

within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

Dated: August 26, 2009.

**Laura Yoshii,**

*Acting Regional Administrator, Region IX.*

■ Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

**PART 52—[AMENDED]**

■ 1. The authority citation for part 52 continues to read as follows:

*Authority:* 42 U.S.C. 7401 *et seq.*

**Subpart F—California**

■ 2. Section 52.220 is amended by adding paragraph (c)(354)(i)(E)(5) to read as follows:

**§ 52.220 Identification of plan.**

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(c) * * *
(354) * * *
(i) * * *
(E) * * *
(5) Rule 4703, "Stationary Gas Turbines," adopted on September 20, 2007.
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**DEPARTMENT OF TRANSPORTATION**

**Federal Railroad Administration**

**49 CFR Part 213**

[Docket No. FRA-2008-0036]

RIN 2130-AB90

**Track Safety Standards; Continuous Welded Rail (CWR)**

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Correcting amendment.

**SUMMARY:** FRA published a final rule in the **Federal Register** on August 25, 2009, revising the Track Safety Standards. The final rule included compliance dates for Class I, II, and III

railroads only. The final rule inadvertently omitted compliance dates for commuter railroads, intercity passenger railroads, and any other additional railroads that have continuous welded rail (CWR). This document corrects the final rule by including compliance dates for the omitted railroads and amending a reference to the effective date in the rule text.

**DATES:** *Effective date:* This correcting amendment is effective October 21, 2009. *Compliance dates:* October 9, 2009 for Class I railroads; November 23, 2009 for Class II railroads, commuter railroads, and intercity passenger railroads; and February 22, 2010 for Class III railroads and any other additional railroads with CWR.

**FOR FURTHER INFORMATION CONTACT:** Kenneth Rusk, Staff Director, Office of Railroad Safety, FRA, 1200 New Jersey Avenue, SE., Washington, DC 20590 (*telephone:* (202) 493-6236); or Sarah Grimmer Yurasko, Trial Attorney, Office of the Chief Counsel, FRA, 1200 New Jersey Avenue, SE., Washington, DC 20950 (*telephone:* (202) 493-6390).

**SUPPLEMENTARY INFORMATION:** So that the agency would be better able to review CWR plans as required by the final rule published August 25, 2009 (74 FR 42988), FRA determined that there are three different compliance dates for railroads containing CWR, based on the railroad size.<sup>1</sup> In the final rule, FRA stated that the compliance date for Class I railroads is October 9, 2009 (45 days after the publication date), the compliance date for Class II railroads is November 23, 2009 (90 days after the publication date), and the compliance date is February 22, 2010 (180 days after the publication date) for Class III railroads. FRA inadvertently left commuter railroads, intercity passenger railroads, and any other additional railroads with CWR track out of the compliance schedule; therefore, FRA is now clarifying that the compliance date for commuter railroads and intercity passenger railroads is November 23, 2009, and the compliance date for any other additional railroads with CWR is February 22, 2010.

Due to this inadvertent error, FRA is also changing the date listed at 49 CFR 213.119(c)(2). This paragraph states that, in the case of a bolted joint installed during CWR installation after August 25, 2009 (the publication date of the final rule), within 60 days the track owner must either: (1) Weld the joint; (2) install a joint with six bolts;<sup>2</sup> or (3)

<sup>1</sup> See 49 CFR 1201.1-1(a).  
<sup>2</sup> See 49 CFR 213.121(e), stating that, in the case of CWR, each rail shall be bolted with at least two

anchor every tie 195 feet in both directions of the joint.

**List of Subjects in 49 CFR Part 213**

Penalties, Railroad safety, Reporting and recordkeeping requirements.

■ Accordingly, 49 CFR part 213 is corrected by making the following correcting amendment:

**PART 213—TRACK SAFETY STANDARDS**

■ 1. The authority citation for part 213 continues to read as follows:

*Authority:* 49 U.S.C. 20102-20114 and 20142; 28 U.S.C. 2461, note; and 49 CFR 1.49(m).

**§ 213.119 [Amended]**

■ 2. In § 213.119(c)(2), remove the date of "August 25, 2009", and add in its place "October 21, 2009".

Issued in Washington, DC, on September 30, 2009.

**Joseph C. Szabo,**  
*Administrator.*

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Parts 223 and 622**

[Docket No. 0910141365-91366-01]

RIN 0648-AY21

**Sea Turtle Conservation; Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic**

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

**ACTION:** Final rule.

**SUMMARY:** This rule implements an area closure and associated gear restrictions applicable to the bottom longline component of the reef fish fishery in the exclusive economic zone (EEZ) of the Gulf of Mexico to reduce incidental take and mortality of sea turtles. Specifically, this rule prohibits the use of bottom longline gear for the harvest of reef fish shoreward of a line approximating the 35-fathom depth contour in the eastern Gulf of Mexico and limits bottom longline vessels operating in the reef fish fishery east of longitude 85°30'W to 1,000 hooks onboard, of which only 750

bolts at each joint. This is a total of four bolts required at each joint.

may be actively fished or rigged for fishing.

**DATES:** This rule is effective on October 16, 2009.

**FOR FURTHER INFORMATION CONTACT:** Michael Barnette, telephone: 727-551-5794, fax: 727-824-5309, e-mail: [michael.barnette@noaa.gov](mailto:michael.barnette@noaa.gov).

**SUPPLEMENTARY INFORMATION:** 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*) turtles are listed as endangered. The loggerhead (*Caretta caretta*) and green (*Chelonia mydas*) turtles are listed as threatened, except for breeding populations of green turtles in Florida and on the Pacific coast of Mexico, which are listed as endangered.

Sea turtles are incidentally taken, and some are killed, as a result of numerous activities, including fishery-related activities in the Gulf of Mexico and along the Atlantic seaboard. Under the ESA and its implementing regulations, the taking of sea turtles is prohibited, with exceptions identified in 50 CFR 223.206(d), or according to the terms and conditions of a biological opinion issued under section 7 of the ESA, or according to an incidental take permit issued under section 10 of the ESA.

### Background

On February 15, 2005, NMFS completed a biological opinion for the Gulf reef fish fishery, as managed under the Gulf of Mexico Reef Fish Fishery Management Plan (Reef Fish FMP). The opinion concluded that the continued authorization of the Gulf reef fish fishery was not likely to jeopardize the continued existence of any listed species of sea turtles. An incidental take statement (ITS) was issued specifying the amount and extent of anticipated take on a three-year basis, along with reasonable and prudent measures and associated terms and conditions deemed necessary and appropriate to minimize the impact of these takes. Other listed species were found not likely to be adversely affected. No critical habitat overlapped with the action area, thus none was affected.

As provided in 50 CFR 402.16, reinitiation of formal consultation is required when discretionary involvement or control over the action has been retained (or is authorized by law) and: (1) the amount or extent of the incidental take is exceeded; (2) new information reveals effects of the agency action that may affect listed species or

critical habitat in a manner or to an extent not previously considered; (3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat not previously considered; or (4) if a new species is listed or critical habitat designated that may be affected by the identified action.

On September 3, 2008, NMFS' Southeast Regional Office, Sustainable Fisheries Division, requested reinitiation of ESA section 7 consultation on the Reef Fish FMP. The request was based on a preliminary analysis conducted by the Southeast Fisheries Science Center (SEFSC) of recent observer data. The SEFSC's preliminary analysis indicated that the overall amount and extent of incidental take for sea turtles specified in the incidental take statement of the 2005 opinion had been exceeded by the bottom longline component of the fishery. The final report, "Estimated Takes of Sea Turtles in the Bottom Longline Portion of the Gulf of Mexico Reef Fish Fishery July 2006 Through 2007 Based on Observer Data," (NMFS SEFSC 2008) was received on October 8, 2008. The final report confirmed that loggerhead takes had been substantially exceeded by the commercial bottom longline component and that consultation needed to be reinitiated.

On October 28, 2008, NMFS presented a summary of the final report to the Gulf of Mexico Fishery Management Council (Council), and informed the Council that the 2005 opinion ITS had been exceeded and that a new biological opinion needed to be conducted for the fishery. In response to this new information, the Council passed a motion to prepare a scoping document for Amendment 31 to the Reef Fish FMP to address sea turtle and longline interactions, indicating a desire to consider time/area closures, gear modifications, alternative baits, observer program modifications, and effort limitations. The Council also requested a temporary emergency rule to reduce the sea turtle bycatch in the Gulf bottom longline component of the reef fish fishery in the short-term while they continued to develop Amendment 31 to address the problem in the long-term. On January 9, 2009, after extensive review of NMFS SEFSC 2008 and ongoing activities in the Gulf reef fish fishery, NMFS determined that continuing to authorize the fishery during the reinitiation period would not violate section 7(a)(2) or section 7(d) of the ESA.

Per the Council's request, NMFS published a temporary emergency rule on May 1, 2009, to reduce the incidental

take and mortality of sea turtles in the bottom longline component of the reef fish fishery in the Gulf of Mexico EEZ while the Council completed Amendment 31 (74 FR 20229, May 1, 2009). Effective May 18, 2009 through October 28, 2009, the rule prohibited the use of bottom longline gear to harvest reef fish east of 85°30'W longitude shoreward of a line approximating the 50-fathom depth contour until the 2009 deepwater grouper and tilefish quotas were met, and in water of all depths east of 85°30'W longitude thereafter. In the rule, NMFS specified that if it determined that less restrictive measures would suffice to adequately reduce turtle takes by the longline component of the reef fish fishery, NMFS could rescind the closure before the 180-day effective period of the emergency rule was reached and potentially implement less restrictive measures.

On August 13, 2009, the Council voted in favor of submitting Amendment 31 to NMFS for Secretarial review and approval. Amendment 31, now under Secretarial Review, proposes the following actions to reduce sea turtle take by the bottom longline component of the reef fish fishery east of Cape San Blas, Florida: (1) A prohibition on the use of bottom longline gear shoreward of a line approximating the 35-fathom contour from June through August; (2) a reduction in the number of longline vessels operating in the fishery through an endorsement provided only to vessel permits with a demonstrated history of landings, on average, of at least 40,000 pounds of reef fish annually with fish traps or longline gear during 1999-2007; and (3) restricting the total number of hooks that may be possessed onboard each reef fish bottom longline vessel to 1,000, only 750 of which may be rigged for fishing.

On October 13, 2009, NMFS completed a biological opinion on the continued authorization of the Gulf reef fish fishery, as managed under the Reef Fish FMP. The biological opinion considered all Reef Fish FMP amendments implemented to date, as well as the regulatory actions included in this rule and actions proposed in Amendment 31. The opinion concluded that the continued authorization of the Gulf reef fish fishery was likely to adversely affect sea turtles and sawfish, but was not likely to jeopardize the continued existence of any listed species. An ITS was issued specifying the amount and extent of anticipated take on a three-year basis, along with reasonable and prudent measures and

associated terms and conditions deemed necessary and appropriate to minimize the impact of these takes.

The emergency rule currently in place is set to expire on October 29, 2009. A final rule implementing Amendment 31, if approved, is not expected to be effective until May 2010. Therefore, at a minimum, an interim action is needed to reduce the incidental take and mortality of sea turtles in the bottom longline component of the reef fish fishery in the Gulf of Mexico EEZ after the emergency rule expires but before Amendment 31 is implemented; this rule supersedes the current emergency rule, which expires on October 29, 2009.

The measures implemented through the current emergency rule have effectively ended reef fish longline fishing in the eastern Gulf of Mexico until the deep-water grouper and tilefish fishing year starts January 1, 2010. This has caused economic hardship for the commercial fishing industry. Should the current emergency rule be renewed until regulations developed in Amendment 31 are implemented, this economic hardship will continue as most effort conducted by the longline component is targeted at shallow-water grouper species. Analyses of alternatives for Amendment 31, including those in the biological opinion, indicate there are alternatives that would allow longline operations, albeit with some limitations, while still providing adequate protection for sea turtles. Therefore, the purpose of this rulemaking is to balance the continued operation of the bottom longline component of the reef fish fishery while maintaining adequate protective measures for sea turtles until the Council's preferred management strategy in Amendment 31 can be implemented.

Additional time is required to implement Amendment 31, in particular the proposed longline endorsement provision, and the time constraint precludes the inclusion of this provision in this rulemaking. The longline endorsement would require evaluation of landings records and subsequent issuing of endorsements to qualifying reef fish permit owners. This process would take several months. Therefore, the longline endorsement provision will not be implemented by this action.

#### Classification

The Assistant Administrator for Fisheries, NOAA (AA), has determined that this rule is necessary to balance the need to reduce the incidental take and associated mortality of sea turtles with the need to reduce the ongoing social and economic hardships in the bottom longline component of the reef fish

fishery in the Gulf of Mexico EEZ. The AA has determined this rule is consistent with the ESA and other applicable law.

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

Pursuant to 5 U.S.C. 553(b)(B), the AA finds good cause to waive prior notice and opportunity for public comment. Prior notice and opportunity to comment would be contrary to the public interest, because delaying action to address threatened and endangered species interactions in the fishery would likely result in additional take and mortality of sea turtle species. Such take would be in excess of the take analyzed in the effects analysis for the relevant time period, and potentially even result in exceeding the incidental take statement issued with the most recent biological opinion. As a result, this would introduce risk of jeopardizing the survival and recovery of sea turtle populations, which is inconsistent with the requirements of the ESA. While other more restrictive actions could be taken to reduce takes in the fishery, in the absence of any further regulatory action, the current restrictions in the fishery will expire on October 29, 2009, and the bottom longline component of the fishery will be authorized to occur in a manner that has been documented to result in excessive take of sea turtles. As stated above, such take would not be in compliance with the ESA, and would be contrary to the public interest in protecting threatened and endangered species populations. Extending the existing closure would be more restrictive than necessary to fulfill the agency's obligations under the ESA, and would result in undue social and economic hardship on participants using bottom longline gear in the fishery.

For these same reasons, the AA finds good cause to waive the 30-day delay in effective date pursuant to 5 U.S.C. 553(d)(3).

Because prior notice and opportunity for public comment are not required for this rule by 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* are inapplicable.

The Endangered Species Act provides the statutory basis for the rule.

#### List of Subjects

##### 50 CFR Part 223

Endangered and threatened species; Exports; Imports; Transportation.

##### 50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

Dated: October 16, 2009.

**James W. Balsiger,**

*Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.*

■ For the reasons set out in the preamble, 50 CFR parts 223 and 622 are amended as follows:

#### PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

■ 1. The authority citation for part 223 continues to read as follows:

**Authority:** 16 U.S.C. 1531 1543; subpart B, § 223.201–202 also issued under 16 U.S.C. 1361 *et seq.*; 16 U.S.C. 5503(d) for § 223.206(d)(9).

■ 2. In § 223.206 paragraph (d) introductory text is revised and paragraph (d)(12) is added to read as follows:

##### § 223.206 Exceptions to prohibitions relating to sea turtles.

\* \* \* \* \*

(d) *Exception for incidental taking.* The prohibitions against taking in § 223.205(a) do not apply to the incidental take of any member of a threatened species of sea turtle (i.e., a take not directed towards such member) during fishing or scientific research activities, to the extent that those involved are in compliance with all applicable requirements of paragraphs (d)(1) through (d)(12) of this section, or in compliance with the terms and conditions of an incidental take permit issued pursuant to paragraph (a)(2) of this section.

\* \* \* \* \*

(12) *Prohibitions applicable to bottom longline fishing for Gulf reef fish.* (i) Bottom longlining for Gulf reef fish as defined in § 622.2 of this title is prohibited in the portion of the Gulf EEZ east of 85°30' W. long. that is shoreward of rhumb lines connecting, in order, the following points:

Point	North lat.	West long.
A	28°58.70'	85°30.00'
B	28°59.25'	85°26.70'
C	28°57.00'	85°13.80'
D	28°47.40'	85°03.90'
E	28°19.50'	84°43.00'
F	28°00.80'	84°20.00'
G	26°48.80'	83°40.00'

Point	North lat.	West long.
H	25°17.00'	83°19.00'
I	24°54.00'	83°21.00'
J	24°29.50'	83°12.30'
K	24°26.50'	83°00.00'

(ii) Within the prohibited area specified in paragraph (d)(12)(i) of this section, a vessel with bottom longline gear on board may not possess Gulf reef fish unless the bottom longline gear is appropriately stowed, and a vessel that is using bottom longline gear to fish for species other than Gulf reef fish may not possess Gulf reef fish. For the purposes

of paragraph (d)(12) of this section, appropriately stowed means that a longline may be left on the drum if all gangions and hooks are disconnected and stowed below deck; hooks cannot be baited; and all buoys must be disconnected from the gear but may remain on deck.  
 (iii) Within the Gulf EEZ east of 85°30' W. long., a vessel for which a valid Gulf reef fish permit has been issued under § 622.4 of this title and that is fishing bottom longline gear or has bottom longline gear on board cannot possess more than a total of 1,000 hooks including hooks on board the vessel and hooks being fished, and cannot possess more than 750 hooks rigged for fishing at any given time. For the purpose of

this paragraph, “hooks rigged for fishing” means hooks attached to a line or other device capable of attaching to the mainline of the longline.  
 \* \* \* \* \*

**PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC**

■ 3. The authority citation for part 622 continues to read as follows:

**Authority:** 16 U.S.C. 1801 *et seq.*  
**§ 622.34 [Amended]**

■ 4. In § 622.34, paragraph (q) is removed and reserved.

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