a headrope length greater than 12 ft (3.6 m) or a footrope length greater than 15 ft (4.6 m) is prohibited unless a NMFS-approved top-opening, hard TED or special hard TED is installed when the try nets are rigged for fishing. Try nets with a headrope length 12 ft (3.6 m) or less and a footrope length 15 ft (4.6 m) or less would be exempt from the TED-use requirement in accordance with paragraph (e)(2)(ii)(B)(1).
4. The use of a webbing flap that completely covers the escape opening in the trawl is prohibited. Any webbing that is attached to the trawl, forward of the escape opening, must be cut to a

length so that the trailing edge of such webbing does not approach to within 2 inches (5.1 cm) of the posterior edge of the TED grid. The requirements for the size of the escape opening would be unchanged.

The proposed rule would suspend for a 30-day period all provisions in 50 CFR 227.72(e), including, but not limited to 50 CFR 227.72(e)(2)(ii)(B)(1) (use of try nets), 50 CFR 227.72(e)(4)(iii) (Soft TEDs), 50 CFR 227.72(e)(4)(i)(F) (Position of escape opening), and 50 CFR 227.72(e)(4)(iv)(C) (Allowable modification to TEDs), that are not consistent with these prohibitions.

This proposed rule would also require owners and operators of shrimp trawlers in the area subject to temporary restrictions to carry a NMFS-approved observer aboard their vessel(s), if directed to do so by the Director, Southeast Region, NMFS, upon written notification sent to either the address specified for the vessel registration or documentation purposes, or otherwise served on the owner or operator of the vessel. Owners and operators and their crew would be required to comply with the terms and conditions specified in such written notification.

These restrictions would allow shrimp trawling to continue in the affected area while providing heightened protection for sea turtles. The use of those TEDs with the greatest potential for turtle capture would be prohibited. Although soft TEDs and bottom-opening TEDs have generally been approved for use, NMFS believes that they may not be as effective at releasing turtles, particularly small juvenile turtles, under some conditions, as top-opening hard TEDs. NMFS researchers have determined through recent in-water testing that small turtles require almost twice as long to escape from a bottom-opening TED than from a top-opening TED (average 125.6 seconds vs. average 68.8 seconds) under ideal conditions. NMFS has previously promulgated regulations to address and discuss other problems with bottom-opening hard TEDs (59 FR 33447, June 29, 1994; 60 FR 15512, March 24, 1995).

Try nets without an approved TED installed would be prohibited except for small try nets. While try nets have been exempted from the requirement to have a TED installed, because they are only intended for use in brief sampling tows not likely to result in turtle mortality, turtles are, however, caught in try nets. Either through repeated captures or long tows, try nets can contribute to the mortality of sea turtles. Takes of sea turtles in try nets, including one mortality, have been documented by NMFS.