

rulemaking has no federalism implications, other than the possible preemption of State laws under Federal railroad safety statutes, specifically 49 U.S.C. 20106. Therefore, preparation of a federalism summary impact statement for this proposed rulemaking is not required.

G. Unfunded Mandates Reform Act of 1995

Pursuant to section 201 of the Unfunded Mandates Reform Act of 1995,⁴⁶ each Federal agency shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law). Section 202 of the Act⁴⁷ further requires that before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the Agency shall prepare a written statement detailing the effect on State, local, and tribal governments and the private sector. This proposed rulemaking would not result in such an expenditure, and thus preparation of such a statement is not required.

H. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.”⁴⁸ FRA has evaluated this proposed rulemaking in accordance with Executive Order 13211 and determined that this regulatory action is not a “significant energy action” within the meaning of the Executive Order.

I. Tribal Consultation

FRA has evaluated this proposed rulemaking under the principles and criteria in Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, dated November 6, 2000. This proposed rulemaking would not have a substantial direct effect on one or more Indian tribes, would not impose substantial direct compliance costs on Indian tribal governments, and would

not preempt tribal laws. Therefore, the funding and consultation requirements of Executive Order 13175 do not apply, and a tribal summary impact statement is not required.

J. Privacy Act Statement

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to www.regulations.gov, as described in the system of records notice, DOT/ALL-14 FDMS, accessible through www.transportation.gov/privacy. To facilitate comment tracking and response, FRA encourages commenters to provide their names, or the name of their organization; although submission of names is optional. Whether or not commenters identify themselves, FRA will fully consider all timely comments. If you wish to provide comments containing proprietary or confidential information, please contact FRA for alternate submission instructions.

Issued in Washington, DC.

Amitabha Bose,
Administrator.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 222

[Docket No. 220902-0182]

RIN 0648-BL37

2023 Annual Determination To Implement the Sea Turtle Observer Requirement

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

ACTION: Proposed rule, request for comment.

SUMMARY: The National Marine Fisheries Service (NMFS) publishes this proposed Annual Determination (AD) for 2023, pursuant to its authority under the Endangered Species Act (ESA). Through the AD, NMFS identifies U.S. fisheries operating in the Atlantic Ocean, Gulf of Mexico, and Pacific Ocean that will be required to take fisheries observers upon NMFS' request. The purpose of observing identified fisheries is to learn more about sea turtle interactions in a given fishery, evaluate measures to prevent or reduce sea turtle

takes, and implement the prohibition against sea turtle takes. Fisheries identified on the 2023 AD (see Table 1) will be eligible to carry observers upon NMFS' request as of January 1, 2023, and will remain on the AD for a five-year period until December 31, 2027.

DATES: Comments must be received by October 11, 2022.

ADDRESSES: You may submit comments on this document, identified by NOAA-NMFS-2022-0062, by either of the following methods:

Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to <https://www.regulations.gov> and enter NOAA-NMFS-2022-0062 in the Search box. Click on the “Comment” icon, complete the required fields, and enter or attach your comments.

Mail: Submit written comments to Chief, Marine Mammal and Sea Turtle Conservation Division, Attn: Sea Turtle Annual Determination, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (*e.g.*, name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT:

Jaclyn Taylor, Office of Protected Resources, 301-427-8402; Ellen Keane, Greater Atlantic Region, 978-282-8476; Dennis Klemm, Southeast Region, 727-824-5312; Dan Lawson, West Coast Region, 206-526-4740; Irene Kelly, Pacific Islands Region, 808-725-5141. Individuals who use a telecommunications device for the hearing impaired may call the Federal Information Relay Service at 1-800-877-8339 between 8 a.m. and 4 p.m. Eastern time, Monday through Friday, excluding Federal holidays.

SUPPLEMENTARY INFORMATION:

Purpose of the Sea Turtle Observer Requirement

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.

⁴⁶ Public Law 104-4, 2 U.S.C. 1531.

⁴⁷ 2 U.S.C. 1532.

⁴⁸ 66 FR 28355 (May 22, 2001).

All sea turtles found in U.S. waters are listed as either endangered or threatened under the ESA. Kemp's ridley (*Lepidochelys kempii*), loggerhead (*Caretta caretta*; North Pacific distinct population segment (DPS)), leatherback (*Dermochelys coriacea*), green (*Chelonia mydas*; Central West Pacific and Central South Pacific DPSs) and hawksbill (*Eretmochelys imbricata*) sea turtles are listed as endangered. Loggerhead (Northwest Atlantic distinct population segment), green (North Atlantic, South Atlantic, Central North Pacific, and East Pacific DPSs), and olive ridley (*Lepidochelys olivacea*) sea turtles are listed as threatened, except for breeding colony populations of olive ridleys on the Pacific coast of Mexico, which are listed as endangered. Due to the inability to distinguish between populations of olive ridley turtles away from the nesting beach, NMFS considers these turtles endangered wherever they occur in U.S. Pacific waters. While some sea turtle populations have shown signs of recovery, many populations continue to decline.

Bycatch in fishing gear is the primary anthropogenic source of sea turtle injury and mortality in U.S. waters. Section 9 of the ESA prohibits the take (defined to include 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 provides for civil and criminal penalties for anyone who violates the Act or a regulation issued to implement the ESA. NMFS may grant exceptions to the take prohibitions with an incidental take statement or an incidental take permit issued pursuant to ESA section 7 or 10, respectively. To do so, NMFS must determine the activity that will result in incidental take is not likely to jeopardize the continued existence of the affected listed species. For some Federal fisheries and most state fisheries, NMFS has not granted an exception for incidental takes of sea turtles primarily because we lack information about fishery-sea turtle interactions.

For most fisheries, the most effective way for NMFS to learn more about bycatch in order to implement the take prohibitions and prevent or minimize take is to place observers aboard fishing vessels. In 2007, NMFS issued a regulation (50 CFR 222.402) establishing

procedures to annually identify, pursuant to specified criteria and after notice and opportunity for comment, those fisheries in which the agency intends to place observers (72 FR 43176; August 3, 2007). These regulations specify that NMFS may place observers on U.S. fishing vessels, commercial or recreational, 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 United States. Failure to comply with the requirements under these regulations may result in civil or criminal penalties under the ESA.

NMFS will pay the direct costs for vessels to carry the required 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 required to carry observers, if requested, for a period of five years without further action by NMFS. This will enable NMFS to develop appropriate observer coverage and sampling protocols to investigate whether, how, when, where, and under what conditions sea turtle bycatch is occurring, and to evaluate whether existing measures are minimizing or preventing bycatch.

Sea Turtle Distribution

Atlantic Ocean and Gulf of Mexico

Sea turtle species found in waters of the Atlantic Ocean and Gulf of Mexico include green, hawksbill, Kemp's ridley, leatherback, and loggerhead turtles. The waters off the U.S. east coast and Gulf of Mexico provide important foraging, breeding, and migrating habitat for these species. Further, the southeastern United States, from North Carolina through the Florida Gulf coast, is a major sea turtle nesting area for loggerhead, leatherback, and green turtles, and, to a much lesser extent, Kemp's ridley and hawksbill turtles.

Four sea turtle species occur seasonally in New England and mid-Atlantic continental shelf waters north of Cape Hatteras, North Carolina: green, Kemp's ridley, leatherback, and loggerhead. The occurrence of these species in these waters is largely temperature dependent. In general, some turtles move up the coast from southern wintering areas as water temperatures warm in the spring. The trend reverses in the fall as water temperatures decrease. By December, turtles that migrated northward return to southern waters for the winter. Hard-shelled species are most commonly found south of Cape Cod, Massachusetts. Leatherbacks regularly

occur as far north in U.S. waters as the Gulf of Maine in the summer and fall.

Green turtles generally inhabit inshore and nearshore waters from Texas to Massachusetts, the U.S. Virgin Islands, and Puerto Rico.

In the Atlantic, hawksbills are most common in Puerto Rico and its associated islands and in the U.S. Virgin Islands. In the continental United States, the species is primarily recorded from south Texas and south Florida and infrequently from the remaining Gulf States and north of Florida.

Kemp's ridleys occur throughout waters of the Gulf of Mexico and U.S. Atlantic coast from Florida to New England. The major nesting area for Kemp's ridleys is in Tamaulipas, Mexico, with limited nesting extending to the Texas coast and occasional nesting on the east coast from Florida to North Carolina.

Loggerheads occur throughout the Atlantic and Gulf of Mexico, ranging from inshore shallow water habitats to deeper oceanic waters. The largest nesting assemblage of loggerheads in the world is in the southeastern United States from Florida to North Carolina.

Adult leatherbacks are capable of tolerating a wide range of water temperatures and have been sighted along the entire continental coast of the United States as far north as the Gulf of Maine and south to Puerto Rico, the U.S. Virgin Islands, and into the Gulf of Mexico. The southeast coast of Florida represents a significant nesting area for leatherbacks in the western North Atlantic.

U.S. Pacific Ocean

Leatherback sea turtles are consistently present off the U.S. west coast, usually north of Point Conception, California. They migrate to central and northern California from their natal beaches in the Western Pacific to feed on jellyfish during summer and fall. Leatherback turtles usually appear in Monterey Bay and California coastal waters during August and September and move offshore in October and November. Other observed concentrations of leatherbacks include areas north of Cape Blanco, Oregon to Cape Flattery, Washington offshore from the Columbia River plume.

Loggerhead and olive ridley sea turtles are rarely observed in the U.S. west coast EEZ, but records show that all species have stranded in California and the Pacific Northwest. Two small resident populations of green turtles have been identified in the southern California Bight, associated historically with the warm water outflows from power plants in San Diego Bay, the Seal

Beach National Wildlife Refuge, and the San Gabriel River in Long Beach, California.

In the eastern Pacific, loggerheads have been reported as far north as Alaska and as far south as Chile. Occasionally there are sightings reported from the coasts of Washington and Oregon, but most records are of juveniles off the coast of California. Based upon observer records and aerial observations, loggerheads travel into the southern California Bight during El Niño events (or anomalously warm water conditions similar to an El Niño). The majority of fishery interactions with loggerheads during El Niño conditions have occurred during the summer.

Olive ridleys have been recorded stranded all along the U.S. west coast, although they are usually cold-stunned (*i.e.*, out of their normal habitat). Olive ridleys are believed to use warm water currents along the west coast for foraging. The specific distribution of olive ridleys along the U.S. west coast is unknown at this time.

Sea turtles occur throughout the Pacific Islands Region including the State of Hawaii and the U.S. territories of Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Pacific Island Remote Areas (PRIA; comprised of Baker, Howland, and Jarvis Islands, Johnston Atoll, Kingman Reef, and Palmyra Atoll). Green and hawksbill turtles are most common in these nearshore U.S. EEZ waters while leatherbacks, loggerheads, and olive ridleys occur in offshore pelagic waters.

Process for Developing the Annual Determination (AD)

Pursuant to 50 CFR 222.402, NOAA's Assistant Administrator for Fisheries (AA), in consultation with Regional Administrators and Fisheries Science Center Directors, develops a proposed AD identifying which fisheries are required to carry observers, if requested, to monitor potential interactions with sea turtles. NMFS provides an opportunity for public comment on any proposed determination. The determination is informed by 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; and/or qualitative data from logbooks or fisher reports. Specifically, fisheries are identified for inclusion on the AD based on the extent to which:

(1) The fishery operates in the same waters and at the same time as when 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.

The AA uses the most recent version of the annually published Marine Mammal Protection Act (MMPA) List of Fisheries (LOF) as the comprehensive list of commercial fisheries for consideration. The LOF includes all known state and Federal commercial fisheries that occur in U.S. waters and on the high seas. However, in preparing the AD, we do not rely on the three-part MMPA LOF classification scheme. In addition, unlike the LOF, the AD may include recreational fisheries likely to interact with sea turtles based on the best available information.

NMFS consults with appropriate state and Federal fisheries officials to identify which fisheries, both commercial and recreational, to consider. NMFS carefully considers all recommendations and information available for developing the proposed AD. The proposed AD is not an exhaustive or comprehensive list of all fisheries with documented or suspected sea turtle bycatch; rather it is intended as a mechanism to fill critical data gaps, where observer data is not currently sufficient for turtle data collection needs. NMFS will not include a fishery on the proposed AD if that fishery does not meet the criteria for inclusion on the AD (50 CFR 222.402(a)).

For many fisheries, NMFS may already be addressing bycatch through another mechanism (*e.g.*, rulemaking to implement modifications to fishing gear and/or practices), may be observing the fishery under a separate statutory authority, or will consider including them in future ADs based on the four previously noted criteria (50 CFR 222.402(a)). The fisheries not included on the 2023 AD may still be observed by NMFS fisheries observers under different authorities (*e.g.*, MMPA, Magnuson-Stevens Fishery Conservation and Management Act (MSA)) than the ESA, if applicable.

The final determination will publish in the **Federal Register** and individuals permitted for each fishery identified on the AD will receive a written notification. NMFS will also notify state or territory agencies. Once included in the final determination, a fishery will remain eligible for observer coverage for a period of five years to enable the

design of an appropriate sampling program and to ensure collection of sufficient scientific data for analysis. If NMFS determines a need for more than five years to obtain sufficient scientific data, NMFS will include the fishery in another proposed AD, prior to the end of the fifth year.

On the 2018 AD, NMFS identified two fisheries and required them to carry observers, if requested, through December 31, 2022. The 2020 AD identified four additional fisheries and required them to carry observers, if requested, through September 29, 2025. The fisheries included on the current AD are available at <https://www.fisheries.noaa.gov/national/bycatch/sea-turtle-observer-requirement-annual-determination>.

Fisheries Proposed for Inclusion on the 2023 Annual Determination

NMFS proposes to include two fisheries in the Atlantic Ocean/Gulf of Mexico on the 2023 AD. The two fisheries, described below and listed in Table 1, are the mid-Atlantic gillnet and Gulf of Mexico menhaden purse seine fisheries. These two fisheries were previously listed on the 2018 AD for a five-year period ending December 31, 2022.

NMFS used the 2022 MMPA LOF (87 FR 23122; April 19, 2022) as the comprehensive list of commercial fisheries to evaluate for fisheries to include on the AD. The fishery name, definition, and number of vessels/persons for fisheries listed in the AD are taken from the most recent MMPA LOF. Additionally, the fishery descriptions below include a particular fishery's current classification on the MMPA LOF (*i.e.*, Category I, II, or III); Category I and II fisheries are required to carry observers under the MMPA, if requested by NMFS. As noted previously, NMFS also has authority to observe fisheries in Federal waters under the MSA and collect sea turtle bycatch information. The AD authority will work within the current observer programs, and allow NMFS the flexibility to further consider sea turtle data collection needs when allocating observer resources.

Gillnet Fisheries

Sea turtles are vulnerable to entanglement and drowning in gillnets, especially when gear is unattended. The main risk to sea turtles from capture in gillnet gear is forced submergence. Sea turtle entanglement in gillnets can also result in severe constriction wounds and/or abrasions. Large mesh gillnets (*e.g.*, 7 inch stretched mesh or greater) have been documented as particularly effective at capturing sea turtles.

However, sea turtles are prone to and have been commonly documented entangled in smaller mesh gillnets as well.

Mid-Atlantic Gillnet Fishery

NMFS proposes to include the mid-Atlantic gillnet fishery on the 2023 AD due to known sea turtle bycatch and the need to collect more data in state gillnet fisheries. This fishery has an estimated 4,020 vessels/persons and targets monkfish, spiny dogfish, smooth dogfish, bluefish, weakfish, menhaden, spot, croaker, striped bass, large and small coastal sharks, Spanish mackerel, king mackerel, American shad, black drum, skate spp., yellow perch, white perch, herring, scup, kingfish, spotted seatrout, and butterfish.

The fishery uses drift and sink gillnets, including nets set in a sink, stab, set, strike, or drift fashion, with some unanchored drift or sink nets used to target specific species. The dominant material is monofilament twine with stretched mesh sizes from 2.5–12 inches (6.4–30.5 cm), and string lengths from 150–8,400 feet (46–2,560 m). This fishery includes any residual large pelagic driftnet effort in the mid-Atlantic and any shark and dogfish gillnet effort in the mid-Atlantic zone.

Fishing occurs from right off the beach (6 ft. (1.8 m)) or in nearshore coastal waters to offshore waters (250 ft. (76 m)). This fishery operates year-round west of a line drawn at 72°30' W longitude south to 36°33.03' N latitude and east to the eastern edge of the EEZ and north of the North Carolina/South Carolina border. The fishery does not include the Category II and III inshore gillnet fisheries (*i.e.*, Chesapeake Bay, North Carolina, Long Island Sound inshore gillnet, Delaware River inshore gillnet, Rhode Island, southern Massachusetts (to Monomoy Island), and New York Bight (Raritan and Lower New York Bays) inshore gillnet fisheries).

The mid-Atlantic gillnet fishery is managed by several Federal Fishery Management Plans (FMPs) and Interstate FMPs managed by the Atlantic States Marine Fisheries Commission. These fisheries are primarily managed by total allowable catch, individual trip limits (quotas), effort caps (limited number of days at sea per vessel), time and area closures, and gear restrictions and modifications.

The mid-Atlantic gillnet fishery is classified as Category I fishery on the MMPA LOF, which authorizes NMFS to observe this fishery in state and Federal waters for marine mammal interactions and to collect information on sea turtles should a take occur on an observed trip.

This fishery was listed on the 2018 AD and was eligible for observer coverage through 2022. The Chesapeake Bay inshore gillnet fishery and Long Island inshore gillnet fishery were listed on the 2020 AD and are eligible for observer coverage if requested by NMFS through September 29, 2025. By including the mid-Atlantic gillnet fishery on the 2023 AD, NMFS may authorize observer coverage more completely along the mid-Atlantic region.

NMFS proposes to include this fishery pursuant to the criteria identified at 50 CFR 222.402(a)(1) for listing a fishery on the AD because sea turtles are known to occur in the same areas where the fishery operates, takes have been documented in this fishery, and NMFS intends to monitor this fishery, particularly the segment that occurs in the nearshore state coastal waters of the mid-Atlantic and Delaware Bay. There were 3,006 observed trips in the mid-Atlantic gillnet fishery, excluding Chesapeake Bay and Long Island Sound, from 2017 through 2021. Other gillnet fisheries (*i.e.*, Chesapeake Bay and Long Island inshore gillnet fisheries) in nearshore waters of the mid-Atlantic are currently listed on the AD through 2025. The re-listing of the mid-Atlantic gillnet fishery on the 2023 AD will allow NMFS to take a more holistic approach to evaluating sea turtle bycatch in gillnet fisheries in state waters from New York through Virginia.

Seine Fisheries

Seine fisheries may use mesh similar to that used in gillnets, but the gear is prosecuted differently from traditional gillnets. Purse seines have the potential to entangle and drown sea turtles.

Gulf of Mexico Menhaden Purse Seine Fishery

NMFS proposes to include the Gulf of Mexico menhaden purse seine fishery on the 2023 AD. The Gulf of Mexico menhaden purse seine fishery has an estimated 40–42 vessels/persons, and targets menhaden and thread herring. This fishery uses purse seine gear and operates in bays, sounds, and nearshore coastal waters along the Gulf of Mexico coast. The majority of fishing effort occurs in Louisiana and Mississippi, with lesser effort in Alabama and Texas state waters. Florida prohibits the use of purse seines in state waters. The fishery is managed under the Gulf States Marine Fisheries Commission Interstate Gulf Menhaden FMP.

The fishery was observed in the early-1990s by Louisiana State University. Sea turtle strandings in the northern Gulf of Mexico have been documented during times and in areas near where the Gulf

of Mexico menhaden purse seine fishery operates. In 2011, NMFS operated a pilot observer program in this fishery to better understand the fishery's operations and evaluate the feasibility of observing marine mammal and sea turtle bycatch. During the pilot observer program, two sea turtles were documented; one dead Kemp's ridley that was excluded by the large fish excluder and one live unidentified turtle that was successfully released from the purse-seine net.

A new collaborative project with NMFS and the Gulf of Mexico menhaden purse seine industry to develop effective observer methods to collect information about sea turtle bycatch in the Gulf of Mexico menhaden purse seine fishery began in 2020. This project is funded through the Deepwater Horizon Oil Spill Open Ocean Trustee Implementation Group to restore resources injured in the Gulf of Mexico by the 2010 Deepwater Horizon oil spill. A one-week proof-of-concept testing was conducted in October 2021, and a full-scale pilot observer project began in 2022.

The Gulf of Mexico menhaden purse seine fishery is classified as a Category II fishery on the MMPA LOF. This fishery was listed on the 2018 AD and was eligible for observer coverage through 2022. The re-listing of this fishery on 2023 AD will continue the efforts of the pilot observer program.

NMFS proposes to include this fishery pursuant to the criteria identified at 50 CFR 222.402(a)(1) for listing a fishery on the AD because sea turtles are known to occur in the same areas where the fishery operates, takes have been documented in this fishery, and NMFS intends to monitor this fishery.

Implementation of Observer Coverage in a Fishery Listed on the 2023 AD

As part of the proposed 2023 AD, NMFS has included, to the extent practicable, information on the fisheries and gear types to observe, geographic and seasonal scope of coverage, and any other relevant information. NMFS intends to monitor the fisheries and anticipates that it will have the funds to support observer activities. The final rule implementing this proposed 2023 AD will include a 30-day delay in the date of effectiveness for implementing observer coverage, except for those fisheries where the AA has determined that there is good cause pursuant to the Administrative Procedure Act to make the rule effective upon publication of the final rule.

The design of any observer program for fisheries identified through the AD

process, including how observers will be allocated to individual vessels, will vary among fisheries, fishing sectors, gear types, and geographic regions, and will ultimately be determined by the individual NMFS Regional Office, Science Center, and/or observer program. Pursuant to 50 CFR 222.404, during the program design, NMFS will follow the standards below for distributing and placing observers among fisheries identified in the AD and among vessels in those fisheries:

- (1) The requirement 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.

Vessels subject to observer coverage under the AD must comply with observer safety requirements specified in 50 CFR 600.725 and 600.746. Specifically, 50 CFR 600.746(c) requires vessels subject to observer coverage to provide adequate and safe conditions for carrying an observer and conditions that allow for operation of normal observer functions. To provide such conditions, a vessel must comply with the applicable regulations regarding observer accommodations (see 50 CFR parts 229, 300, 600, 622, 635, 648, 660, and 679) and possess a current United States Coast Guard (USCG) Commercial Fishing Vessel Safety Examination decal or a USCG certificate of examination. A vessel that fails to meet these requirements at the time an observer is to be deployed is prohibited from

fishing (50 CFR 600.746(f)), unless NMFS determines that an alternative platform (e.g., a second vessel) may be used or that the vessel is not required to take an observer under 50 CFR 222.404(b). All fishers on a vessel must cooperate in the operation of observer functions. Observer programs designed or carried out in accordance with 50 CFR 222.404 are consistent with existing NOAA observer policies and applicable federal 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.*), and the Observer Health and Safety regulations (50 CFR part 600).

Additional information on observer programs in commercial fisheries is located on the NMFS National Observer Program’s website: <https://www.fisheries.noaa.gov/topic/fishery-observers>.

TABLE 1—STATE AND FEDERAL COMMERCIAL FISHERIES PROPOSED FOR INCLUSION ON THE 2023 ANNUAL DETERMINATION

Fishery	Years eligible to carry observers
<i>Purse Seine Fisheries:</i>	
Gulf of Mexico menhaden purse seine	2023–2027
<i>Gillnet Fisheries:</i>	
Mid-Atlantic gillnet	2023–2027

Classification

The Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this proposed rule would not have a significant economic impact on a substantial number of small entities. Any entity with combined annual fishery landing receipts less than \$11 million is considered a small entity for purposes of the Regulatory Flexibility Act (50 CFR 200.2). Under this \$11 million standard, all entities subject to this action are considered small entities.

NMFS has estimated that approximately 4,062 vessels participating in the two proposed fisheries listed in Table 1 would be eligible to carry an observer, if requested. However, NMFS would only request a fraction of the total number of participants to carry an observer, based on the sampling protocol identified for each fishery by regional observer programs. As noted throughout this proposed rule, NMFS would select vessels and focus coverage during times and areas where fishing effort overlaps with sea turtle distribution. Due to the unpredictability of fishing effort, NMFS

cannot pre-determine the specific number of vessels that it will request to carry an observer.

If a vessel is requested to carry an observer, fishers will not incur any direct economic costs associated with carrying that observer. In addition, 50 CFR 222.404(b) states that an observer will not be placed on a vessel if the facilities for quartering an observer or performing observer functions are inadequate or unsafe, thereby exempting from this requirement vessels that are too small to accommodate an observer. Because this proposed rule would not have a significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis is not required and was not prepared.

The information collection for the AD is approved under Office of Management and Budget (OMB) control number 0648–0593. Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid OMB Control Number.

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

In accordance with the Companion Manual for NOAA Administrative Order (NAO) 216–6A, NMFS preliminarily determined that publishing this proposed AD qualifies to be categorically excluded from further NEPA review, consistent with categories of activities identified in Categorical Exclusion G7 (“Preparation of policy directives, rules, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature, or for which the environmental effects are too broad, speculative or conjectural to lend themselves to meaningful analysis and will be subject later to the NEPA process, either collectively or on a case-by-case basis”) of the Companion Manual, and we have not identified any extraordinary circumstances listed in Chapter 4 of the Companion Manual for NAO 216–6A that would preclude application of this categorical exclusion. If NMFS takes a management action for a specific fishery, for example, requiring fishing gear modifications, NMFS would first prepare any environmental document specific to that action that is required under NEPA.

This proposed rule would not affect species listed as threatened or endangered under the ESA or their associated critical habitat. The impacts of numerous fisheries have been analyzed in various biological opinions, and this proposed rule would not affect the conclusions of those opinions. The inclusion of fisheries on the AD is not considered a management action that would adversely affect threatened or endangered species. If NMFS takes a

management action, for example, requiring modifications to fishing gear and/or practices, NMFS would review the action for potential adverse effects to listed species under the ESA.

This proposed rule would have no adverse impacts on sea turtles, and information collected from observer programs may have a positive impact on sea turtles by improving knowledge of sea turtles and the fisheries interacting with sea turtles.

This proposed rule would not affect the land or water uses or natural resources of the coastal zone, as specified under section 307 of the Coastal Zone Management Act.

Dated: September 2, 2022.

Samuel D. Rauch, III,
*Deputy Assistant Administrator for
Regulatory Programs, National Marine
Fisheries Service.*

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