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**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Parts 222 and 223****[Docket No. 070712318-7318-01; I.D. 110306A]****RIN 0648-AU81****Sea Turtle Conservation; Observer Requirement for Fisheries**

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

**ACTION:** Final rule.

**SUMMARY:** Pursuant to its authority under the Endangered Species Act of 1973 (ESA), NMFS issues this final regulation to require fishing vessels subject to the jurisdiction of the United States that are identified through the annual determination process specified in the rule to take observers upon NMFS' request. The purpose of this measure is to learn more about sea turtle interactions with fishing operations, to evaluate existing measures to reduce sea turtle takes, and to determine whether additional measures to address prohibited sea turtle takes may be necessary. NMFS and/or interested cooperating entities will pay the direct costs of the observer. Through this rule, NMFS also extends the number of days from 30 to 180 (with a possible 60-day extension) that the agency may place observers in response to a determination by the Assistant Administrator that the unauthorized take of sea turtles may be likely to jeopardize their continued existence under existing regulations. This extension will help the agency address immediate observer needs in response to an emergency sea turtle-related event.

**DATES:** Effective September 4, 2007.

**ADDRESSES:** Requests for copies of the Environmental Assessment and Final Regulatory Impact Review (EA/RIR) prepared for this final rule should be addressed to the Chief, Marine Mammal and Turtle Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

**FOR FURTHER INFORMATION CONTACT:** Tanya Dobrzynski (ph. 301-713-2322, fax 301-427-2522, email [Tanya.Dobrzynski@noaa.gov](mailto:Tanya.Dobrzynski@noaa.gov) or Therese

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**SUPPLEMENTARY INFORMATION:****Purpose**

Under the ESA, 16 U.S.C. 1531 *et seq.*, NMFS has the responsibility to implement programs to conserve marine life listed as endangered or threatened.

All sea turtles that are found in U.S. waters are listed as either endangered or threatened under the ESA. The Kemp's ridley (*Lepidochelys kempii*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*) sea turtles are listed as endangered. Loggerhead (*Caretta caretta*), green (*Chelonia mydas*), and olive ridley (*Lepidochelys olivacea*) sea turtles are listed as threatened, except for breeding colony populations of green sea turtles in Florida and on the Pacific coast of Mexico and breeding colony populations of olive ridleys on the Pacific coast of Mexico, which are listed as endangered. While some sea turtle populations have shown signs of recovery, many populations continue to decline.

Incidental take, or bycatch, in fishing gear is one of the main sources of sea turtle injury and mortality nationwide. Section 9 of the ESA prohibits the take (including harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting or attempting to engage in any such conduct), including incidental take, of endangered sea turtles. Pursuant to section 4(d) of the ESA, NMFS has issued regulations extending the prohibition of take, with exceptions, to threatened sea turtles (50 CFR 223.205 and 223.206). Section 11 of the ESA authorizes the issuance of regulations to enforce the prohibitions against take. NMFS may grant exceptions to the take prohibitions with an incidental take statement or an incidental take permit issued pursuant to section 7 or 10, respectively, of the ESA. To do so, NMFS must determine that the activity that will result in incidental take is not likely to jeopardize the continued existence of the affected listed species. In some cases, NMFS has been able to make this determination because the fishery is conducted with a modified gear or modified fishing practice that NMFS has been able to evaluate. However, for some Federal fisheries and most state fisheries, NMFS has not granted an exception primarily because we lack information about fishery-turtle interactions. Therefore, any incidental take of sea turtles in those fisheries is

unlawful as it has not been exempted from the ESA prohibition on take.

The most effective way for NMFS to learn more about sea turtle-fishery interactions is to place observers aboard fishing vessels. NMFS issues this regulation to establish procedures through which each year NMFS will identify, pursuant to specified criteria and after notice and opportunity for comment, those fisheries in which the agency intends to place observers. NMFS and/or interested cooperating entities will pay the direct costs for observers. These include observer salary and insurance costs. NMFS may also evaluate other potential direct costs, should they arise. Once selected, a fishery will be eligible to be observed for five years without further action by NMFS. This will enable NMFS to develop an appropriate sampling protocol to investigate whether, how, when, where, and under what conditions incidental takes are occurring; to evaluate whether existing measures are minimizing or preventing interactions; and to determine whether additional measures are needed to implement ESA take prohibitions and conserve turtles.

**Other Procedures for Observer Placement**

Prior to this final rule, NMFS established a regulatory procedure to place observers on vessels contingent upon a determination by the NMFS Assistant Administrator that the unauthorized take of sea turtles may be likely to jeopardize their continued existence (50 CFR 223.206(d)(4)). In that regulation, NMFS limited observer coverage requirements within a fishery to 30 days, with the possibility of renewal for additional periods of 30 days each. NMFS has used this procedure to address immediate observer needs, such as when fishery activity and relatively high sea turtle strandings have occurred simultaneously in a particular area. However, these temporary observer requirements are designed to respond to acute problems, and not to implement monitoring programs that yield statistically rigorous information, which is one of the purposes of this rule. Further, because 30 days does not always provide the opportunity to investigate the cause of an event, such as elevated sea turtle strandings, and renewing the measure for additional 30-day periods can be time-consuming and result in lost opportunities to monitor a critical event, through this rule, NMFS is extending the number of days the observer coverage requirements under 50 CFR 223.206(d)(4) may remain

effective from 30 to 180 days, with a possible 60-day extension. The combined 240 days is consistent with the emergency regulatory provision in section 4(b)(7) of the ESA.

As a condition of exempting incidental take from the ESA take prohibition in certain fisheries, NMFS has also implemented observer coverage or monitoring requirements under the authority of the ESA on a fishery-by-fishery basis, such as in the shrimp trawl, summer flounder trawl, Virginia pound net, and other fisheries. These requirements were implemented only after data from strandings, temporary observer coverage, or other sources indicated that prohibited sea turtle takes were occurring in those fisheries.

NMFS has also placed observers on vessels in federally-managed fisheries under the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act, as amended in 1996 and 2006 (Magnuson-Stevens Act), and the Marine Mammal Protection Act, as amended in 1994 (MMPA), to document fish bycatch and incidental mortality and serious injury of marine mammals, respectively. The Magnuson-Stevens Act authorizes NMFS to require observers on fisheries managed under a Federal fishery management plan, while the MMPA allows NMFS to require observers in both Federal and non-federal commercial fisheries depending on the level of interaction between fisheries and marine mammals.

Secondary to collecting information on fish and marine mammal bycatch through placement of observers on fishing vessels via these statutes, NMFS has also collected data on sea turtle interactions in fisheries. Nonetheless, actions taken under the MMPA and Magnuson-Stevens Act do not provide sea turtle bycatch information on a sufficiently comprehensive basis. The Magnuson-Stevens Act only provides NMFS authority to require observers on vessels in fisheries managed under a Federal fishery management plan (16 U.S.C. 1853(b)(8)). Thus, the authority primarily covers fisheries operating in Federal waters, and not state fisheries where sea turtle interactions also occur. The MMPA allows NMFS to require observers on commercial fisheries that have been listed on the annual List of Fisheries as Category I (where incidental mortality and serious injury of marine mammals is considered "frequent") and Category II (where incidental mortality and serious injury of marine mammals is considered "occasional"), but not Category III (where there is a remote likelihood of or no known incidental mortality and serious injury of marine mammals) (16 U.S.C. 1387), under

which the majority of fisheries are listed. Furthermore, the List of Fisheries applies to commercial fisheries, and observers are not placed on recreational vessels, which in some cases use identical gear to commercial fishermen that is known to incidentally take sea turtles. Given that some state, recreational, and Category III fisheries may cause incidental take of sea turtles, neither the Magnuson-Stevens Act nor the MMPA provides broad enough authority to monitor fisheries that may incidentally take sea turtles. Additionally, monitoring programs established under the Magnuson-Stevens Act or MMPA are designed primarily to optimize observation of fish or marine mammal bycatch, respectively, and may only collect sea turtle bycatch information secondarily. This is not optimal since the sampling regime for other species may not adequately cover times and areas where sea turtle interactions are most likely to occur. Thus, to obtain the most representative data on sea turtle takes in various fisheries, NMFS needs to design sampling programs based on sea turtle distribution and abundance and directed toward those gear types and fisheries that are a priority concern for sea turtle recovery.

NMFS has also relied on using voluntary observer coverage to obtain data in several non-federally managed fisheries. For example, from November 1 - 20, 1999, 56 dead sea turtles washed ashore in a small area of Pamlico Sound, North Carolina, in the vicinity of Hatteras and Ocracoke Inlets (64 FR 70196, December 16, 1999). Thirty-five of the sea turtles were Kemp's ridleys, the most endangered species of sea turtle. Many sink gillnet fishing vessels were operating in the vicinity. North Carolina state observers were placed on a limited number of the gillnet boats to monitor sea turtle interactions. Because both state and NMFS' observer placement was voluntary, many of the fishermen elected not to carry observers, which resulted in limited information on sea turtle interactions in areas where the interactions were most likely to occur. Adequate sampling occurred only after North Carolina received an ESA section 10(a)(1)(B) incidental take permit (67 FR 67150, November 4, 2002) and observer coverage was a requirement of the permit. These events in North Carolina highlight that a voluntary observer program limits the extent of coverage and hinders the collection of reliable data.

#### Sea Turtle/Fisheries Interactions

Sea turtle takes have been documented for numerous gear types/

fisheries along the Atlantic, Gulf of Mexico, and Pacific coasts. Both commercial and recreational fisheries in state and federal waters use gear types that may incidentally take sea turtles. Data available on the extent of sea turtle interactions vary by gear type, area, and season. Nonetheless, certain types of gear are more prone to incidentally capturing sea turtles than others, depending on the way the gear is fished and the time and area within which it is fished.

Fisheries that use trawls, gillnets, seines, pound nets, traps, pots, dredges, longlines, and hook and line, for example, are potential sources of sea turtle take. Incidental take has been documented in these gear types where the distributions of sea turtles and fisheries overlap. For example, alternative monitoring platforms used to monitor the VA pound net fishery revealed that sea turtle takes are a concern in this fishery. As a result, NMFS implemented management measures aimed at reducing sea turtle interactions in pound net leaders in the southern portion of the Chesapeake Bay from May 6-July 15 of each year, when sea turtles are known to be present and sea turtle strandings are known to occur (71 FR 36024, June 23, 2006). NMFS conducted an ESA section 7 consultation on the pound net fishery and determined that the fishery with the management measures was not likely to jeopardize sea turtles and the agency was able to exempt the fishery from the ESA prohibition on take. While these measures may be reducing the number of sea turtle takes in pound nets, sea turtle strandings in the area have continued despite the management measures. Other fisheries, such as inshore gillnet and purse seine fisheries in the area, may also be contributing to the problem and need to be further evaluated.

There are similar examples in other areas around the United States where more comprehensive and targeted observer coverage on fishing vessels is needed to better understand and address the problem of prohibited sea turtle takes incidental to fishing activities, such as the shrimp fishery in the state and Federal waters of the southeast United States and the Gulf of Mexico. This rule would enable NMFS to monitor gear types, such as try nets and skimmer trawls, used in this fishery, which are not currently required to use turtle excluder devices (TEDs) but that have been documented to interact with sea turtles (Epperly *et al.* 2002; Scott-Denton *et al.* 2007). Both commercial and recreational pots/traps and gillnets have been documented to interact with

sea turtles in U.S. waters (Dwyer *et al.* 2002; 67 FR 71895, December 3, 2002; NMFS SEFSC Beaufort Laboratory 2007, unpubl. data); therefore, more information is needed on potential sea turtle interactions in these gear types/fisheries to better evaluate them. In addition, long-term, comprehensive coverage is needed to fill information gaps on sea turtle takes in these and other fisheries and gear types.

Thus, through this final rule, NMFS issues ESA regulations to specify that NMFS may place observers on U.S. fishing vessels, either recreational or commercial, operating in U.S. territorial waters, the U.S. exclusive economic zone (EEZ), or on the high seas, or on vessels that are otherwise subject to the jurisdiction of the U.S. Consistent, regular monitoring via placement of observers on fishing vessels is needed to gather data on sea turtle takes and, where necessary, to evaluate existing measures and develop new management measures in certain gear types and/or fisheries to implement the prohibition on take of sea turtles. This action, issued under the authority of the ESA, is a necessary step in the process of implementing the prohibition on take of listed species and to conserve sea turtles listed as threatened or endangered.

#### Observer Program Design

The design of any observer program implemented under this rule, including how observers would be allocated to individual vessels, would vary among fisheries, fishing sectors, gear types, and geographic regions and would ultimately be determined by the individual NMFS Regional Office, Science Center, and/or observer program. During the program design, NMFS would be guided by the following standards in the distribution and placement of observers among fisheries identified in annual determinations and vessels in those particular fisheries:

- (1) The requirements to obtain the best available scientific information;
- (2) The requirement that observers be assigned fairly and equitably among fisheries and among vessels in a fishery;
- (3) The requirement that no individual person or vessel, or group of persons or vessels, be subject to inappropriate, excessive observer coverage; and
- (4) The need to minimize costs and avoid duplication, where practicable.

Consistent with 16 U.S.C. 1881(b), vessels where the facilities for accommodating an observer or carrying out observer functions are so inadequate or unsafe (due to size or quality of equipment, for example) that the health

or safety of the observer or the safe operation of the vessel would be jeopardized, would not be required to take observers under this rule. Nonetheless, per 50 CFR 600.746, a vessel that would otherwise be required to carry an observer, but is inadequate or unsafe for purposes of carrying an observer and for allowing operation of normal observer functions, is prohibited from fishing without observer coverage. Failure to comply with the requirements under this rule may result in civil or criminal penalties under the ESA.

Observer programs designed or carried out in accordance with this regulation would be required to be consistent with existing observer-related NOAA policies and regulations, such as those under the Fair Labor and Standards Act (29 U.S.C. 201 *et seq.*), the Service Contract Act (41 U.S.C. 351 *et seq.*), Observer Health and Safety regulations (50 CFR 600), and other relevant policies.

#### Annual Determination Process

The Assistant Administrator for Fisheries, NOAA (AA), in consultation with Regional Administrators and Fisheries Science Center Directors, will make an annual proposed determination identifying which fisheries are required to carry observers, if requested, to monitor potential interactions with sea turtles. Any final determination will be made after an opportunity for public comment. The determination will be based on the best available scientific, commercial, or other information regarding sea turtle-fishery interactions; sea turtle distribution; sea turtle strandings; fishing techniques, gears used, target species, seasons and areas fished; or qualitative data from logbooks or fisher reports.

The AA will use the most recent version of the annually published MMPA List of Fisheries (LOF) as the comprehensive list of commercial fisheries for consideration in addition to known information on non-commercial fisheries in a given area. The LOF includes all known state and federal commercial fisheries that occur in U.S. waters. The categorization scheme of fisheries on the LOF would not be relevant to this process. Unlike the LOF process, recreational fisheries likely to interact with sea turtles on the basis of the best available information may also be included in the determination of fisheries to be monitored under this rule. NMFS will consult with appropriate state or federal fisheries officials and other entities to identify which recreational fisheries should be considered in the annual determination.

Notice of the final determination will be made in writing to individuals permitted for each fishery identified for monitoring. NMFS will also notify state agencies and provide notification through publication in local newspapers, radio broadcasts, and other means, as appropriate. Once included in the final determination, a fishery will remain eligible for observer coverage for five years to enable the design of an appropriate sampling program and to ensure collection of sufficient scientific data for analysis. If NMFS determines that more than five years are needed to obtain sufficient scientific data, NMFS will include the fishery in the AA's annual proposed determination again prior to the end of the fifth year. As part of its annual determination, NMFS will include, to the extent practicable, information on the fisheries or gear types to be sampled, geographic and seasonal scope of coverage, or any other relevant information. A 30-day delay in effective date for implementing observer coverage will follow the annual determination, except for those fisheries included in earlier annual determinations within the previous five years or where the AA has determined that there is good cause pursuant to the Administrative Procedure Act to make the rule effective without a 30-day delay.

The timing of this process should be coordinated to the extent possible with the annual LOF publication process, as specified in 50 CFR 229.8.

#### Comments and Responses

NMFS received fourteen substantive comment letters during the comment period on the ESA observer proposed rule. These letters came from commercial fishing industry organizations, conservation organizations, states, and private individuals. In addition, approximately twenty letters of similar content were received from concerned citizens.

##### *Comments in Support of the Rule*

*Comment 1:* Several commenters stated that the flexibility provided in this rule would lead to better understanding of the impact of bycatch on sea turtles, particularly in state waters, where it is currently lacking. Many commenters also agreed with the need to extend the maximum number of monitoring days after declaration of an "emergency" event (e.g., a stranding) from 30 to 180, stating that greater sampling levels would provide more accurate estimates of interaction rates.

*Response:* For the reasons stated in the preamble, NMFS has decided to

proceed with development of a final rule for this action.

*Comment 2:* One commenter supported the broadest application of this rule, including to all commercial and recreational fishing vessels operating in state and federal waters, as well as U.S. fishing vessels operating outside the territorial seas and exclusive economic zone of the U.S.

*Response:* Section 9 of the ESA, and its implementing regulations, prohibits the take of endangered or threatened species by any person subject to the jurisdiction of the U.S. Accordingly, this regulation applies to U.S. commercial or recreational fishing vessels, or vessels otherwise subject to the jurisdiction of the U.S., operating in U.S. territorial waters, in the U.S. exclusive economic zone, or on the high seas. NMFS has clarified the preamble and regulatory text to reflect this.

#### *Comments Concerning Try Nets*

*Comment 3:* One commenter stated that increasing observer coverage for try nets should not be a priority because: (a) try nets larger than 12 feet require TEDs, and smaller try nets have a low probability of catching a turtle; (b) the shrimp fishery has declined by over 58 percent in recent years due to increasing fuel costs, shrimp imports, and hurricane effects; and there is a moratorium on federal shrimp permits.

*Response:* The annual determination process specified in this final rule requires NMFS to identify those fisheries it intends to observe. The selection criteria include the extent of overlap between the fishing operation and sea turtle presence, type of gear used, documented or reported interactions, and available funds. Given limited resources, NMFS will prioritize fisheries to observe, including the shrimp fishery and trynets. Factors such as the probability of an interaction, past coverage, and fishing trends will be considered.

#### *Comments Concerning Recreational Fisheries Monitoring*

*Comment 4:* Some commenters said the rule does not place adequate emphasis on the need to monitor and observe recreational fisheries, stating that NMFS needs to demonstrate an equal commitment to observe recreational and commercial fisheries. One commenter stated that this rule should not be finalized until a specific process to implement and achieve statistically valid observer coverage in the recreational sector has been identified.

*Response:* There is a need to address sea turtle bycatch in both recreational

and commercial fisheries. For this reason, NMFS is providing a mechanism to monitor recreational fisheries in this rule. Nonetheless, given the diffuse nature of recreational fisheries and the lack of licensing systems in place to track participants in many recreational fisheries, NMFS recognizes that it will take time to get systems in place that allow for better tracking and understanding of the extent and impact of recreational fisheries. NMFS will consult with appropriate state and/or Federal fisheries officials and other entities to identify which recreational fisheries should be considered in the annual determination.

*Comment 5:* One commenter noted that recreational fisheries have grown enormously in the recent past and in many cases use the same gear as is used in the commercial sector and therefore should be considered a source of sea turtle bycatch.

*Response:* NMFS has provided a mechanism to monitor sea turtle bycatch in the recreational sector via this rulemaking.

#### *Comments Concerning Observer Safety*

*Comment 6:* One commenter pointed out that the Regulatory Impact Review correctly notes the revenue cost of lost bunk space. However, the greatest impact of lost bunk space is the increase in physical labor and/or loss of sleep for the crew. Lost bunk space reduces safety of life at sea. National Standard 10 and other provisions of the Magnuson-Stevens Act require promotion of safety at sea. This should be considered under ESA rules as well.

*Response:* Safety at sea is a critical consideration in placing observers on a vessel. If fewer crew are onboard, the vessel master must accommodate any change in crew capability to ensure safety. NMFS will work closely with the fishing industry, fishery management councils, and states to identify any safety issues that may arise as a result of observer placement under this rule.

*Comment 7:* One commenter stated that observers themselves should determine the safety of a vessel before making a trip decision.

*Response:* Observers conduct pre-trip safety checks and decide whether or not to board a vessel, in accordance with 50 CFR 600.746.

*Comment 8:* One commenter disagreed with the statement, "Vessels too small to accommodate an observer will not be required to take an observer under this rule." The commenter felt there is no minimum vessel size to take an observer. Observers should be trained to work on small vessels. Small

vessels can have a great impact on sea turtles and should not be excluded.

*Response:* Small vessels can have an impact on sea turtles, and steps should be taken to quantify and address those impacts. Safety for both the observer and crew are serious considerations in observer placement and observers monitoring small vessels receive special training so they are prepared to address those challenges. While the deployment of observers is still seen as one of the most effective approaches, there are other options that may be considered. Recent advances in technology, such as digital video and imaging, have made remote electronic monitoring a viable alternative in some cases. Additionally, alternate platforms have been used successfully to monitor Virginia pound nets and other fisheries.

*Comment 9:* One commenter supports the requirement that vessel owners should comply with observer health and safety requirements. Alternative monitoring systems (e.g., electronic, remote platforms) should be established for fisheries with exceedingly small vessels to be monitored so that a representative sample of vessels can be maintained.

*Response:* See response to comment 8.

*Comment 10:* One commenter noted that the reference to observer safety requirements is incorrect and should be changed to 50 CFR 600.725 and 50 CFR 600.746.

*Response:* NMFS has changed the reference accordingly.

#### *Comments Concerning the Duration of Selection of a Fishery for Monitoring under this Rule*

*Comment 11:* One commenter requested a mechanism to review the designation of a fishery for monitoring consideration more frequently than after the five-year period of inclusion on the list expires. The commenter contended that observer coverage would not necessarily be warranted after a year or season of coverage showed no turtle interactions.

*Response:* Due to resource constraints, NMFS will focus the annual determinations on priority fisheries. Nonetheless, NMFS needs the flexibility of a five-year period to monitor a fishery for sea turtle interactions to account for interannual variability in sea turtle bycatch rates and events, as well as in fishing effort. One year of observer coverage that shows no sea turtle interactions would not necessarily rule out that prohibited sea turtle takes occur in the observed fishery, if that year were anomalous for some reason. Furthermore, low take levels in one year or even over several years do not

necessarily mean that monitoring of a fishery should discontinue, because changes in fishing or sea turtle distribution or fishing effort may necessitate reconsidering a fishery for monitoring. There will be a comment period associated with each year's proposed determination of fisheries to monitor, which will provide an opportunity for public input on fisheries proposed for monitoring under this regulation.

*Comment 12:* One commenter requested that NMFS institute a transparent process based on specific criteria for removing a fishery from the monitoring list after five years. The commenter noted this should be based on whether the fishery is believed to interact with sea turtles rather than an arbitrary time period. A fishery should remain on the list unless NMFS proves it does not interact with sea turtles. Then NMFS should propose de-listing the fishery and open that decision for public comment.

*Response:* NMFS believes five years will most often enable it to compile necessary information on sea turtle takes in a fishery. If after five years, NMFS feels it needs additional time to monitor the fishery, the rule provides a mechanism to reinstate the five-year period for that particular fishery. The rule states, "If NMFS wishes to continue observations beyond the fifth year, NMFS must include the fishery in the proposed annual determination and seek comment, prior to the expiration of the fifth year." NMFS will notify the public whether a fishery will be removed from the annual determination, after the fifth year in that year's proposed annual determination, which will be open for public comment.

#### *Comments Concerning Impacts on Fishermen*

*Comment 13:* One commenter recommended the proposed rule include a section explaining fishermen's rights and options related to accommodating observers. The commenter requested that NMFS address the following questions: (a) Will fishers be apprised of how many times they will be required to have observers?; (b) What options exist for vessel owners to select date/times/locations?; What options are there for refusal?; (d) What is the penalty for non-compliance?; and (e) What can/cannot the observer do relative to vessel operations?

*Response:* An observer is not required to board, or stay aboard, a vessel that is unsafe or inadequate. Written notification of the final annual determination will be mailed to the owners or operators of fishing vessels.

In the notification, NMFS will make every effort to provide information on the fishing sector, and temporal and geographic scope of coverage. NMFS will select optimal days, times, and locations to observe the vessel, based on appropriate sampling design and collection of scientific data regarding takes of sea turtles, and will notify fishermen accordingly. Failure to comply with the requirements under this rule may result in civil and/or criminal penalties as prescribed by the ESA. Observers may only observe and record data, and may not be required to perform duties normally performed by crew members.

*Comment 14:* One commenter said NMFS should consider the social and economic impacts of sea turtle observer coverage under this rule in combination with all other observer coverage requirements (e.g., for fish population assessment, other protected species monitoring) with which fishermen must comply and should establish a maximum cap on total observer trips for individual or groups of vessels at a given homeport.

*Response:* The standards for placing observers as specified in the final rule will ensure that cumulative social and economic burdens will be minimized. NMFS will ensure that assignment of observers is fair and equitable, and that no individual person or vessel, or group of persons or vessels, is subject to inappropriate, excessive observer coverage. NMFS will also minimize costs and avoid duplication, where practicable.

#### *Comments Concerning Coordination with States*

*Comment 15:* One state requested that it be directly notified of the annual proposed determination of fisheries eligible for sea turtle bycatch monitoring. Another state offered its help in identifying fisheries that should be targeted for monitoring based on the level of sea turtle interactions.

*Response:* Effective implementation of this rule will require regular communication and coordination with coastal states. As stated in the regulatory text at § 222.402(b), "The Assistant Administrator shall publish the proposed determination in the **Federal Register** notice and seek comment from the public. Additionally, NMFS will notify state agencies and provide notification through publication in local newspapers, radio broadcasts, and any other means as appropriate." NMFS appreciates and encourages assistance from states in identifying fisheries that should be monitored for turtle interactions.

#### *Comments Concerning Status of Sea Turtles*

*Comment 16:* One commenter noted that recent analyses by the state of Florida of 17 years of loggerhead turtle (*Caretta caretta*) nesting data in Florida indicate a 22.3-percent decline in nests during this period. Threats to reproductive adult populations or earlier life stages on feeding grounds (e.g., fishing interactions), as opposed to threats on land, are likely the cause of decline. The commenter contends the doubling of loggerhead strandings in Florida over the past decade supports this claim.

*Response:* NMFS is concerned about the recent data on loggerhead nesting trends from Florida. The Turtle Expert Working Group, a group of scientists and managers focused on turtle population assessment issues, is currently reviewing the status of loggerhead turtles, including the Florida nesting information, to try to determine the status of the species and sources of the decline. This final rule will allow for more comprehensive monitoring of sea turtle interactions in state, federal, and recreational fisheries and will help identify previously unknown sources of turtle interactions with fishing gear.

*Comment 17:* One commenter expressed that NMFS is putting the cart before the horse and should first determine and provide statistically valid, accurate scientific data on the actual status and population trends of turtles along the east coast before addressing turtle bycatch. The commenter claimed NMFS needs population information to determine what constitutes a significant take rate for a particular population of sea turtle. The commenter inquired how NMFS will conduct jeopardy determinations and ESA section 7 consultations without population status information.

*Response:* Section 9 of the ESA prohibits the take (including harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting or attempting to engage in any such conduct), including incidental take, of an endangered species. Additionally, pursuant to section 4(d) of the ESA, NMFS has issued regulations extending the prohibition of take, with exceptions, to threatened sea turtles (50 CFR 223.205 and 223.206). Thus, take of any level is prohibited unless it is specifically exempted from the ESA take prohibition. NMFS also has an obligation under Sec. 4(f)(1) of the ESA to develop and implement recovery plans to promote the conservation and recovery of endangered and threatened species. In collaboration with NMFS

scientists and other scientists knowledgeable in sea turtle biology and population structure, NMFS is conducting sea turtle population assessments. For instance, NMFS completed assessments on the Kemp's ridley and loggerhead in 1998 and 2000 (Turtle Expert Working Group, "An Assessment of the Kemp's Ridley and Loggerhead Sea Turtle Populations in the Western North Atlantic," NOAA Technical Memorandum NMFS-SEFSC-409, 96 pp (1998); Turtle Expert Working Group, "Assessment Update for the Kemp's Ridley and Loggerhead Sea Turtle Populations in the Western North Atlantic," NOAA Technical Memorandum NMFS-SEFSC-444, 115 pp (2000)), and the leatherback in 2007 (Turtle Expert Working Group, "An Assessment of the Leatherback Population in the Atlantic Ocean," NOAA Technical Memorandum NMFS-SEFSC-555, 116 pp. (2007)). NMFS is currently reassessing the loggerhead population, given the recent data from Florida. NMFS uses these data and other sources of best available scientific data in ESA section 7 consultations and as the basis for other management decisions.

#### *Comments Concerning Recommended Information Collection*

*Comment 18:* Commenters recommended that NMFS observers collect as much data as possible on the nature of the sea turtle take, including information on the location, number, time of day, catch per unit effort, and water temperature associated with the take; and the size, genetic identity, general health (e.g., appearance of fibropapillomatosis), and behavior of the sea turtles taken. Collecting information on these parameters will help NMFS limit regulations to the appropriate parameters and not unnecessarily burden fishermen.

*Response:* It is important to collect all the above information, and NMFS will design observer programs to collect as much relevant information on sea turtles as possible within legal limits in order to best address prohibited sea turtle takes.

#### *Comments Concerning Observer Coverage*

*Comment 19:* One commenter thought it was good to extend the emergency monitoring authority currently in 50 CFR 223.206(d)(4) from 30 to 180 days, with a possible 60-day extension to 240 days, but thought the proposed regulatory language would limit the total amount of time an observer may be deployed, which current regulations do not. The commenter recommends

retaining the language in the current regulation so that it does not limit total coverage under this provision to a maximum of 240 days.

*Response:* The 240-day maximum is consistent with ESA section 4(b)(7) and other emergency regulations that NMFS has promulgated under the ESA. Furthermore, NMFS believes that public notice and comment is appropriate if observer placement requirements are proposed for continuance after the 240-day maximum.

*Comment 20:* One commenter recommended that observer programs take seasons and water temperatures into account when allocating resources and observers, given that sea turtle distribution can vary seasonally, particularly at higher latitudes.

*Response:* Sampling designs must reflect the biology and distribution of the species to optimize monitoring of sea turtle bycatch events and increase the precision of the estimates of sea turtle interactions. NMFS' estimates of sea turtle bycatch will be enhanced by this final rule, as it eliminates the reliance on obtaining sea turtle-fishing gear interaction data through observer programs designed to monitor marine mammal or fish bycatch.

*Comment 21:* One commenter stated that the South Carolina shad gillnet fishery should not be included in the annual determination of fisheries for monitoring because it operates in winter when sea turtles are not present.

*Response:* The annual determination process specified in this final rule requires NMFS to identify those fisheries it intends to observe given concerns regarding interactions with sea turtles. The selection criteria include the extent of overlap between the fishing operation and sea turtle distribution, type of gear used, documented or reported interactions, incidence of sea turtle strandings in an area where a particular fishery operates, and available funds. Thus, where and when a fishery operates will be a factor in selection for monitoring. While sea turtles, depending on the species, are generally south or further offshore of South Carolina in the winter months, annual variability exists and sea turtles have been documented in South Carolina waters during the winter months. NMFS will work with South Carolina to determine if there is any overlap between the shad gillnet fishery and sea turtle distribution and whether monitoring of this fishery is warranted under this rule.

*Comment 22:* One commenter noted that sea turtle interactions in trawl nets and pots/traps are incredibly rare and that observer coverage would have to be

extremely high to yield any information. In some fisheries, the occurrence of bycatch is so rare that placing observers would be meaningless. Therefore, NMFS should select fisheries that have a "reasonable chance" of observing an interaction.

*Response:* As stated in response to Comment 21, the annual determination process specified in this final rule requires NMFS to identify those fisheries it intends to observe given concerns regarding interactions with sea turtles. The selection criteria include the extent of overlap between the fishing operation and sea turtle distribution, type of gear used, documented or reported interactions, incidence of sea turtle strandings in an area where a particular fishery operates, and available funds. Once a fishery is selected, coverage levels are determined based on several factors, including spatial and temporal variability in the fisheries and the distribution of the species being observed. Where warranted, target coverage levels for rare events are much higher than for common events. In some currently observed fisheries (e.g., Hawaii shallow set longline fishery for swordfish) where interactions are rare, the coverage level is 100 percent to allow for accurate information to be collected. For new observer programs, a pilot study is often initiated to provide information on variability of bycatch species within the fishery. The information collected during this pilot study is then used to more accurately determine the target observer coverage necessary to provide accurate bycatch estimates (typically measured as a coefficient of variation around the bycatch estimate). If appropriate, monitoring of catch or bycatch through electronic means or alternate platforms may be evaluated during the pilot study.

*Comment 23:* NMFS should make every effort to obtain adequate observer coverage for all fisheries on the list, including requesting the appropriate amount of funding in the budget process.

*Response:* NMFS is committed to achieving adequate observer coverage, and that means making every effort to request, identify, and allocate funds. Part of the decision for placing a fishery on the list is the extent of anticipated funds. However, there are many competing needs for limited funds, and priorities could change over the time a fishery is on the list.

#### *Comments Concerning the Annual Determination Process*

*Comment 24:* One commenter stated that the rule must specify that the

annual review by the Assistant Administrator shall include consideration of applicable past observer coverage before final categorization of a given fishery. Such a pre-listing review, the commenter contends, would exclude many New Jersey gillnet fisheries from listing.

*Response:* Past monitoring of a particular fishery, and the resulting data and its present applicability, will be taken into consideration in the development of an annual determination of fisheries to be monitored under this rule, as appropriate. However, prior monitoring of a fishery does not necessarily mean it will be excluded from the annual determination if, for example, NMFS needs to obtain additional sea turtle interaction information to improve data accuracy and precision, if fishing practices or effort have changed, or if sea turtle distribution has changed based on environmental conditions.

*Comment 25:* Some commenters recommended that the annual determination of fisheries to be monitored not be limited by resources as indicated in one of NMFS' criteria for inclusion on the list: "The extent to which NMFS intends to monitor the fishery and anticipates that it will have the funds to do so." Instead, the determination should be as inclusive as possible, for instance, by including all fisheries with unknown levels of sea turtle interaction, and should be determined by sea turtle conservation needs and priorities rather than available funding.

*Response:* This process will be driven by the need to identify those fisheries in which sea turtle takes occur, so that existing management measures to reduce sea turtle takes may be evaluated and a determination made as to whether any additional measures may be necessary to implement the prohibition on take of sea turtles. Sea turtle conservation and recovery priorities will also be considered. However, NMFS included this criterion to help prioritize fisheries for monitoring. Additionally, this criterion will assist in notifying the public of NMFS' intent to monitor a given fishery.

*Comment 26:* One commenter stated that the rule should include a public comment process between proposed and final annual determinations of fisheries to be monitored.

*Response:* The final rule at § 222.402(b) states: "The Assistant Administrator shall publish the proposed determination and any final determination in the **Federal Register**. Public comment will be sought at the

time of publication of the proposed determination."

*Comment 27:* One commenter notes that listing a fishery under the annual determination simply based on similarity to other listed fisheries is inappropriate. This process should occur on a fishery by fishery basis and be examined for temporal and spatial overlap with sea turtles, regional distinctions in fishing practices, and past observer coverage.

*Response:* In many cases, similarities of fishing gear to gear known to take sea turtles can make it a potential threat to sea turtles if the fishery overlaps with turtles in time and space. Nonetheless, NMFS will take fishing gear deployment or other characteristics (e.g., average tow time of gear) into account, as appropriate, when proposing fisheries in the annual determination. NMFS will also attempt to design observer programs to optimize sea turtle bycatch monitoring, for instance, by deploying observers during seasons and in locations when sea turtle bycatch is believed to be most problematic. This is an important cost-effective measure.

*Comment 28:* One commenter asked what terms and conditions will be specified in the written annual determination of fisheries to be monitored under this rule.

*Response:* As stated in § 222.402(b) of the proposed and final rules, "The proposed and final determinations will include, to the extent practicable, information on fishing sector, targeted gear type, target fishery, temporal and geographic scope of coverage, or other information, as appropriate."

*Comment 29:* One commenter recommended that NMFS take advantage of other associated and independent assessments of sea turtle bycatch being undertaken by the Strategy for Sea Turtle Conservation and Recovery in Relation to Atlantic and Gulf of Mexico Fisheries (Strategy) and Project GLOBAL at Duke University.

*Response:* NMFS acknowledges the comment.

#### *Comments Concerning the Use of Best Available Science*

*Comment 30:* One commenter pointed out that the proposed rule does not specify how it will develop sampling programs that yield best available science. It should be clarified that best available science refers to information specifically about sea turtle conservation, including but not limited to, the catch rates of sea turtles in specific gear types, regions, and seasons. Resources should be allocated to yield statistically valid results. The best available science should be explicitly

outlined in a published sampling design for each observed fishery that includes methodologies for maximizing precision and accuracy while minimizing bias.

*Response:* Observer program manuals providing details on data collection protocols are provided on each of the regional observer websites as well as on the National Observer Program (NOP) Web site

([http://www.st.nmfs.gov/st4/nop/Observer\\_training\\_resources.html](http://www.st.nmfs.gov/st4/nop/Observer_training_resources.html)). The program manuals do not specifically provide information on sampling design, however, the sampling designs for all regional observer programs are published in many different forums, including peer reviewed journals and NMFS stock assessment reports. Sampling designs for all NMFS observer programs are developed to provide statistically valid information and to produce results that will contribute to the body of best available science. The sampling design will vary depending on many factors, including the fishery to be observed, the spatial and temporal variability in the fishery and species observed, and the overall goals of the observer program. Once a fishery is selected for observer coverage, a sampling design will be developed to yield statistically valid results. The issue of minimizing bias was addressed by the National Observer Program through a vessel selection bias workshop held in May 2006. Workshop recommendations to reduce bias included assessing the accuracy of estimated metrics used to compare observed vessels with the general fleet; selecting vessels and trips with equal probability within the sector for which bycatch are to be estimated; and identifying fishing regulations and other factors that may encourage vessel operators to alter fishing behavior when observers are present. These and other recommendations will be implemented by all regional observer programs to evaluate and minimize vessel selection and observer bias. The vessel selection bias workshop report is available online at [http://www.st.nmfs.noaa.gov/st4/nop/documents/Vessel\\_Selection\\_Bias\\_Report\\_final.pdf](http://www.st.nmfs.noaa.gov/st4/nop/documents/Vessel_Selection_Bias_Report_final.pdf).

#### *Comments Concerning Regulatory Language*

*Comment 31:* One commenter thought that Science Center Directors should also have authority to require fishing vessels to carry an observer, since many NMFS observer programs are operated out of Science Centers.

*Response:* As stated in the preamble to the proposed rule at 71 FR 76268 (December 20, 2006), and clarified in this final rule, on an annual basis, the



Assistant Administrator, in consultation with Regional Administrators and Science Center Directors, will determine which fisheries NMFS intends to monitor. Thus, Regional Offices and Science Centers, both of which administer observer programs depending on the NMFS region, will be integral to the process of identifying fisheries for monitoring as well as implementing observer coverage once those fisheries have been identified.

*Comment 32:* One commenter recommended that NMFS delete the statement in the proposed regulatory text, "NMFS will pay direct costs for the observer," stating that it could preclude the establishment of non-NMFS-funded programs through this regulation.

*Response:* Partnerships with interested cooperating entities external to NMFS could enhance the potential for obtaining sea turtle bycatch information under this regulation. NMFS has changed the regulatory and preamble text to reflect this.

#### *General Comments and Questions on the Proposed Rule*

*Comment 33:* One commenter asked whether the agency plans to use observer information to implement broad-based measures across similar gear types or specially designed measures for specific fisheries known to interact with sea turtles.

*Response:* Any management measures to implement the prohibitions of take will be based on the data collected from each fishery and gear type and the recommendations of NMFS and the states in which those fisheries interactions occur. Affected states may elect to develop and apply for an ESA section 10(a)(1)(B) incidental take permit to manage their own fisheries that are known to interact with sea turtles. Alternately, NMFS has implemented ESA regulations in state waters over large geographic areas such as in the shrimp fishery. Any future measures will be fully vetted through the public rulemaking process.

*Comment 34:* One commenter noted that the proposed rule mentions bycatch as a leading threat to sea turtle populations worldwide but questioned what the other threats to sea turtle populations were and what type of observer programs are applied to those threats. The commenter wondered whether there were equal standards for all industries that threaten sea turtles.

*Response:* Information on both fishery and non-fishery threats to sea turtles is available in the sea turtle recovery plans at <http://www.nmfs.noaa.gov/pr/species/esa/turtles.htm>. Generally speaking, threats include coastal

construction, poaching, power plant entrainment, and many other activities. Federal agencies whose activities affect sea turtles must consult under ESA section 7. Private and state entities whose activities affect sea turtles consult with NMFS and/or the U.S. Fish and Wildlife Service pursuant to ESA section 7 as a result of applying for a section 10(a)(1)(B) incidental take permit. As a result of those consultations, many agencies, such as the Army Corps of Engineers in their harbor maintenance program, must monitor the effects of their actions. Measures to minimize and mitigate the effects of human activities on sea turtle populations depend on the extent, frequency, and severity of the effect. Given the high level of variability in these factors, standard measures cannot be applied across industries.

*Comment 35:* One commenter stated that NMFS should not limit its efforts to data collection but should cap and control sea turtle take by setting meaningful bycatch limits that are enforced in a timely manner.

*Response:* Data collection is integral to implementing the prohibitions of take under the ESA, but is merely one step in the process. This action will also allow NMFS to better address sea turtle conservation and recovery by helping NMFS identify, quantify, and ultimately develop measures, where necessary, to reduce incidental sea turtle take in fishing gear. Voluntary and mandatory self-reporting have limited utility and the current observer requirements do not allow NMFS to sufficiently address sea turtle bycatch, as the preamble describes. To address sea turtle bycatch in fishing gear on a more comprehensive level, NMFS implemented the Sea Turtle Strategy referenced in comment 29 above. The Strategy is seeking to address prohibited sea turtle bycatch on a per-gear basis rather than a target fishery basis. Monitoring undertaken through this final rule will help provide a baseline assessment of fisheries that may be a concern, which, in combination with sea turtle population studies and other information, will help prioritize and focus measures for sea turtle conservation.

*Comment 36:* One commenter noted that sea turtles in shallow water zones (e.g., along the Atlantic shelf) are highly vulnerable to fisheries, especially those using trawls and dredges.

*Response:* This final rule will allow for more comprehensive monitoring of sea turtle interactions along the Atlantic shelf and other areas where sea turtles are found.

*Comment 37:* One commenter suggested NMFS continue to use

alternative platforms to monitor fisheries when they are difficult to cover with observers.

*Response:* See response to comment 8 above.

*Comment 38:* One commenter questioned who qualifies and provides observers and how observers are authorized before being placed on vessels.

*Response:* The majority of regional observer programs operate under government contract with private observer service providers. Several programs, including the North Pacific Groundfish Observer Program, West Coast Off-shore hake observer program, and the Northeast sea scallop observer program, obtain observers through NMFS-permitted observer service providers. These providers operate through direct contracts with the fishing vessel and provide qualified observers to NMFS. The observer service providers interview, hire, and deploy the observers on fishing vessels as required either through the government contract or through NMFS regulations for the industry funded programs. NMFS has developed national observer eligibility standards to ensure that all NMFS observers have consistent minimum qualifications, including standards for education and experience, training, conflict of interest, physical condition, communication skills, and citizenship or ability to work legally in the U.S. They will be implemented by all regional observer programs. All regional observer programs provide formal observer training and all observers must pass an exam prior to deployment.

#### *Comments on the Draft Environmental Assessment*

*Comment 39:* One commenter supported Alternative 3 ("Require Observer Programs in All Incidental Take Permits (Section 10(a)(1)(b)) Related to Fisheries") of the Draft Environmental Assessment accompanying the proposed rule. The commenter said this alternative would enable the most accurate bycatch monitoring and reporting, improve understanding of recreational and commercial bycatch, and be a critical step toward developing a national comprehensive bycatch program.

*Response:* NMFS rejected this Alternative because a comprehensive, coast-wide monitoring program is needed as an initial baseline assessment to further address sea turtle bycatch. Under this Alternative, individual states would need to assess and make determinations on whether to apply for an incidental take permit under the



ESA. The onset of observer programs may vary greatly, and geographic gaps in coverage may result. Each state's fisheries monitoring program may consist of different protocols for sampling and data collection, which may hinder the ability to compare and analyze data. NMFS believes this final rule will provide a more systematic and comprehensive framework for collecting bycatch data in fisheries of concern than would be achieved under Alternative 3. Nonetheless, this final rule does not preclude the authorities and responsibilities of ESA section 10(a)(1)(b). NMFS will work closely with states in implementing this final rule and on long-term measures to address prohibited takes of sea turtles.

#### Summary of Changes from the Proposed Rule

This section details and explains notable changes made to the final rule from the proposed rule.

NMFS has changed language in the preamble and regulatory text to clarify that NMFS and/or interested cooperating entities will pay direct costs for the observer. NMFS made this change in response to a comment, described above, that the rule should not preclude interested cooperating entities from supporting observer coverage for certain fisheries, as appropriate. Such partnerships exist in observer programs around the country and may help enhance coverage levels where needed.

NMFS changed language in the regulatory text at § 222.401 to clarify that the NMFS Assistant Administrator will work with both Science Center Directors and Regional Administrators to identify fisheries that should be observed for sea turtle interactions under this regulation. This is appropriate since observer programs are administered at both the Science Center and Regional office level, depending on the specific region.

NMFS clarified language in the preamble and regulatory text describing the appropriate application of the rule to U.S. fishing vessels operating inside waters of the U.S. (territorial waters and waters within the U.S. EEZ) as well as on the high seas. The rule clarifies that NMFS may place observers on either recreational or commercial U.S. fishing vessels operating within U.S. waters or on the high seas, or on vessels that are otherwise subject to the jurisdiction of the United States.

NMFS corrects an error in § 222.402(b) that states: "In addition, a written notification of the proposed determination will be sent to the addresses specified for the vessel in

either the NMFS or state fishing permit application, or to the address specified for registration or documentation purposes, or upon written notification otherwise served on the owners or operators of a vessel" (emphasis added). NMFS intended this step to occur at the final, not proposed, determination stage, where such notification would be more appropriate and cost-effective.

NMFS clarifies in the final rule the exceptions to the 30-day delay in the effective date for implementing observer coverage following a final annual determination. The Classification section of the proposed rule stated, "A 30-day delay in effective date for implementing observer coverage will follow the annual notification, except for those fisheries that were listed in the preceding annual notification or where the AA has determined there is good cause [pursuant to the Administrative Procedure Act] to make the rule effective without a 30-day delay." NMFS, however, did not include the "good cause" portion of the exception in the regulatory text of the proposed rule due to an oversight. Thus, NMFS adds this exception to the 30-day delay in effective date to the final rule.

NMFS corrects the citation to the observer health and safety requirements in § 222.401 of the final rule.

#### References

Dwyer, K.L., C.E. Ryder, and R. Prescott. 2002. Anthropogenic mortality of leatherback sea turtles in Massachusetts waters. 2002. In: Proceedings of the Twenty-Second Annual Symposium on Sea Turtle Conservation and Biology. NOAA Tech Memo. NMFS-SEFSC-503, p.260.

Epperly, S., Avens, L., Garrison, L., Henwood, T., Hoggard, W., Mitchell, J., Nance, J., Poffenberger, J., Sasso, C., Scott-Denton, E., and Yeung, C. 2002. Analysis of sea turtle.

Bycatch in the commercial shrimp fisheries of Southeast U.S. waters and the Gulf of Mexico. NOAA Technical Memorandum NMFS-SEFSC-490, 88p.

National Marine Fisheries Service, Southeast Fisheries Science Center, Beaufort Laboratory. 2007. Sea Turtle Sightings Database, unpublished.

Scott-Denton, Elizabeth; Cryer, Pat; Gocke, Judith; Harrelson, Mike; Nance, James; Smith, Rebecca; and Williams, Jo Anne. CCB-0702. 2007. Incidental capture of sea turtles in the U.S. southeastern shrimp trawl fishery.

#### Classification

An informal Section 7 consultation was prepared for the proposed rule. It found that this action is not likely to adversely affect species listed as

threatened or endangered or their associated critical habitat under the ESA.

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

The AA prepared an environmental assessment for this rule, which resulted in a Finding of No Significant Impact. A copy of the EA is available (see ADDRESSES).

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule would not have a significant impact on a substantial number of small entities. The factual basis for this certification is as follows:

For the purpose of this certification, all fishermen affected by this rule will be considered individual small entities. Given the nature of sampling programs and limited NMFS resources, this rule will likely affect fewer than one hundred fishermen at any given time.

Individual small entities will not be required to incur direct costs for complying with this observer requirement as NMFS and/or cooperating entities will pay the direct costs associated with observer coverage. Direct costs include observer salary and insurance costs. Potential indirect costs to individual small entities required to take observers under this rule may include: lost space on deck for catch, lost bunk space, and lost fishing time due to time needed to process bycatch data. For all these potential indirect costs, it is important to note that, due to limited resources and sampling protocols, effective monitoring will rotate observers among a limited number of vessels in a fishery at any given time. Thus, the potential indirect costs to individual small entities further described below are expected to be minimal since observer coverage would only be required for a small percentage of an individual's total annual fishing time.

Lost space on deck for catch is a potential indirect cost to small entities. The indirect costs would potentially be less room to store catch or to house another active fishermen. However, in accordance with Observer Health and Safety standards, vessels too small to safely accommodate an observer will not be required to take an observer under this rule. Thus, the individuals most likely to be affected by this indirect cost, will not likely be required to accommodate an observer.

Lost bunk space is a potential cost in that a vessel may need to limit the number of working fishermen onboard to accommodate an observer for

overnight trips. While this could result in lost fishing effort, and therefore lost catch, this would only be a potential cost to that subset of fishing vessels for which overnight fishing trips are a regular occurrence. Furthermore, given that larger vessels are usually used for fishing involving multi-day trips, the circumstances in which an observer would significantly displace fishing effort due to lost bunk space are not expected to occur with frequency. Thus, for this and the reasons stated above, the potential indirect cost of lost bunk space to individual small entities resulting from this rule is expected to be minimal.

Lost fishing time due to time needed to process sea turtle bycatch data is another potential indirect cost to fishermen of this observer requirement. However, while individually significant, sea turtle bycatch events are generally rare occurrences. Thus, the need to process such data is not expected to occur on a frequent basis, rendering this an insignificant impact on individual fishermen. This rule includes an annual notification process whereby the Assistant Administrator for Fisheries (AA) would make an annual determination identifying which fisheries require observer coverage for the purpose of monitoring potential sea turtle takes. The determination will be based on the best available commercial, biological, and other data. NMFS will publish a proposed notice in the **Federal Register** for public comment. A 30-day delay in effective date for implementing observer coverage will follow the **Federal Register** publication of any final annual notification, except for those fisheries that were listed in the preceding annual notification or where the AA has determined that there is good cause pursuant to the Administrative Procedure Act to make the rule effective without a 30-day delay. Annual notification will include, but not be limited to, information on the fisheries to be sampled, geographic and seasonal scope, and level of coverage.

For the reasons stated herein, the rule to establish mandatory observer coverage is not likely to impose a significant economic impact on a substantial number of small entities.

This rule does not contain a collection-of-information requirement subject to the Paperwork Reduction Act.

This rule contains policies with federalism implications as that term is defined in Executive Order 13132. The Assistant Administrator for NMFS notified state environmental management directors of this rule via a formal letter and detailed fact sheet describing the rule. NMFS will continue to solicit input from the appropriate

officials of affected state, local, and/or tribal governments to solicit their input on the development of relevant observer programs under this rule.

#### List of Subjects

##### 50 CFR Part 222

Administrative Practice and Procedure, Endangered and threatened species, Exports, Imports, Marine mammals.

##### 50 CFR Part 223

Endangered and threatened species, Exports, Imports, Transportation.

Dated: July 30, 2007.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR parts 222 and 223 are amended as follows:

#### PART 222—GENERAL ENDANGERED AND THREATENED MARINE SPECIES

- 1. The authority citation for part 222 is revised to read as follows:

**Authority:** 16 U.S.C. 1531 *et seq.*; 16 U.S.C. 742a *et seq.*

- 2. New subpart D to part 222 is added to read as follows:

##### Subpart D—Observer Requirement

Sec.

- 222.401 Observer requirement.
- 222.402 Annual determination of fisheries to be observed; notice and comment.
- 222.403 Duration of selection; effective date.
- 222.404 Observer program sampling.

##### Subpart D—Observer Requirement

###### § 222.401 Observer requirement.

Any United States fishing vessel, either commercial or recreational, which operates within the territorial seas or exclusive economic zone of the United States or on the high seas, or any fishing vessel that is otherwise subject to the jurisdiction of the United States, operating in a fishery that is identified through the annual determination process specified in § 222.402 must carry aboard a NMFS-approved observer upon request by the NMFS Assistant Administrator, in consultation with NMFS Regional Administrators and Science Center Directors, as appropriate. NMFS and/or interested cooperating entities will pay direct costs for the observer. Owners and operators must comply with observer safety requirements specified at 50 CFR 600.725 and 50 CFR 600.746 and the terms and conditions specified in the written notification.

###### § 222.402 Annual determination of fisheries to be observed; notice and comment.

(a) The Assistant Administrator, in consultation with Regional Administrators and Science Center Directors, will make an annual determination identifying which fisheries the agency intends to observe. This determination will be based on the extent to which:

(1) The fishery operates in the same waters and at the same time as sea turtles are present;

(2) The fishery operates at the same time or prior to elevated sea turtle strandings; or

(3) The fishery uses a gear or technique that is known or likely to result in incidental take of sea turtles based on documented or reported takes in the same or similar fisheries; and

(4) NMFS intends to monitor the fishery and anticipates that it will have the funds to do so.

(b) The Assistant Administrator shall publish the proposed determination and any final determination in the **Federal Register**. Public comment will be sought at the time of publication of the proposed determination. In addition, a written notification of the final determination will be sent to the address specified for the vessel in either the NMFS or state fishing permit application, or to the address specified for registration or documentation purposes, or such notification will be otherwise served on the owners or operator of the vessel. Additionally, NMFS will notify state agencies and provide notification through publication in local newspapers, radio broadcasts, and any other means as appropriate. The proposed and any final determinations will include, to the extent practicable, information on fishing sector, targeted gear type, target fishery, temporal and geographic scope of coverage, or other information, as appropriate.

(c) Fisheries listed on the most recent annual Marine Mammal Protection Act List of Fisheries in any given year, in accordance with 16 U.S.C. 1387, will serve as the comprehensive set of commercial fisheries to be considered for inclusion in the annual determination. Recreational fisheries may also be included in the annual determination.

(d) Publication of the proposed and final determinations should be coordinated to the extent possible with the annual Marine Mammal Protection Act List of Fisheries process as specified at 50 CFR 229.8.

(e) Inclusion of a fishery in a proposed or final determination does

not constitute a conclusion by NMFS that those participating in the fishery are illegally taking sea turtles.

**§ 222.403 Duration of selection; effective date.**

(a) Fisheries included in the final annual determination in a given year will remain eligible for observer coverage under this rule for five years, without need for NMFS to include the fishery in the intervening proposed annual determinations, to enable the design of an appropriate sampling program and to ensure collection of scientific data. If NMFS wishes to continue observations beyond the fifth year, NMFS must include the fishery in the proposed annual determination and seek comment, prior to the expiration of the fifth year.

(b) A 30-day delay in effective date for implementing observer coverage will follow the annual notification, except for those fisheries that were included in a previous determination within the preceding five years or where the AA has determined that there is good cause pursuant to the Administrative Procedure Act to make the rule effective without a 30-day delay.

**§ 222.404 Observer program sampling.**

(a) During the program design, NMFS would be guided by the following standards in the distribution and placement of observers among fisheries and vessels in a particular fishery:

(1) The requirements to obtain the best available scientific information;

(2) The requirement that assignment of observers is fair and equitable among fisheries and among vessels in a fishery;

(3) The requirement that no individual person or vessel, or group of persons or vessels, be subject to inappropriate, excessive observer coverage; and

(4) The need to minimize costs and avoid duplication, where practicable.

(b) Consistent with 16 U.S.C. 1881(b), vessels where the facilities for accommodating an observer or carrying out observer functions are so inadequate or unsafe (due to size or quality of equipment, for example) that the health or safety of the observer or the safe operation of the vessel would be jeopardized, would not be required to take observers under this rule.

**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, § 223.201–202 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, the second sentence of paragraph (d)(4)(iv) is revised to read as follows:

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

\* \* \* \* \*

(d) \* \* \*

(4) \* \* \*

(iv) *Procedures.* \* \* \* An emergency notification will be effective for a period of up to 30 days and may be renewed for additional periods of up to 30 days each, except that emergency placement of observers will be effective for a period of up to 180 days and may be renewed for an additional period of 60 days. \* \* \*

\* \* \* \* \*

[FR Doc. E7–15145 Filed 8–2–07; 8:45 am]

**BILLING CODE 3510–22–S**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 229**

[Docket No. 070726420–7421–01]

**RIN 0648–XB74**

**Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan**

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

**ACTION:** Temporary rule.

**SUMMARY:** The Assistant Administrator for Fisheries (AA), NOAA, announces temporary restrictions consistent with the requirements of the Atlantic Large Whale Take Reduction Plan's (ALWTRP) implementing regulations. These regulations apply to lobster trap/pot and anchored gillnet fishermen in an area totaling approximately 3,530 nm<sup>2</sup> (12,108 km<sup>2</sup>), southeast of Chatham, Massachusetts, for 15 days. The purpose of this action is to provide protection to an aggregation of northern right whales (right whales).

**DATES:** Effective beginning at 0001 hours August 5, 2007, through 2400 hours August 19, 2007.

**ADDRESSES:** Copies of the proposed and final Dynamic Area Management (DAM) rules, Environmental Assessments (EAs), Atlantic Large Whale Take Reduction Team (ALWTRT) meeting summaries, and progress reports on implementation of the ALWTRP may also be obtained by writing Diane

Borggaard, NMFS/Northeast Region, One Blackburn Drive, Gloucester, MA 01930.

**FOR FURTHER INFORMATION CONTACT:**

Diane Borggaard, NMFS/Northeast Region, 978–281–9300 x6503; or Kristy Long, NMFS, Office of Protected Resources, 301–713–2322.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access**

Several of the background documents for the ALWTRP and the take reduction planning process can be downloaded from the ALWTRP Web site at <http://www.nero.noaa.gov/whaletrp/>.

**Background**

The ALWTRP was developed pursuant to section 118 of the Marine Mammal Protection Act (MMPA) to reduce the incidental mortality and serious injury of three endangered species of whales (right, fin, and humpback) due to incidental interaction with commercial fishing activities. In addition, the measures identified in the ALWTRP would provide conservation benefits to a fourth species (minke), which are neither listed as endangered nor threatened under the Endangered Species Act (ESA). The ALWTRP, implemented through regulations codified at 50 CFR 229.32, relies on a combination of fishing gear modifications and time/area closures to reduce the risk of whales becoming entangled in commercial fishing gear (and potentially suffering serious injury or mortality as a result).

On January 9, 2002, NMFS published the final rule to implement the ALWTRP's DAM program (67 FR 1133). On August 26, 2003, NMFS amended the regulations by publishing a final rule, which specifically identified gear modifications that may be allowed in a DAM zone (68 FR 51195). The DAM program provides specific authority for NMFS to restrict temporarily on an expedited basis the use of lobster trap/pot and anchored gillnet fishing gear in areas north of 40° N. lat. to protect right whales. Under the DAM program, NMFS may: (1) require the removal of all lobster trap/pot and anchored gillnet fishing gear for a 15-day period; (2) allow lobster trap/pot and anchored gillnet fishing within a DAM zone with gear modifications determined by NMFS to sufficiently reduce the risk of entanglement; and/or (3) issue an alert to fishermen requesting the voluntary removal of all lobster trap/pot and anchored gillnet gear for a 15-day period and asking fishermen not to set any additional gear in the DAM zone during the 15-day period.