

DEPARTMENT OF COMMERCE**National Oceanic Atmospheric Administration****50 CFR Part 679**

[Docket No. 020814193-2193-01; I.D. 070102C]

RIN 0648-AQ05

Fisheries of the Exclusive Economic Zone Off Alaska; Extend the Interim Groundfish Observer Program Through December 31, 2007, and Amend Regulations for the North Pacific Groundfish Observer Program

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS issues a proposed rule to extend through 2007 the existing regulations for the interim North Pacific Groundfish Observer Program (Observer Program), which otherwise expires December 31, 2002. This proposed rule would also amend regulations governing the Observer Program. These changes would clarify and improve observer certification and decertification processes; change the duties and responsibilities of observers and observer providers to eliminate ambiguities and strengthen the regulations; and grant NMFS the authority to place NMFS staff and other qualified persons aboard vessels and at shoreside or floating stationary plants to increase NMFS' ability to interact effectively with observers, fishermen, and processing plant employees. These parts of the action are necessary to improve Observer Program support of the management objectives of the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area and the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMPs) for those industry sectors already subject to such requirements. The intended effect is better managed fishery resources that result in the effective conservation of marine resources and habitat.

DATES: Comments on this proposed rule must be received by October 11, 2002.

ADDRESSES: Comments should be sent to Sue Salvesson, Assistant Administrator for Sustainable Fisheries, Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802, Attn: Lori Gravel, or delivered to the Federal Building, 709 W 9th Street, Juneau, AK. Copies of the

Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) prepared for this proposed action also may be obtained from the same address. Send comments on information collection requests to NMFS and to OMB, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 (Attn: NOAA Desk Officer).

FOR FURTHER INFORMATION CONTACT: Sue Salvesson, 907-586-7228.

SUPPLEMENTARY INFORMATION:

Background

Groundfish fisheries in waters of the Gulf of Alaska (GOA) and Bering Sea Aleutian Islands management area (BSAI) are managed under quotas set annually for groundfish species and for several other species that the groundfish fishery is prohibited from retaining. Management programs have been implemented to allocate specified quotas among areas, seasons, gear types, processor and catcher vessel sectors, cooperatives, and individual fishermen. Annual quotas are based on stock assessments generated principally by NMFS and on recommendations from the North Pacific Fishery Management Council (Council). NMFS' Alaska Region is responsible for monitoring the progress of fisheries toward attainment of those quotas, and allocations thereof, and for closing the fisheries when quotas are reached. Stock assessments, quota monitoring, and management require collection of data from the fishery to account for all groundfish and prohibited species catch, including the portion of the catch that is discarded. North Pacific groundfish observers aboard vessels and at shoreside or floating stationary processors collect the data necessary for those purposes.

Observer requirements have been in place in Alaska since the mid-1970s, when the Magnuson Fishery Conservation and Management Act (later re-named the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act)) was implemented and monitoring and phasing out foreign groundfish fisheries in the U.S. Exclusive Economic Zone (EEZ) was a priority. As these foreign fisheries ended by 1991, the Observer Program infrastructure was changed to provide observer coverage for domestic vessels and shoreside processing plants participating in these Alaskan groundfish fisheries. A domestic Observer Program was developed by the Secretary in consultation with the Council and implemented through Amendment 18 to the GOA FMP and

Amendment 13 to the BSAI FMP (54 FR 50386, December 6, 1989, and 55 FR 4839, February 12, 1990). The Observer Program established observer coverage requirements that have remained generally unchanged through 2002.

High quality observer data are a cornerstone of Alaska groundfish fisheries management. However, NMFS' ability to maintain data quality assurance is constrained by several features of the current program structure. Concerns exist with allowing fishing companies to negotiate directly with observer companies for observer services because this creates a potential conflict of interest and reduces NMFS management controls over the observer companies' performance. Incentives for industry to use this procurement system to its advantage increase as observers assume greater responsibilities for monitoring individual vessel performance. Observer providers are under pressure to provide observers who meet their clients' needs rather than to focus on data quality assurance. Competitive pressure to reduce coverage costs to the industry keeps observer salaries low, resulting in reduced observer availability. Instability in the fishing and observer provider industries has created situations in the past where observers were not paid for work performed. Such circumstances adversely influence data quality by undermining observer morale and increasing observer work force turnover.

NMFS has certified observer providers since 1990, but the current program structure prevents the agency from effectively monitoring provider operations to assess actual performance and to make necessary modifications. As a result, companies that may not meet Observer Program standards are allowed to continue business without significant risk of being decertified.

The Council directed NMFS to address these concerns through development of an alternate program structure requiring all fishery participants to pay a fee toward observer coverage. Under this program, known as the Research Plan, NMFS would collect the fee and contract directly with observer companies, removing the direct link between the fishing industry and the observer providers. The Research Plan and collection of such a fee is authorized under Section 313 of the Magnuson-Stevens Act. The Council adopted the Research Plan in 1992, and NMFS approved and implemented this program in 1994.

Industry concerns about the Research Plan arose during its development and subsequent implementation. These issues included: (1) Redistribution of

observer costs resulting from collection of fees based on a percentage of ex-vessel revenue; (2) no observer cost cap where additional observer coverage might be required in specified management programs; (3) limited coverage levels funded under the Research Plan that could constrain development of programs under consideration by the Council requiring increased observer coverage; and (4) increased costs of coverage due to contractual arrangements between NMFS and observer companies that would fall under the Service Contract Act (SCA).

After consideration of these concerns, the Council voted to repeal the Research Plan in December 1995 and to refund the fees collected from the 1995 fisheries. The Council requested NMFS to develop a new plan to address the data integrity issues the Research Plan was intended to address. Under the new concept endorsed by the Council, a Joint Partnership Agreement (JPA) was developed during 1997 with the Pacific States Marine Fisheries Commission (PSMFC). Fishing operations would continue to pay coverage costs, but payment would be made to PSMFC, which would subcontract with observer companies for services.

At its April 1996 meeting, the Council adopted an interim groundfish Observer Program, based on 1996 coverage requirements, that authorized mandatory groundfish observer coverage through 1997 in order to continue coverage requirements during the development of the JPA.

PSMFC identified an unresolvable legal issue that forestalled efforts to proceed with the JPA. It determined that the risk of a lawsuit through its role as a third party to observer procurement arrangements would be too high, and NMFS could not sufficiently indemnify PSMFC against legal challenge. With the demise of the JPA, the Council, the Council's Observer Advisory Committee (OAC), and NMFS continued to advocate pursuit of an appropriate program structure that would address the issues that the Research Plan and the JPA were to resolve. During the interim period, the Observer Program was extended in 1998 with an expiration date of December 31, 2000.

At its October 1999 meeting, the Council reconvened the OAC with a new chairman and membership. The Council charged the committee with reviewing the Observer Program in its entirety and developing appropriate alternatives to the current program to meet the needs and goals of the Council and NMFS, including those cited for the

development of the Research Plan and the proposed JPA with PSMFC.

In 2000, the interim Observer Program again was extended for two years with an expiration date of December 31, 2002. This action was approved with the expectation that a restructured program would be developed and implemented by that date. Although NMFS has been working with the OAC since March 2000 to develop an alternative program structure, little progress has been made, in large part due to limitations in existing statutory authority that would prohibit funding options other than those developed under the Research Plan. At its April 2002 meeting, the Council again adopted an extension of the interim Observer Program, as well as changes to the program to address several legal concerns, to clarify responsibilities of observers and observer providers and to authorize placement of NMFS staff aboard vessels or at shoreside or floating processors to support observer functions.

This proposed action would extend the current interim program through December 31, 2007, to allow additional time for the development and analysis of alternatives that would address numerous issues facing the Observer Program, including the concern about conflict of interest eroding the quality of data collected by observers. The Council intends that a preferred alternative to address those issues and concerns will be selected and implemented by January 1, 2008.

Further, this proposed action would improve regulations governing observer and observer provider responsibilities through modifications and additions to existing observer and observer provider duties and obligations. This action would further increase the ability of NMFS to interact effectively with observers, fishermen, and processing plant employees by granting NMFS authority to place NMFS staff and authorized individuals aboard groundfish and halibut vessels and at shoreside and stationary floating processors that require observer coverage.

The objective of the proposed management actions is to ensure that the Observer Program will continue to perform and improve its critical scientific, conservation, and management functions. As noted above, data provided by the Observer Program are, collectively, a critical element in the conservation and management of groundfish, other living marine resources, and their habitat. These data are used for assessing the status of groundfish stocks, setting and

monitoring groundfish quotas and allocations thereof, monitoring bycatch of non-groundfish species, assessing effects of the groundfish fishery on other living marine resources and their habitat, and assessing methods for improving the conservation and management of groundfish, of other living marine resources, and of their habitat. Additionally, management of the Western Alaska Community Development Quota (CDQ) program and American Fisheries Act (AFA) fisheries are structured to rely on observer data for individual vessel catch accounting. These data largely factor into the current level of confidence in the management of federally managed fisheries in Alaska. Accurate catch accounting results in prosecution of fisheries at harvest levels that better approach actual allocations without exceeding them, thereby maintaining resource management objectives and avoiding, to the extent practicable, losses of revenue from potential mis-allocations resulting from the underharvest of total allowable catch (TAC).

Because of the critical uses of observer data, extending the Observer Program beyond 2002 is essential. Improvements to the Observer Program are necessary to address both perceived and actual sources of data quality problems. In the absence of observer data or of some equivalent alternative source of fishery data, NMFS cannot fulfill its conservation and management obligations, as prescribed under the Magnuson-Stevens Act and other law.

Initial Permitting or Certification Determination. This proposed action seeks to establish through regulation an application format and/or procedure for both observers and observer providers and to create a mechanism for an official, or board of officials, appointed by the Regional Administrator, Alaska Region, NMFS (Regional Administrator), to review applications, determine who meets the certification or permitting criteria, and issue the appropriate license. This action will also establish a permit application or certification appeals process independent from the Observer Program.

Standards and criteria for issuance of certifications to observers or of permits to observer providers must be comprehensible and must describe clearly the certification/permitting procedures and requirements. This proposed action clearly establishes these requirements. If the applicant fails to meet the certification or permitting criteria, a decision to deny certification of an observer or an application for an observer provider permit must be issued in writing, including an explanation of

the reasoning used in deciding to deny a certification or permit. Notice must be given to the applicant that the decision may be appealed upon request.

The denial of an observer certification or observer provider permit application would be appealable. The Regional Administrator, Office of Administrative Appeals (OAA), would review denials for both observers and observer providers upon request. Each decision from the OAA would be referred to the Regional Administrator who would uphold or overturn the OAA and make the final agency determination. Any further appeal could be taken to the United States District Court. Processes for appeals are described below.

Duration of an Observer's Certification or an Observer Provider's Permit. The duration of a permit or certification is determined by the agency. Several factors may influence this, including the administrative burden for issuing those permit or certification licenses, the character of the work being performed by the licensee, and the duration of the program under which the permit or certification is issued. Currently, an observer's certification expires repeatedly over the course of his or her career. Observer provider certifications have been renewed by rulemaking in recent years. Detailed discussion of the duration of an observer's certification and an observer provider's permit is found below.

Clarity of Performance Standards. This proposed action seeks to clarify language of observer and observer provider performance standards, including responsibilities and prohibitions, which are detailed below.

Due Process in Permit or Certification Sanctions. Current regulations at § 679.50 establish an appeals process in cases of observer or observer-provider certification suspension or decertification. These processes are administered within the same offices of the Observer Program Office and Alaska Regional Office that make the initial determinations for suspension and decertification. This proposed action seeks to establish through regulation appropriate independent appeals processes for both observers and observer providers.

Administrative Record. Reviewers such as the OAA or a court must be able to ascertain both the facts and standards used by the Observer Program and the way it applied the standards to the facts of the individual case. While suspension or decertification records may be available to the public under the Freedom of Information Act (FOIA), subject to FOIA and Privacy Act

restrictions, the observer or observer provider who is directly affected by an agency action should be provided with all records relevant to the decision record unless exempted.

Permitting Procedures and Sanctions for North Pacific Groundfish Observer Providers. The proposed process for evaluation of observer provider applications and issuance of permits would be improved through clearer application requirements, defined evaluation criteria, an evidentiary period for submitting supplemental information, required written decisions by NMFS, and an administratively separate appeals process.

Permit vs. Certification for Observer Providers. This proposed action would change the nomenclature for observer provider licensing that will result in the providers being "permitted", rather than "certified" to provide observer services to industry. Just as commercial fishing is authorized by a permit, observer providers would receive a permit from the agency, clarifying the role of observer providers in the structure of NMFS fishery regulations. Whereas a certification grants permission to the holder to perform tasks with some minimum required training, a permit is more business-oriented, granting permission to perform activities that do not require training by the agency.

Permit Application Requirements. Under the proposed action, new persons wishing to provide observer services in Alaska groundfish fisheries would be required to apply for a permit that authorizes this activity. Applications may be submitted at any time.

Observer providers previously certified by NMFS to provide observers and who actively deployed observers in Alaska groundfish fisheries in 2002 would be considered to be qualified for these permits in 2003 by their demonstrated performance and their existing documentation on file. Such providers would not be required to submit a new application, and the owner(s) would be issued a permit based on their existing record. These observer providers would continue to be accountable for any violations of regulations that occurred while they were functioning as NMFS-certified observer providers prior to January 1, 2003. Upon issuance of a new observer provider permit, these observer provider permit holders would be held accountable to all applicable regulations promulgated by NMFS while participating in the Observer Program. Former program participants, who were NMFS-certified providers, would be held accountable to only those

regulations in force at the time of their participation in the program.

Because accurate identification of the business' ownership would be required for issuance of the permit, each existing NMFS-certified provider would be required to correct or update any changes to ownership, management, and/or contact information within 30 days of receiving a permit under § 679.50(i)(1)(ii)(A) of the proposed rule. Subsequent changes or expansions in ownership of an observer provider would require the original owner to submit a new application prior to the effective date of the new ownership arrangement.

A new applicant for an observer provider permit would be required to submit a narrative application that contains information necessary for NMFS to evaluate the applicant to determine if he or she is qualified to be an observer provider. Observer providers contribute an important service to NMFS by recruiting, hiring, and deploying high-quality individuals to serve as observers. NMFS must ensure that observer providers meet minimum requirements so that this important service is consistently maintained. NMFS would permit all applicants who: (1) demonstrate that they understand the scope of the regulations they will be held to; (2) document how they will comply with those regulations; (3) demonstrate that they have the business infrastructure necessary to carry out the job; (4) are free from conflict of interest; (5) do not have past performance problems on a Federal contract or any history of decertification as either an observer or observer provider; and (6) are free from criminal convictions for certain serious offenses that could reflect on their ability to carry out the role of an observer provider.

Each application for an observer provider permit must contain several elements. These elements and an explanation of need are as follows:

(A) Identification of the management, organizational structure, and ownership structure of the applicant's business, including identification by name and general function of all controlling management interests in the company, including but not limited to owners, board members, officers, authorized agents, and staff. If the applicant is a corporation, the articles of incorporation must be provided. If the applicant is a partnership, the partnership agreement must be provided.

This information is necessary to clearly identify the permit recipient, organization management, and appropriate contacts for particular

issues. Occasionally, operational and compliance problems arise with observer providers, and NMFS attempts to solve these problems at an early stage by contacting appropriate parties in the observer provider's organization. Organizational and management information helps NMFS minimize compliance problems with observer providers. When a business is based outside the United States, an authorized agent must be identified for the observer provider. An authorized agent means a person appointed and maintained within the United States who is authorized to receive and respond to any legal process issued in the United States to an owner or employee of an observer provider.

(B) Contact information for the owner, authorized agent, and company information. This information includes mailing addresses, physical location of the company, telephone and fax numbers, and business e-mail address for each office and authorized agent.

This information enables NMFS to communicate with the owner(s) for official correspondence as well as with contact persons for day-to-day operations at each of the applicant's locations.

In addition, an applicant with ownership based outside of the United States would be required to identify an authorized agent and provide contact information for that agent, including mailing address, and phone and fax numbers where the agent can be contacted for official correspondence.

(C) A signed acknowledgment, under penalty of perjury, from each owner, or owners, board members and officers, of a corporation, certifying that they are free from a conflict of interest as defined in 50 CFR 679.50(i)(3).

This acknowledgment will help ensure that NMFS provides permits only to applicants who are free from a conflict of interest and will ensure that the applicants are aware of this provision of the regulations. NMFS would provide an acknowledgment template form, which applicants could use to satisfy this part of the application.

(D) A statement signed under penalty of perjury from each owner, or owners, board members and officers of a corporation, describing any criminal convictions, performance ratings on any Federal contracts held by the observer provider, and any previous decertification while working as an observer or observer provider.

These declarations will help ensure that NMFS provides permits only to applicants who do not have a record of poor performance or certain criminal

behavior. Although NMFS would not perform background checks unless compelling reasons dictated, screening such declarations will assist NMFS in permitting applicants who will help promote honesty and integrity in the Observer Program.

(E) A description of any prior experience the applicant may have in placing individuals in remote field and/or marine work environments. This includes, but is not limited to recruiting, hiring, deployment, and personnel administration.

This background information would aid NMFS in determining how much assistance the provider would require to remain in compliance with the regulations. For example, one recent applicant had previous experience providing observers to Canada, but not to the United States, and NMFS worked with the applicant to ensure that it understood U.S. fisheries management processes and its obligations and responsibilities as an observer provider under NMFS regulations.

(F) A description of the applicant's ability to carry out the responsibilities and duties of an observer provider, and the arrangements to be used to achieve such responsibilities and duties.

This information would demonstrate the applicant's understanding of the regulations and the applicant's ability to comply with these regulations. NMFS views this information as a critical part of the application because each observer provider's compliance with regulatory responsibilities is important for the overall program to be successful. Specific explanations of how the applicant intends to comply with each component of the regulations would be required for a complete application.

The importance of elements contained in paragraphs A and B necessitates that NMFS add a new responsibility for the observer providers. This new responsibility would require observer providers to notify and update NMFS through the Observer Program Office within 30 days when any of the required elements listed in § 679.50(i)(1)(ii)(A) and (B) of the proposed rule change. This requirement will help facilitate the communication between NMFS and observer providers, which is necessary to ensure that NMFS and observer providers continue to work well together.

Observer Provider Permit Application Evaluation. The Regional Administrator would appoint members from NMFS' staff to a review board that would evaluate applications for an observer provider permit. The board would evaluate each application to determine whether it is complete and whether

established criteria are met (see below) and could seek further clarification from the applicant if necessary. Once the board's review is complete, it would make a determination on the application.

The criteria that would be used to evaluate an application and an explanation of why each criterion is needed are:

(1) Absence of conflict of interest. Observer providers cannot have a conflict of interest as defined under § 679.50(i)(3) of the proposed rule. This provision is included as an evaluation criterion to ensure a permit is not granted to someone who would be in violation of NMFS' regulations. More importantly, this criterion and the conflict of interest regulations helps promote and preserve the integrity of the Observer Program.

(2) Absence of criminal convictions related to embezzlement, theft, forgery, bribery, falsification, or destruction of records, making false statements or receiving stolen property; or the commission of any other offense indicating a lack of business integrity or business honesty that would seriously and directly affect the fitness of an applicant in providing observer services under this section. This evaluation criterion would help eliminate applicants who have a record of criminal behavior, which could raise questions about the integrity of the observer providers.

(3) Performance ratings on a Federal contract. This evaluation criterion would help eliminate applicants with a history of past performance problems as a Federal contractor. NMFS believes that a past performance problem on a Federal contract should be a consideration in determining whether to grant an observer provider permit because of the further risk of failure as an observer provider. Observer provider failures are disruptive to the industry and to NMFS' groundfish management and are catastrophic to the individual observers employed by that provider. NMFS seeks to minimize that risk.

(4) Absence of any history of decertification as either an observer or observer provider. NMFS believes that a previous decertification as an observer or observer provider should exclude an applicant from consideration because of the further risk of failure. Historically, only one NMFS-certified provider has been decertified, and this provision ensures that the persons involved would not seek to become permitted under this new system.

The review board would make an initial administrative determination to approve the application or provide

written notice of an evidentiary period for the applicant to provide additional information or evidence to support the application. If the review board approves the application, NMFS would issue an observer provider permit to the applicant. The applicant would then be authorized to provide observers to industry and would also be subject to the regulations governing observer providers.

If the review board provides an applicant with written notice of an evidentiary period to provide further information, it would be due to the application being deficient in some manner. The written notice would identify where the application is deficient and provide the applicant with a 60-day period to provide additional information to correct the deficiency. After that 60-day period, the review board would review any additional material provided and issue an Initial Administrative Determination (IAD) that would either approve or deny the application.

An applicant for an observer provider permit who is issued an IAD denying the application may appeal the determination to the OAA. Under existing regulations at § 679.43, the OAA would review the appeal and make an independent judgement. There is no right to administrative appeal for the OAA decision. However, the Regional Administrator, on his or her own initiative, may overturn the OAA decision; in this case, the Regional Administrator's decision would become final agency action. This Regional Administrator discretion would be required to be exercised within 30 days. If the Regional Administrator did not act to overturn the OAA decision within 30 days, the OAA decision would become the final agency action. Final agency actions can be further appealed to the U.S. District Court. As part of the proposed changes to this appeals process, regulations at § 679.43 would also be amended to provide for the establishment of an Address of Record for the observer provider applicant who wishes to appeal an adverse IAD.

Observer Provider Permit Duration. A permit issued to an observer provider would remain effective through December 31, 2007, unless: (1) a new owner of the observer provider company requires that a new permit application process be initiated under § 679.50(i)(1)(vi) of the proposed rule; (2) the permitted provider ceases to deploy observers to groundfish fisheries in the North Pacific during a period of 12 continuous months under § 679.50(i)(1)(vii) of the proposed rule; or (3) the permit issued to an observer

provider is suspended or revoked under § 679.50(i)(1)(viii) of the proposed rule.

If a permit lapses after a period of 12 months of inactivity as described above, NMFS would issue an IAD to the permit holder stating that NMFS records indicate that the permit had lapsed and that the permit holder has the opportunity to appeal the determination. The IAD would also detail the appeals process available to the permit holder. Permit holders who appealed this IAD would be issued an interim permit so they could operate while their appeal was reviewed.

Observer Provider Sanctions. Current regulations at § 679.50(j) set forth the procedures for suspension and decertification of certified observer providers. These procedures currently are administered by the Alaska Regional Office in consultation with the Observer Program Office. Authority to hear appeals from such decisions also resides with the Regional Administrator. However, potential violations of performance standards by an observer provider are investigated by NMFS Enforcement and referred to General Counsel for Enforcement, Alaska Region (GCEL/AK). GCEL/AK may initiate civil prosecution proceedings and a Notice of Violation and Assessment (NOVA) may be issued to the provider. The NOVA advises the provider of the alleged violation and the monetary amount of the assessment. The NOVA also describes the appeals process, which is presided over by an Administrative Law Judge (ALJ).

The Observer Program Office currently refers potential regulatory violations regarding observer providers, including those serious enough to warrant suspension or revocation of the provider's permit, to NMFS Enforcement for investigation. NMFS Enforcement develops the facts for a potential prosecutorial action and forwards the case to GCEL/AK, who makes prosecutorial decisions in consultation with the Observer Program Office. GCEL/AK issues NOVAS or Notices of Permit Sanctions (NOPS), depending on the severity of the violation, and its determination that a provider's permit to provide observers to the North Pacific groundfish industry should be suspended or revoked. The primary change in this action regarding observer provider permit sanctions is that permit revocation or suspension would be implemented through this enforcement process rather than through a separate administrative process conducted by the Observer Program Office and the Alaska Regional Office. Exclusive use of the agency's enforcement process for permit

sanctions would enhance the agency's ability to obtain compliance with its regulations and create a consistent permit suspension and revocation process.

The NOVA and NOPS procedures are established at 15 CFR part 904. The agency proposes to remove all the observer provider suspension and decertification procedure regulations at § 679.50, to the extent they are replaced by 15 CFR part 904. The Observer Program/Alaska Regional Office would not maintain its own process for suspension or revocation of an observer provider permit. Accordingly, the agency would not need a designated official for these actions. Under 15 CFR part 904, appeals of enforcement actions are heard through an ALJ system. The ALJ is an entity independent from NOAA and the observer provider. The ALJ's decision is appealable to the U.S. District Court.

Certification Requirements and Procedures for North Pacific Groundfish Observers. Individuals wishing to be certified as North Pacific Groundfish Observers currently are required by regulation to complete an observer training course and to meet other requirements established by the Observer Program Office. Such certification allows them to be deployed through private observer provider companies to vessels and plants in Alaska that harvest or process groundfish and require observer coverage. NMFS provides certification training throughout the calendar year, depending on the availability of observer training sessions and training needs.

Observers who completed sampling activities between June 30, 2001, and December 31, 2002, and have not since been decertified or had their certification suspended would be considered to have met certification requirements. NMFS would issue each of these observers a new certification and certification training endorsement prior to their first deployment after December 31, 2002. Under the proposed regulations these observers would be required to obtain subsequently the appropriate endorsements (described below) to their certification prior to each subsequent deployment. These observers would be subject to any enforcement actions for violations that occurred prior to January 1, 2003, as well as to all regulations governing observers beginning January 1, 2003.

Certification Process. The proposed changes to regulations reorganize some current observer certification procedures and add some additional requirements. The Observer Program

would continue to require that new candidates for observer certification meet standards developed to ensure that individuals will be able to complete their duties and responsibilities and work safely in the marine environment. Under the proposed action, NMFS would certify individuals who: (1) meet any educational or other requirements for registration in an observer certification training class; (2) successfully complete the NMFS-approved observer training class; and (3) meet all pre-deployment requirements established by the Observer Program.

Substantiating information for certification, with one exception, would be required to be submitted to NMFS by the observer provider at least 5 working days prior to the beginning of a scheduled observer training. If the required observer information is not submitted within 5 working days prior to the beginning of a scheduled training session, the observer provider could still register a candidate for a subsequent training session, provided all relevant materials are submitted in a timely manner for that training session. The exception to the above submission deadline is that the required, signed statement from a licensed physician asserting that the observer candidate is in proper health and physical condition for the job must be submitted prior to certification. While individuals whose certification has expired previously can be re-certified by successfully completing specified requirements, an individual who has previously been decertified cannot obtain a new observer certification.

The determination to either certify or deny certification would be made by a certification official within the Observer Program, appointed by the Regional Administrator. The certification official would be familiar with the content of the training sessions. As is current practice, certification would be issued when the candidate has demonstrated his or her abilities and has met all certification requirements.

If a candidate fails training, he or she would be notified in writing on or before the last day of training. Such notification would indicate the reasons the candidate failed the training and whether the candidate would be allowed to retake the training. If the candidate is allowed to retake the training, the conditions for re-training would be specified in the notice. If a determination is made that the candidate may not pursue further training, notification will be in the form of an IAD denying certification. Observer providers would continue to be kept informed of developing issues

that might cause denial of a certification, so they can better plan to meet their clients' needs.

Candidates' appeals from an IAD to deny certification would be made to the OAA rather than to the Observer Program Office, as is the current practice. Regulations at § 679.43 would be amended to provide for the establishment of an Address of Record for the observer or observer candidate who wishes to appeal an adverse IAD. A candidate who appeals the IAD and prevails would not receive certification until after the final resolution of that appeal. If unsuccessful, the candidate could further appeal to the U.S. District Court.

Endorsements. Basic observer certification currently expires after each deployment, and additional training and briefing requirements exist to "re-certify" observers and ensure that they are prepared for each deployment. Additionally, observers are required to obtain an additional certification to qualify as observers in AFA and CDQ fisheries. These additional certifications are maintained by an observer's successful achievement of specified deployment standards. An observer's performance is evaluated by NMFS after each deployment.

The proposed action would replace the current system of pre-deployment certification with a system of certification endorsements. Under the proposed rule, observers would receive a certification that would expire with the expiration of the proposed interim Observer Program on December 31, 2007. To ensure that observers are properly prepared for each assignment, the following series of endorsements to the certification would be required to deploy as an observer:

(1) **Certification training endorsement.** A certification training endorsement would signify the successful completion of the training course required to obtain observer certification. This endorsement would be granted with the initial issuance of an observer certification and would be required for any deployment as an observer in the Bering Sea and Aleutian Islands groundfish fisheries or in the Gulf of Alaska groundfish fisheries. This endorsement would expire when the observer has not been deployed and performed sampling duties as required by the Observer Program for a period of time, specified by the Observer Program Office, after his or her most recent debriefing. An observer may renew this endorsement by successfully completing the certification training course once more.

(2) **Annual general endorsements.** Each observer would be required to

obtain an annual general endorsement to his or her certification prior to his or her first deployment within any calendar year subsequent to a year in which a certification training endorsement is obtained. To obtain an annual general endorsement, an observer would be required to successfully complete the annual briefing requirements specified in writing by the Observer Program Office.

(3) **Deployment endorsements.** Each observer who has completed an initial deployment after certification or an annual briefing would be required to receive a deployment endorsement to his or her certification prior to any subsequent deployments that year. An observer would be able to obtain a deployment endorsement by successfully completing all pre-cruise briefing requirements, including, but not limited to, all briefing attendance requirements, and by maintaining all performance and conduct standards. These requirements would be specified in writing by the Observer Program Office during the observer's most recent debriefing.

(4) **Level 2 endorsements.** Observers wishing to deploy aboard vessels participating in CDQ fisheries and in AFA fisheries as "lead" observers currently are required to meet specific levels of observer experience and to successfully complete additional training to obtain a "CDQ" certification. Under this proposed action, these requirements would not change, with one nomenclature exception. The term "CDQ certification" would be changed to "Level 2 endorsement" on the observer's basic certification. This change reflects the similarities in the additional level of experience and training required to monitor the CDQ and AFA fisheries. The term "Level 2" is both more generic in terms of applicability to various fisheries management programs, specifically denoting an observer with a higher level of experience and training. The certification would be changed to an endorsement for the reasons stated above. Similar changes for "Level 2" "lead" observer certifications would be made.

One minor change to criteria for obtaining the Level 2 endorsement is that an observer would be required to receive an evaluation rating that the observer has met NMFS' deployment expectations for his or her most recent deployment. Current regulations require a deployment rating of "1" or "2" (meets or exceeds NMFS' deployment expectations), but the Observer Program has changed its deployment rating system. This action would require that

an observer receive an evaluation by NMFS that indicated that the observer's performance met Observer Program expectations for that deployment.

Observer Sanctions. Observer suspension and decertification proceedings currently occur entirely within the Observer Program, including both initial determinations on sanctions and appeals of those determinations. Only criminal proceedings against observers under 15 CFR part 904 occur outside the Observer Program, with NMFS Enforcement, U.S. Department of Justice and NOAA General Counsel conducting those efforts. NMFS proposes to maintain initial observer suspension and decertification determinations within the purview of the Observer Program but would move appeals of these determinations to the OAA to provide more assurance of objectivity in final decision making. The Observer Program would continue to address less serious observer misconduct or poor performance issues through policies and procedures that currently are in practice. These written policies are available to observers during certification training and subsequently from the Observer Program Office upon request.

Under the proposed action, the Regional Administrator would appoint an observer suspension/decertification officer or officers to review cases referred by Observer Program staff for suspension or decertification, or both, and to issue a written notice to the observer if NMFS intends to proceed with the action. If the action is pursued, this notice would detail the reasons for and the terms of the action. The notice would also indicate to the observer his

or her right to appeal the decision and the procedure for filing such an appeal. The observer would have an opportunity to present documentation that would show mitigating circumstances or refute the evidence before the official. Under this procedure, the Observer Program Office would create a written record, but would not hold hearings. If the observer does not contest the proposal to decertify or suspend the certificate, the Observer Program's initial decision would become final.

If the observer wanted to appeal an adverse initial determination by the Observer Program and the suspension decertification officer(s), the decision would be referred to the OAA. The OAA would provide a hearing officer who has special training in reviewing administrative records. Additionally, the OAA could preside over fact-finding hearings, hear testimony or review evidence and issue written decisions with determinations of factual issues and application of the regulations. The OAA's determination would be referred to the Regional Administrator, who can uphold or overturn the OAA's decision in making the final agency determination.

The OAA system would provide an efficient mechanism for decisions on observer appeals, suited to observers' needs for a straight-forward procedure and for pursuing appeals and resolution. Rather than resulting in monetary fines, these cases result in administrative sanctions, which the OAA is appropriately prepared to address.

The agency would continue to refer to NMFS' Alaska Enforcement Division (AED) certain cases for investigation

that may involve serious observer misconduct, such as the exceptional cases where observers should be prosecuted for criminal offenses or receive monetary sanctions for egregious violations of the regulations. These would be instances of fraud, assault, or other more serious violations. Prosecution of these cases would continue to be handled by NOAA/GCEL/AK, with appeals directed to ALJs. Successful prosecution of these cases would result in penal sanctions. Penal sanctions are those penalties that result from criminal prosecution or from civil prosecution that result in monetary fines. Predictably, given past experience, these would be very rare actions. Only one such observer case has been referred to GCEL/AK.

Observer and Observer Provider Responsibilities. Several existing regulations at § 679.50(i) and (j) that specify observer and observer provider responsibilities would be modified to clarify NMFS' intent and to eliminate ambiguities. Four new responsibilities, described below, are proposed to better address observer and observer provider performance issues of particular concern. Provisions in the proposed action that would increase NMFS' management controls over observer providers and observers would be expected to maintain or increase the quality of the data provided by the Observer Program.

Modifications to existing responsibilities. Tables 1 and 2 contain side by side comparisons of existing regulatory text for observer and observer provider responsibilities with proposed modified regulatory text.

TABLE 1.—COMPARISON OF EXISTING AND PROPOSED REGULATORY TEXT GOVERNING OBSERVER RESPONSIBILITIES

Current citation for 50 CFR 679.50	Existing regulatory text	Proposed citation for 50 CFR 679.50	Proposed modified regulatory text
(h)(2)(ii)(A)	Observers must diligently perform their assigned duties	(j)(2)(ii) (A)	Observers must perform their assigned duties as described in the Observer Manual or other written instructions from the Observer Program Office.

TABLE 1.—COMPARISON OF EXISTING AND PROPOSED REGULATORY TEXT GOVERNING OBSERVER RESPONSIBILITIES—
Continued

Current citation for 50 CFR 679.50	Existing regulatory text	Proposed citation for 50 CFR 679.50	Proposed modified regulatory text
(h)(2)(ii)(D)	Observers must refrain from engaging in any illegal actions or any other activities that would reflect negatively on their image as professional scientists, on other observers, or on the Observer Program as a whole. This includes, but is not limited to: (1) Engaging in excessive drinking of alcoholic beverages(2) Engaging in the use or distribution of illegal drugs; or (3) Becoming physically or emotionally involved with vessel or processing facility personnel.	(j)(2)(ii)(D)	Observers must refrain from engaging in any illegal actions or any other activities that would reflect negatively on their image as professional scientists, on other observers, or on the Observer Program as a whole. This includes, but is not limited to: (1) Violating the observer drug and alcohol policy established by the Observer Program; (2) Engaging in the use, possession, or distribution of illegal drugs; (3) Engaging in physical sexual contact with personnel of the vessel or processing facility to which the observer is assigned, or with any vessel or processing plant personnel who may be substantially affected by the performance or nonperformance of the observer's official duties.

TABLE 2. COMPARISON OF EXISTING AND PROPOSED REGULATORY TEXT GOVERNING OBSERVER PROVIDER RESPONSIBILITIES.

Current 50 CFR 679.50	Existing Regulatory Text	Proposed citation for 50 CFR 679.50	Proposed Modified Regulatory Text
(i)(2)(i)	Recruiting, evaluating, and hiring qualified candidates to serve as observers, including minorities and women.	(i)(2)(i) (A) and (B)	Observer providers must provide qualified candidates to serve as observers. (A) To be qualified, a candidate must have: (1) a Bachelor's degree or higher from an accredited college or university with a major in one of the natural sciences; (2) have successfully completed a minimum of 30 semester hours or equivalent in applicable biological sciences with extensive use of dichotomous keys in at least one course; (3) have successfully completed at least one undergraduate course each in math and statistics with a minimum of 5 semester hours total for both; and (4) computer skills that enable the candidate to work competently with standard database software and computer hardware. (B) Prior to hiring an observer candidate, the observer provider must: (1) provide to the candidate copies of NMFS-provided pamphlets describing observer duties; and (2) provide to the candidate a copy of the Observer Program's drug and alcohol policy. Observer job pamphlets and the drug and alcohol policy are available from the Observer Program Office at the address listed in paragraph (e)(3) of this section.

TABLE 2. COMPARISON OF EXISTING AND PROPOSED REGULATORY TEXT GOVERNING OBSERVER PROVIDER RESPONSIBILITIES.—Continued

Current 50 CFR 679.50	Existing Regulatory Text	Proposed citation for 50 CFR 679.50	Proposed Modified Regulatory Text
(i)(2)(viii)	In cooperation with vessel or processing facility owners, ensuring that all observers' in-season catch messages and other required transmissions between observers and NMFS are delivered to NMFS within a time specified by the Regional Administrator.	(i)(2)(i)(C)	A written contract must exist between the observer provider and each observer employed by the observer provider. The contract must be signed by the observer and observer provider prior to the observer's deployment and must contain the following provisions for continued employment: (1) that the observer comply with the Observer Program's drug and alcohol policy; (2) that all the observer's in-season catch messages between the observer and NMFS are delivered to the Observer Program Office at least every 7 days, unless otherwise specified by the Observer Program; and (3) that the observer completes in-person mid-deployment data reviews, unless: (i) the observer is specifically exempted by the Observer Program, or (ii) the observer does not at any time during his or her deployment travel through a location where Observer Program staff are available for an in-person data review. The written contract must further require that the observer complete a phone or fax mid-deployment data review as described in the Observer Manual.
(i)(2)(ix)	Ensuring that observers complete mid-deployment data reviews when required.	(i)(2)(C)	A written contract must exist between the observer provider and each observer employed by the observer provider. The contract must be signed by the observer and observer provider prior to the observer's deployment and must contain the following provisions for continued employment: (1) that the observer comply with the Observer Program's drug and alcohol policy; (2) that all the observer's in-season catch messages between the observer and NMFS are delivered to the Observer Program Office at least every 7 days, unless otherwise specified by the Observer Program; and (3) that the observer completes in-person mid-deployment data reviews, unless: (i) the observer is specifically exempted by the Observer Program, or (ii) the observer does not at any time during his or her deployment travel through a location where Observer Program staff are available for an in-person data review. The written contract must further require that the observer complete a phone or fax mid-deployment data review as described in the Observer Manual.

TABLE 2. COMPARISON OF EXISTING AND PROPOSED REGULATORY TEXT GOVERNING OBSERVER PROVIDER RESPONSIBILITIES.—Continued

Current 50 CFR 679.50	Existing Regulatory Text	Proposed citation for 50 CFR 679.50	Proposed Modified Regulatory Text
(i)(2)(x)	Ensuring that observers complete debriefing as soon as possible after the completion of their deployment and at locations specified by the Regional Administrator.	(i)(2)(ii)	An observer provider must ensure that observers employed by it do the following in a complete and timely manner: (A) once an observer is scheduled for a final deployment debriefing under paragraph (i)(2)(ix)(E), submit to NMFS all data, reports required by the Observer Manual, and biological samples from the observer's deployment by the completion of the electronic vessel and/or processor survey(s); (B) complete NMFS electronic vessel and/or processor surveys before performing other jobs or duties which are not part of NMFS groundfish observer requirements; (C) report for his or her scheduled debriefing, and that the observer completes all debriefing responsibilities; and (D) return all sampling and safety gear to the Observer Program Office.
(i)(2)(xi)	Ensuring all data, reports, and biological samples from observer deployments are complete and submitted to NMFS by the time of completion of the debriefing survey.	(i)(2)(ii)	An observer provider must ensure that observers employed by it do the following in a complete and timely manner: (A) once an observer is scheduled for a final deployment debriefing under paragraph (i)(2)(ix)(E), submit to NMFS all data, reports required by the Observer Manual, and biological samples from the observer's deployment by the completion of the electronic vessel and/or processor survey(s); (B) complete NMFS electronic vessel and/or processor surveys before performing other jobs or duties which are not part of NMFS groundfish observer requirements; (C) report for his or her scheduled debriefing, and that the observer completes all debriefing responsibilities; and (D) return all sampling and safety gear to the Observer Program Office.
(i)(2)(ii)	Ensuring that only observers provide observer services.	(i)(2)(iii)	An observer provider must assign to vessels or shoreside or floating processors only observers: (A) with valid North Pacific groundfish observer certifications and endorsements to provide observer services; (B) who have informed the provider at the time of embarkation that he or she is not experiencing any new physical ailments or injury since submission of the physician's statement as required in paragraph (i)(2)(ix)(C) of this section that would prevent him or her from performing his or her assigned duties; and (C) who have successfully completed all NMFS required training and briefing before deployment.
(i)(2)(iii)	Providing observers as requested by vessels and processors to fulfill vessel and processor requirements for observer coverage.	(1)(2)(iv)	An observer provider must provide an observer for deployment as requested by vessels and processors to fulfill vessel and processor requirements for observer coverage under sections (c) and (d) of this section. An alternate observer must be supplied in each case where injury or illness prevents the observer from performing his or her duties or where the observer resigns prior to completion of his or her duties.

TABLE 2. COMPARISON OF EXISTING AND PROPOSED REGULATORY TEXT GOVERNING OBSERVER PROVIDER RESPONSIBILITIES.—Continued

Current 50 CFR 679.50	Existing Regulatory Text	Proposed citation for 50 CFR 679.50	Proposed Modified Regulatory Text
(i)(2)(vi)	Supplying alternate observers or prospective observers if one or more observers are not approved by NMFS, fail to successfully complete observer training or briefing, are injured and must be replaced, or resign prior to completion of duties.	(1)(2)(v)	An observer provider must provide an observer for deployment as requested by vessels and processors to fulfill vessel and processor requirements for observer coverage under sections (c) and (d) of this section. An alternate observer must be supplied in each case where injury or illness prevents the observer from performing his or her duties or where the observer resigns prior to completion of his or her duties.
(i)(2)(iv)	Providing observers' salary, and any other benefits and personnel services in a timely manner.	(i)(2)(v)	An observer provider must provide to its observer employees salaries and any other benefits and personnel services in accordance with the terms of each observer's contract.
(i)(2)(v)(A)	Observers must not be deployed on the same vessel or at the same shoreside processor or stationary floating processor for more than 90 days in a 12-month period.	(i)(2)(vii)	Unless alternative arrangements are approved by the Observer Program Office, an observer provider must not: (A) deploy an observer on the same vessel or at the same shoreside or stationary floating processor for more than 90 days in a 12-month period; (B) deploy an observer for more than 90 days; (C) include in a single deployment of an observer assignments to more than four vessels, including groundfish and all other vessels, and/or shoreside processors; and (D) move an observer from a vessel or floating or shoreside processor before that observer has completed his or her sampling or data transmission duties.
(i)(2)(v)(B)	A deployment cannot exceed 90 days.	(i)(2)(vii)	Unless alternative arrangements are approved by the Observer Program Office, an observer provider must not: (A) deploy an observer on the same vessel or at the same shoreside or stationary floating processor for more than 90 days in a 12-month period; (B) deploy an observer for more than 90 days; (C) include in a single deployment of an observer assignments to more than four vessels, including groundfish and all other vessels, and/or shoreside processors; and (D) move an observer from a vessel or floating or shoreside processor before that observer has completed his or her sampling or data transmission duties.

TABLE 2. COMPARISON OF EXISTING AND PROPOSED REGULATORY TEXT GOVERNING OBSERVER PROVIDER RESPONSIBILITIES.—Continued

Current 50 CFR 679.50	Existing Regulatory Text	Proposed citation for 50 CFR 679.50	Proposed Modified Regulatory Text
(i)(2)(v)(C).	A deployment cannot include assignments to more than four vessels, shoreside, and/or floating stationary processors.	(i)(2)(vii)	Unless alternative arrangements are approved by the Observer Program Office, an observer provider must not: (A) deploy an observer on the same vessel or at the same shoreside or stationary floating processor for more than 90 days in a 12-month period; (B) deploy an observer for more than 90 days; (C) include in a single deployment of an observer assignments to more than four vessels, including groundfish and all other vessels, and/or shoreside processors; and (D) move an observer from a vessel or floating or shoreside processor before that observer has completed his or her sampling or data transmission duties.
(i)(2)(xiii)	Monitoring observers' performance to ensure satisfactory execution of duties by observers and conformance with NMFS' standards of observer conduct.		Deleted. This regulation was deleted because it was replaced with more specific observer provider responsibilities for oversight of particular observer activities and responsibilities.
(i)(2)(vii)	Maintaining communications with observers at sea and shoreside facilities. Each observer contractor must have an employee responsible for observer activities on call 24 hours a day to handle emergencies involving observer logistics, whenever observers are at sea, stationed at shoreside facilities, in transit, or in port awaiting boarding.	(i)(2)(ix)	An observer provider must have an employee responsible for observer activities on call 24 hours a day to handle emergencies involving observers or problems concerning observer logistics, whenever observers are at sea, stationed at shoreside or floating processor facilities, in transit, or in port awaiting vessel or processor reassignment.
(i)(2)(xiv)	Providing [the following] information to the Observer Program Office by electronic transmission (e-mail), fax, or other method specified by NMFS.	(i)(2)(x)	An observer provider must provide all of the following information to the Observer Program Office by electronic transmission (e-mail), fax, or other method specified by NMFS.
(i)(2)(xiv)(A)	Observer training registration consisting of a list of individuals to be hired upon approval by NMFS and a copy of each person's academic transcripts, resume, and a completed application to the observer provider company for observer employment. The list must include the person's name and sex. The person's social security number is requested. Observer briefing registration consisting of a list of the observer's name, requested briefing class, date of class, and briefing location. If the Observer Program Office has excused an observer from attending a briefing, the briefing registration must also include the names of observers excused from briefing, the date the observer was excused and the name of the staff person granting the excuse. This information must be submitted to the Observer Program Office at least 5 working days prior to the beginning of a scheduled observer certification training or briefing session.	(i)(2)(x)(A)	Observer training and briefing. Observer training and briefing registration materials. This information must be submitted to the Observer Program Office at least 5 working days prior to the beginning of a scheduled observer certification training or briefing session. Registration materials consist of the following: (1) Observer training registration. (i) date of requested training; (ii) a list of observer candidates by NMFS. The list must include each candidate's full name (i.e., first, middle and last names), date of birth, and sex; (iii) a copy of each candidate's academic transcripts and resume; and (iv) a statement signed by the candidate under penalty of perjury which discloses the candidate's criminal convictions. (2) Observer briefing registration. (i) date and type of requested briefing session and briefing location; (ii) list of observers to attend the briefing session. Each observer's full name (first, middle, and last names) must be included.

TABLE 2. COMPARISON OF EXISTING AND PROPOSED REGULATORY TEXT GOVERNING OBSERVER PROVIDER RESPONSIBILITIES.—Continued

Current 50 CFR 679.50	Existing Regulatory Text	Proposed citation for 50 CFR 679.50	Proposed Modified Regulatory Text
(i)(2)(xiv)(B)	Projected observer assignments that include the observer's name; vessel, shore-side processor, or stationary floating processor assignment, type, and code; port of embarkation; target species; and area of fishing. This information must be submitted to the Observer Program Office prior to the completion of the training or briefing session.	(i)(2)(x)(B)	Projected observer assignments. Prior to the observer or observer candidate's completion of the training or briefing session, the observer provider must submit to the Observer Program Office a statement of projected observer assignments that include the observer's name; vessel, shore-side processor, or stationary floating processor assignment, gear type, and vessel/processor code; port of embarkation; target species; and area of fishing.
(xiv) (F)	Notification that, based upon a physical examination during the 12 months prior to an observer's deployment, an examining physician has certified that an observer does not have any health problems or conditions that would jeopardize the observer's safety or the safety of others while deployed, or prevent the observer from performing his or her duties satisfactorily, and that prior to examination, the certifying physician was made aware of the dangerous, remote, and rigorous nature of the work. This information, including the date of the physical examination, must be submitted prior to the completion of the training or briefing session.	(i)(2)(x)(C)	Physical examination. A signed and dated statement from a licensed physician that he or she has physically examined an observer or observer candidate. The statement must confirm that, based on that physical examination, the observer or observer candidate does not have any health problems or conditions that would jeopardize that individual's safety or the safety of others while deployed, or prevent the observer or observer candidate from performing his or her duties satisfactorily. The statement must declare that, prior to the examination, the physician was made aware of the duties of an observer and the dangerous, remote, and rigorous nature of the work by reading the NMFS-prepared pamphlet, provided to the candidate by the observer provider as specified in paragraph (i)(2)(i)(B)(1) of this section. The physician's statement must be submitted to the Observer Program Office prior to certification of an observer. The physical exam must have occurred during the 12 months prior to the observer's or observer candidate's deployment. The physician's statement will expire 12 months after the physical exam occurred. A new physical exam must be performed, and accompanying statement submitted, prior to any deployment occurring after the expiration of the statement.
(xiv)(C)	Observer deployment/logistics reports that include the observer's name, cruise number, current vessel, shore-side processor, or stationary floating processor assignment and code, embarkation date, and actual or estimated disembarkation dates. This information must be submitted weekly as directed by the Observer Program Office.	(i)(2)(x)(D)	Observer deployment/logistics reports. A deployment/logistics report must be submitted by Wednesday, 4:30 pm Pacific local time, of each week with regard to each observer deployed by the observer provider during that week. The deployment/logistics report must include the observer's name, cruise number, current vessel, shore-side processor, or stationary floating processor assignment and vessel/processor code, embarkation date, and estimated or actual disembarkation dates. If the observer is currently not assigned to a vessel, shore-side processor, or stationary floating processor, the observer's location must be included in the report.

TABLE 2. COMPARISON OF EXISTING AND PROPOSED REGULATORY TEXT GOVERNING OBSERVER PROVIDER RESPONSIBILITIES.—Continued

Current 50 CFR 679.50	Existing Regulatory Text	Proposed citation for 50 CFR 679.50	Proposed Modified Regulatory Text
(xiv)(D)	Observer debriefing registration that includes the observer's name, cruise number, vessel, shoreside processor, or floating stationary processor name (s) and requested debriefing date.	(i)(2)(x)(E)	Observer debriefing registration. The observer provider must contact the Observer Program Office within 5 days after the completion of an observer's deployment to schedule a date, time and location for debriefing. Observer debriefing registration information must be provided at the time of debriefing scheduling and must include the observer's name, cruise number, vessel, or shoreside or stationary floating processor name(s), and requested debriefing date.
(xiv)(E)	Copies of "certificates of insurance", that name NMFS Observer Program leader as the "certificate holder". The certificates of insurance shall verify the following coverage provisions and state that the insurance company will notify the certificate holder if insurance coverage is changed or canceled.	(i)(2)(x)(F)	Certificates of Insurance. Copies of "certificates of insurance", that name the NMFS Observer Program leader as the "certificate holder", shall be submitted by February 1 of each year. The certificates of insurance shall verify the following coverage provisions and state that the insurance company will notify the certificate holder if insurance coverage is changed or canceled: (1) Maritime Liability to cover "seamen's" claims under the Merchant Marine Act (Jones Act) and General Maritime Law (\$1 million minimum).(2) Coverage under the U.S. Longshore and Harbor Workers' Compensation Act (\$1 million minimum).(3) States Worker's Compensation as required.(4) Commercial General Liability.

TABLE 2. COMPARISON OF EXISTING AND PROPOSED REGULATORY TEXT GOVERNING OBSERVER PROVIDER RESPONSIBILITIES.—Continued

Current 50 CFR 679.50	Existing Regulatory Text	Proposed citation for 50 CFR 679.50	Proposed Modified Regulatory Text
(l)(2)(ix)(G)	A completed and unaltered copy of each type of signed and valid contract (including all attachments, appendices, addendums, and exhibits incorporated into the contract) an observer contractor has with those entities requiring observer services under paragraphs (c) and (d) of this section and with observers. Completed and unaltered copies of signed and valid contracts with specific entities requiring observer services or with specific observers must be submitted to the Observer Program upon request. Types of signed and valid contracts include the contracts an observer provider has with:(1) vessels required to have observer coverage as specified at paragraphs (c)(1)(i) and (iv) of this section; (2) vessels required to have observer coverage as specified at paragraphs (c)(1)(ii), (v), and (vii) of this section;(3) shoreside processors or stationary floating processors required to have observer coverage as specified at paragraph (d)(1) of this section;(4) shoreside or stationary floating processors required to have observer coverage as specified at paragraph (d)(2) of this section (5) Observers (to include contracts for the various compensation or salary levels of observers....).	(l)(2)(x)(G)	Copies of contracts with observer providers and observers. Observer providers must submit to the Observer Program Office a completed and unaltered copy of each type of signed and valid contract (including all attachments, appendices, addendums, and exhibits incorporated into the contract) between the observer provider and those entities requiring observer services under paragraphs (c) and (d) of this section. Observer providers must also submit to the Observer Program Office upon request, a completed and unaltered copy of a signed and valid contract (including all attachments, appendices, addendums, and exhibits incorporated into the contract and any agreements or policies with regard to observer compensation or salary levels) between the observer provider and the particular entity identified by the Observer Program or with specific observers. Said copies must be submitted to the Observer Program Office via fax or mail at the address or fax number listed in paragraph (e)(3) of this section. Signed and valid contracts include the contracts an observer provider has with:(1) vessels required to have observer coverage as specified at paragraphs (c)(1)(i) and (iv) of this section; (2) vessels required to have observer coverage as specified at paragraphs (c)(1)(ii), (v), and (vii) of this section; (3) shoreside processors or stationary floating processors required to have observer coverage as specified at paragraph (d)(1) of this section; and (4) shoreside processors or stationary floating processors required to have observer coverage as specified at paragraph (d)(2) of this section.(5) Observers.
(xiv)(H)	Reports of observer harassment, concerns about vessel safety, or observer performance problems must be submitted within 24 hours after the observer contractor becomes aware of the problem.	(i)(2)(x)(l)	Reports of the following must be submitted in writing to the Observer Program Office by the observer provider via fax or email address designated by the Observer Program within 24 hours after the observer provider becomes aware of the information:(1) any information regarding possible observer harassment; (2) any information regarding any action prohibited pursuant to 679.7(g) or 600.725(o), (t) and (u); (3) any concerns about vessel or processor safety;(4) any observer illness or injury that prevents the observer from completing any of his or her duties described in the Observer Manual; and (5) any information, allegations or reports regarding observer conflict of interest or breach of the standards of behavior described at (h)(2)(i) or (ii).
(i)(2)(xii)	Ensuring that all sampling and safety gear are returned to the Observer Program Office and that any gear and equipment lost or damaged by observers is replaced according to NMFS requirements.	(i)(2)(xi)	Replacement of lost or damaged gear. An observer provider must replace all lost or damaged gear and equipment issued by NMFS to an observer under contract to that provider. All replacements must be in accordance with requirements and procedures identified in writing by the Observer Program.

New observer provider responsibilities. The Council voted to add five new provisions to the observer provider responsibilities. The provisions would ensure (1) that a new observer drug and alcohol policy is included in observer provider contracts with observers; (2) that observer providers verify valid U.S. Coast Guard vessel safety decals before placing an observer aboard; (3) that limitations placed upon reassignment of observers to vessels and/or processors be followed; (4) that observer duties are completed prior to any employment of the observer by providers for work in crab or other non-groundfish fisheries; and (5) that observer providers implement NMFS observer candidate interview standards and provide observer candidates with a NMFS-produced pamphlet describing the duties of an observer. This proposed action would implement four of these five responsibilities and partially implement the fifth responsibility. The NMFS' observer candidate interview standards have not yet been developed. When NMFS presented this issue to the Council at the Council's April 2002 meeting, the interview standards were perceived as policy guidance that could be developed prior to implementation of the proposed rule. Subsequently, NOAA General Counsel determined that such guidance must be specified as regulatory requirements. These requirements could not be developed within the timeframe necessary to accommodate this proposed rule and would, therefore, be implemented in later rulemaking, once development of the standards is complete. The NMFS-produced pamphlet describing the duties and working environment of the observer could be developed in a timely manner for implementation and would be required to be issued to observer candidates by observer providers during candidate interviews under this proposed rule.

The needs for the new responsibilities proposed here are as follows:

(1) **Observer Drug and Alcohol Policy.** Misuse of alcohol and drugs by observers is a problem because such misuse can cause safety problems and interfere with work. The possession, use, or distribution of illegal drugs is a cause for particular concern to NMFS not only for safety and performance reasons, but also for the reason that NMFS cannot condone such illegal actions. All observer providers currently have a drug and alcohol abuse policy as part of their observer-hiring agreement. However, these policies vary, and NMFS would like to ensure consistency among them. This action would require

observer providers to include in their contracts with observers a provision that observers will abide by the Observer Program's drug and alcohol policy.

NMFS is in the process of developing an appropriate drug and alcohol policy in consultation with, and for adoption by, observer providers. NMFS expects to minimize alcohol and drug abuse by observers under this policy and intends for it to be reasonable and practical for the observer providers to implement. NMFS expects that the providers would implement this policy as part of their standard business practices and employee relations.

(2) **U.S. Coast Guard vessel safety decal verification.** Observer safety is the highest priority of the Observer Program. Vessels carrying observers are required under regulations at § 679.50(f)(1)(ii) to have on board a valid commercial fishing vessel safety decal issued by the Coast Guard. However, obtaining this decal through a Coast Guard inspection is a voluntary program, and vessels are not prevented from operating without one. Therefore, not all vessels carry the decal. Observers are instructed to check for the safety decal before they board the vessel, but this important task sometimes may be overlooked. NMFS believes that the observer providers must bear some responsibility for ensuring a safe working environment for their observers. This action would require observer providers to verify that the vessel has a valid USCG safety decal prior to placing an observer on board.

Such verification by the observer provider entails either of the following: (1) obtaining from the vessel owner or operator a copy of the Coast Guard documentation of the safety inspection and issuance of the decal; or (2) observer provider employees, including observers, would communicate to their employer via phone, fax, or email that they have physically inspected the vessel's Coast Guard safety decal and confirmed that it is valid according to the date issued.

(3) **Observer reassignment limitations.** Observers on vessels delivering to shoreside or floating processors have occasionally been unable to complete their sampling duties. This occurs when observers were either immediately reassigned to other vessels upon arrival at a processor, or the vessel they worked aboard offloaded into a temporary holding tank at the plant and left before the holding tank was emptied. The duties of an observer aboard a vessel delivering to a shoreside or floating processor are complete only when the vessel has finished offloading its catch and the observer has sampled that catch

as it flows past the observer on a conveyor, typically, as the fish enters the plant. This problem has been addressed in the past through Observer Program policy, through which NMFS requested that observer providers allow observers time to complete their processor sampling duties before they returned to sea or are reassigned to another vessel or processor. While observer providers largely have complied with this request, NMFS believes that a regulation is prudent in order to avoid the possibility of non-compliance in the future. Therefore, this proposed action would require observer providers to allow observers the time necessary to complete their sampling and data transmission duties before reassignment to another vessel or processor.

This requirement would not have a noticeable effect on observer logistics because of current observer provider compliance with NMFS' request. In the future, however, it could require some observer providers to hire extra observers to meet the observer coverage needs of the shoreside catcher vessel fleet in some ports such as Kodiak, during the peak of the shoreside pollock season. NMFS and the industry would benefit from receiving more complete and higher-quality data.

(4) **Observer completion of duties.** Occasionally, observers temporarily are assigned by their observer providers to observe in other fisheries, such as the Bering Sea crab fishery, during the middle of a 90-day groundfish deployment. The change in work environment and sampling methodologies can contribute to the degradation of an observer's ability to recall during final debriefing the details of his or her groundfish sampling efforts. This may result in decreased data quality. This proposed rule would require observer providers to ensure that observers complete their NMFS electronic vessel and/or processor surveys, which are a part of each observer debriefing following a groundfish deployment, before performing other jobs or duties that constitute no part of NMFS' groundfish requirements.

All Observer Program field offices are equipped with computers for observers to use in completing their electronic vessel and/or processor surveys. The time it takes to complete a survey depends on the location of the computer that is being used. The fastest computer time is in Anchorage, usually 1 to 3 hours per survey, followed by Kodiak (1 to 4 hours per survey) and Dutch Harbor (1 to 6 hours per survey). Computer time for completing surveys does not have to

be pre-scheduled with the Observer Program Office but can be done on a drop-in basis.

The proposed regulation would require that observers complete a NMFS electronic vessel and/or processor survey prior to their final debriefing, which would help observers to "preserve" their memory of what happened on a particular vessel or processor. This would aid them in completing their final debriefing and data check at the completion of their deployment.

An additional requirement, which was not presented to the Council, but is considered necessary, would be added to observer provider responsibilities. This new responsibility would require observer providers to have a signed written contract with each observer prior to each deployment. Most observer providers already follow this practice. However, this provision is necessary to ensure the observer's protection against potential non-payment for work performed and as added insurance of observer compliance with certain assigned duties and requirements.

Authority to Place NMFS' Staff and Individuals Authorized by NMFS as Observers on Vessels, Shoreside Processors, and Stationary Floating Processors. This proposed action would provide regulatory authority to NMFS to deploy staff and individuals authorized by NMFS as observers on fishing vessels and at shoreside processors and stationary floating processors that currently are required to carry NMFS-certified observers. This action is necessary to improve the ability of observers to operate successfully in these environments, resulting in more effective monitoring of groundfish harvest, bycatch, and impacts to protected species and the marine environment for conservation and management purposes. This action would be expected to improve the working relationship with industry and improve sampling conditions and support for observers in the field by allowing for more interaction and collaboration among NMFS staff, industry, and observers.

Statutory authority to place observers aboard vessels is provided by the Magnuson-Stevens Act to collect information for purposes of conservation and management of a fishery. However, current regulations at § 679.2 define an observer as "any individual who is awarded NMFS certification to serve as an observer under this part, is employed by an observer contractor (provider) for the purpose of providing observer services to vessels, shoreside processors, or

stationary floating processors under this part, and is acting within the scope of his/her employment." This proposed action would modify the definition of an observer to include NMFS staff or individuals authorized by NMFS and would provide the regulatory authority to deploy staff to vessels or processors to perform observer duties or collect related information to be used for the conservation and management of marine resources. Examples of non-NMFS staff that could be issued a letter of authorization by NMFS for such deployments include the University of Alaska Anchorage Observer Training Center staff and individuals to perform scientific or observer-related research projects.

Groundfish observers in Alaska operate in challenging and variable environments, and staff observer deployments would enable NMFS to maintain a working knowledge of observer duties and conditions that would allow the agency to address concerns raised by industry, observer providers, and observers in the field. This would allow NMFS to deploy staff observers under circumstances deemed necessary by NMFS, rather than only when requests for assistance are received from industry. Under current regulations, industry requests may be limited because credit toward observer coverage requirements cannot be granted, even when deployed NMFS staff could perform observer functions in lieu of an observer provided by a private observer provider.

Staff observers would provide information that could be used to better train, support, and debrief groundfish observers. Staff observer deployments would be used to improve fisheries conservation and management through: (1) solving sampling issues specific to individual vessels, shoreside processors, or stationary floating processors; (2) creating new sampling protocols; (3) developing and implementing research projects; (4) maintaining knowledge of current vessel, shoreside processor, or stationary floating processors operations; and (5) providing on-site training for an observer(s) employed by an observer provider.

Solving Sampling Issues Specific to Individual Vessels, Shoreside Processors, or Stationary Floating Processors. NMFS' staff observer deployments are necessary to resolve many vessel and/or fishery specific sampling issues that observers encounter at sea. NMFS currently works to resolve certain issues through written communications or dockside meetings. NMFS would be better able to address

observer-related issues by placing staff or individuals authorized by NMFS in actual working conditions experienced by observers. Such deployments would increase the ability of NMFS to work with industry, observers, and observer providers to resolve the many issues that face the stakeholders in the Alaska groundfish fisheries and foster a more cooperative working relationship with better informed industry participants.

Creating New Sampling Protocols. As Alaska's groundfish fisheries continue to change and management is modified, observer sampling protocols will likely need to be adjusted. This would require NMFS to field test new data collection protocols and adjust current protocols. Staff observer deployments would also allow the agency to keep abreast of the limitations and strengths of observer data and to give NMFS the opportunity to work alongside industry and observers when developing new sampling protocols. A cooperative approach would give industry and observers the opportunity to provide input in this process.

Developing and Implementing Research Projects. The Observer Program completes 10 to 13 special projects each year geared toward satisfying specific data needs of NMFS and its constituents. Not all observers are assigned to these projects, but each project requires specialized training and instruction in methods outside those an observer normally would employ. NMFS' ability to deploy its staff or individuals authorized by it to complete some of these projects or to develop sampling protocols for future projects would greatly enhance its ability to collect this highly valued data. Staff deployments would also afford NMFS the opportunity to discuss the specifics of projects with industry and to gain industry input during the course of the study.

Maintaining Knowledge of Current Vessel, Shoreside Processor, or Stationary Floating Processors Operations. NMFS trainers and observer debriefers, and trainers from the University of Alaska Anchorage Observer Training Center must maintain an in-depth, up-to-date knowledge of observer duties and the variable working conditions under which observers are deployed. A hiring requirement for such staff is that they must be former observers. However, with the constantly changing environment in which observers work, extreme difficulties exist in remaining up-to-date with first-hand knowledge of actual working conditions. Deploying NMFS' staff and other authorized individuals as observers and in other

capacities would keep staff current with the rigors of working at sea, allow for increased industry outreach and an opportunity to assist industry with questions regarding observer duties, improve NMFS' ability to make recommendations regarding sampling and special projects, and increase observer and industry confidence in observer training and debriefing. All these benefits would serve to enhance the effectiveness, efficiency, and capabilities of the Observer Program.

Providing On-Site Training for an Observer(s) Employed by an Observer Provider. Deploying NMFS' staff and individuals authorized by NMFS to work with contracted observers would provide an opportunity to mentor new observers and assist observers working under difficult sampling conditions. Each observer goes through an intensive 3-week training prior to their first deployment, but covering every sampling situation he or she may encounter is not possible. Having the ability to place staff with an observer to resolve sampling issues and provide on-site training would benefit the observer and improve data quality in certain situations. Staff would be able to use their knowledge to help observers develop sampling protocols for their specific sampling environment. This information could also be used during debriefing and to develop new training materials.

Observer Coverage Requirements and Observer Procurement. This proposed action would require vessels, shoreside processors, or stationary floating processors to carry a NMFS staff observer upon written request by the agency. These individuals would be deployed in lieu of, or in addition to, observers procured through private observer provider companies. Determinations regarding the most appropriate use of staff observers would be made with consideration to observer accounts of sampling difficulty, alternative ways to collect data, and improvements that could be made on vessels and at processing facilities that would facilitate data collection and enhance data quality. Evaluation of observer sampling protocols related to new or existing management and research needs would also be considered.

A majority of staff deployments to vessels and processors would be expected to satisfy requirements for observer coverage as specified in § 679.50(c) and (d). A determination on whether any staff deployment will meet coverage requirements for a specific vessel or processor would be made by NMFS in advance of each staff

deployment. Notification of the determination would be made in writing to the vessel owner and/or operator. This determination largely would be based on whether NMFS' staff or individuals authorized by NMFS are deployed to perform the duties of an observer. If the duties of the deployed staff observer did not include complete collection of data normally performed by an observer procured through a permitted observer provider for purposes of meeting regulatory coverage requirements, the staff observer deployment could not be used to satisfy observer coverage requirements.

The Observer Program would work with vessels and processors that are selected to carry NMFS staff or an individual authorized by NMFS to determine when and where deployments would begin and end. NMFS would not have regulatory authority to order a vessel to port to commence such a deployment. However, a vessel selected for a deployment would be required to work with NMFS to develop deployment logistics. This would include communicating vessel schedule and logistics to NMFS. NMFS does not intend to alter fishing operations or schedules in order to facilitate these deployments, and NMFS would be responsible for transportation and shoreside lodging costs associated with staff deployments.

Industry Requests for Staff Observers. Owners and operators of vessels, shoreside processors, and stationary floating processors would be able to submit written requests for assistance from NMFS to improve observer data quality or resolve observer sampling issues. Fulfilling these requests would be at the discretion of NMFS, and requests would be evaluated according to specific needs and staff resources.

Classification

This proposed rule contains collection-of-information requirements subject to the PRA and which have been approved by OMB under OMB control number 0648-0318. These requirements and their associated burden estimates per response are: 60 hours for application for a new observer provider permit; 15 minutes for observer candidates' copies of college transcripts and disclosure statements; 15 minutes for observer provider, observer candidates' copies of college transcripts and disclosure statements; 5 minutes for notice of observer physical examination; 2 hours for observer time for a physical examination; 7 minutes for notice of projected observer assignment; 7 minutes for submission of information

to register observers for different types of briefing sessions; 12 minutes for certificate for insurance; 15 minutes for copies of different types of contracts; 7 minutes for weekly deployment/logistics report; 7 minutes for notice of observer debriefing registration; and 2 hours for report of observer harassment, observer safety concerns, or observer performance problems.

This proposed rule also contains new or revised requirements that have been submitted to OMB for approval. These requirements and their associated burden estimates per response are: 30 minutes for Industry Request for Assistance in Improving Observer Data Quality Issues; 15 minutes for the addition of permit information updates by observer providers to keep permit information current; 40 hours for the observer provider appeals process if a provider disagrees with agency action to deny issuance of a permit; and 20 hours for an observer candidate's appeal if denied certification.

The response times include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS and OMB (see **ADDRESSES**).

Public comment is sought regarding whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

This proposed rule has been determined to be not significant for purposes of E.O. 12866.

NMFS prepared an RIR/IRFA, which describes the impact this proposed rule would have on small entities, if adopted. A copy of this analysis is also available from NMFS (see **ADDRESSES**).

Based on information provided by observer providers and a salary range for

observers that approximates the 2001 unionized salary rate, the total cost per observer day is estimated at \$350, although industry has indicated that it sometimes pays more than \$350/day for an observer. Costs vary on a case-by-case basis depending on duration of observer coverage and observer logistics. Per day costs for observers are expected to increase for 2003 and 2004 due to salary increases and increased insurance costs for observer providers.

An estimate of 36,500 observer deployment days per year and the previously cited estimated cost per observer day results in total annual industry costs for observer coverage of \$13 million and \$13.3 million in 2002 and 2003, respectively, not including the additional insurance costs. Under the proposed action, observer providers would continue to provide approximately the current level of observers services or about 36,500 observer deployment days per year. Continuation of the current program structure would guarantee that NMFS will continue to have access, in a timely manner, to the data that are necessary for the continued effective conservation and management of BSAI and GOA groundfish and other marine assets.

Under the proposed action, observer costs are based on whether or not an observer is aboard and on overall coverage needs. Higher costs are borne by those vessels and plants that require higher levels of coverage. Estimates indicate that for catcher vessels, observer cost as a percent of groundfish ex-vessel revenue, in 2000, averaged a low of 1.5 percent for trawlers between 60 ft (18.3 m) and 124 ft (37.8 m) length overall (LOA), and a high of 3.5 percent for pot gear vessels greater than 124 ft (37.8 m) LOA. For catcher/processors, observer cost as a percent of groundfish product revenue, in 2000, averaged a low of 0.5 percent for surimi trawlers, and a high of 2.0 percent for longliners greater than 124 ft (37.8 m) LOA. The estimates also suggest that some differences in these averages exist for vessels that only fished in either the GOA or BSAI.

The corresponding estimate for shoreside processors is 0.3 percent. For fishing vessels in each of the two observer coverage categories (i.e., 30 percent or 100 percent coverage), the direct observer cost as a percent of groundfish ex-vessel (product) revenue for catcher (catcher/processor) vessels decreases as its average revenue per day increases. Therefore, to the extent that revenue per day in a particular fishery is correlated with vessel size, smaller vessels tend to have a larger observer

cost burden, relative to their groundfish revenue.

The proposed action is expected to increase the quality of the data provided by the Observer Program. This would result in more informed decisions and, therefore, improvements concerning the conservation and management of BSAI and GOA groundfish. The data quality effects of each element of this proposed action or of all the elements combined cannot be quantified. The same is true of the potential benefits from improved conservation and management.

However, each element was selected to decrease one or more deficiencies of the current Observer Program regulations.

The proposed action would clarify and strengthen the duties and responsibilities of observer providers and observers. This would have an added benefit of improved enforcement of the regulations for observer providers and observers. This action would be expected to benefit observer providers by improving communications and the working relationships among the industry, observer providers, observers, and Observer Program Office staff.

Provisions in the proposed action that would increase NMFS management controls over observer providers and observers would be expected to maintain or increase the quality of the data provided by the Observer Program. Overall, these improvements would be expected to increase the direct cost of observer coverage to the industry, improve the quality of the data provided by the Observer Program, and improve communications and the working relationships among the industry, observer providers, observers, and Observer Program Office staff. The increase in direct costs is expected to be minimal because the cost effects of the individual elements will be partially offsetting. A marginal increase in the total cost of providing observers would be expected. Some of the proposed changes would increase costs for observer providers but others would decrease them. Observers are not expected to be subject to additional costs from this proposed action.

The proposed action would increase Observer Program Office, NOAA General Counsel, and NMFS Enforcement collective annual costs by approximately \$0.3 million. However, some of this additional cost would be justified to improve compliance even if none of the proposed changes were made.

Costs associated with placing NMFS staff observers, including individuals authorized by NMFS to act as staff observers, are summarized as follows. This proposed regulatory action would

not limit the number of days NMFS could deploy staff or individuals authorized by NMFS each year. At present funding and staffing levels, NMFS estimates that it is capable of 500 days per year and that only about 150 deployment days per year would occur that would not be credited toward required observer coverage days. At 500 days, NMFS estimates it would expend approximately \$75,000 per year for transportation, per diem, and overtime.

The amount of savings or additional costs would depend on the length of a deployment and the annual number of days that staff are deployed in lieu of observers. At current rates for contracted observers, if 350 observer deployment days provided by observer providers and their observers were replaced with observer days provided by NMFS, the fishing industry would save approximately \$115,000 a year (approximate cost for observers, airfare, and meals). That industry savings would translate into a loss for observer providers and observers, but it would be less than 1 percent of their annual revenue. The fishing industry would incur the cost of feeding an additional person onboard for those 150 days that NMFS would not provide observer coverage. Based on industry estimates of the cost per day to feed crew, that cost would be less than \$4,000. The opportunity cost of providing bunk space would vary by deployment.

An Initial Regulatory Flexibility Analysis (IRFA) was conducted in accordance with the Regulatory Flexibility Act of 1980 and the Small Business Regulatory Enforcement Fairness Act of 1996. The Regulatory Flexibility Act was designed to place the burden on government to review all regulations to ensure that, while accomplishing their intended purposes, they do not unduly inhibit the ability of small entities to compete.

In the IRFA the proposed alternatives could affect the following estimated numbers of small regulated entities: 38 small catcher/processors, zero motherships, 5 processing plants, 31 catcher vessels with 100 percent observer coverage, 389 catcher vessels with 30 percent observer coverage, 6 CDQ groups representing 65 western Alaska communities, and 5 currently operating observer providers.

The Regulatory Flexibility Act requires that the IRFA describe significant alternatives to the proposed rule that accomplish the stated objectives of the applicable statutes and minimize any impact on small entities. The IRFA must discuss significant alternatives to the proposed rule such as: (1) establishing different reporting

requirements for small entities that take into account the resources available to small entities, (2) consolidating or simplifying of reporting requirements, (3) using performance rather than design standards, and (4) allowing exemptions from coverage for small entities.

The 'no action' alternative, or status quo, was rejected because it would have resulted in expiration of the Observer Program after December 31, 2001. This would be unacceptable in view of the importance of the Observer Program. The preferred alternative establishes a program expiration date of December 31, 2007. An alternative was considered that would establish a program with no expiration date. This alternative was rejected because it lacked a specific component of the preferred alternative, i.e., having a specific time frame to encourage more fundamental improvements to the Observer Program at little or no cost.

The proposed changes include clarification of regulatory language through elimination of ambiguities and streamlining administrative processes and reporting requirements. Allowing exemptions from this proposed action for the small entities that are currently required to carry observers, beyond efforts to minimize impacts as described below, would not be appropriate, because the objective to ensure uninterrupted observer coverage requirements beyond 2002 could not be achieved if small entities were exempted.

However, this action incorporates the overall implementation of the interim Observer Program, which includes measures that minimize the significant economic impacts of observer coverage requirements on at least some small entities. Vessels less than 60 ft (18.3 m) LOA are not required to carry an observer while fishing for groundfish. Similarly, vessels 60 ft (18.3 m) and longer, but less than 125 ft (38.1 m) LOA, have lower levels of observer coverage than those 125 ft (38.1 m) LOA and above. All pot vessels over 60 ft (18.3 m) are required to have 30 percent observer coverage for all fishing days in a calendar quarter. The lower requirement for pot vessels was established in recognition of low bycatch rates, but benefits are realized by small entities in the pot fishery, as well. Shoreside or floating stationary processors that process less than 1,000 mt/month of groundfish have lower observer coverage requirements than those that process 1,000 mt/month or more. Shoreside or floating stationary processors that process less than 500 mt/month of groundfish are not required to maintain any observer coverage in

that month. These requirements, which have been incorporated into the requirements of the North Pacific Groundfish Observer Program since its inception in 1989, effectively mitigate the economic impacts on some small entities without significantly adversely affecting the implementation of the conservation and management responsibilities imposed by the FMPs and the Magnuson-Stevens Act.

Further exemption of small entities from the proposed action was achieved in selecting the preferred alternative with the option that restricted granting NMFS authority to place staff and individuals authorized by NMFS to act as staff observers only on vessels already subject to observer coverage requirements. In 2000, 1,140 groundfish vessels less than 60 ft (18.3 m) LOA participated in the groundfish fishery and 494 halibut fishing vessels that were not part of the groundfish fleet. Most of these vessels are expected to be small entities. One option included under each of the alternatives would have granted NMFS the authority to place staff and individuals authorized by NMFS to act as staff observers on groundfish or halibut vessels less than 60 ft (18.3 m) LOA. However, this option was not adopted as a preferred alternative because of the burdens that this would place on that sector of the fleet. That sector of the fleet is not currently required to carry an observer at any time during fishing activities.

List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Recordkeeping and reporting requirements.

Dated: August 29, 2002.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs National Marine Fisheries Service

For the reasons set out in the preamble, 50 CFR part 679 is proposed to be amended as follows:

PART 679— FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

1. The authority citation for 50 CFR part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.*, 1801 *et seq.*, and 3631 *et seq.*

2. In § 679.2, the definition for "Observer Contractor" is removed; the definition for "Observer" is revised, and the definition of "Observer Provider" is added in alphabetical order to read as follows:

§ 679.2 Definitions.

Observer means any

(1) individual awarded NMFS observer certification to carry out observer responsibilities under this part, who is employed by an observer provider for the purposes of providing observer services to vessels, shoreside processors or stationary floating processors under this part; or

(2) NMFS staff, or other individual authorized by NMFS, deployed at the direction of the Regional Administrator aboard vessels or at shoreside processors or stationary floating processors for purposes of providing observer services as required for vessels, shoreside processors or stationary floating processors under § 679.50(c) or (d), or for other purposes of conservation and management of marine resources as specified by the Regional Administrator.

* * * * *

Observer Provider means any person or commercial enterprise that is granted a permit by NMFS to provide observer services to vessels, shoreside processors, or stationary floating processors for observer coverage credit as required in subpart E.

* * * * *

3. In § 679.7, paragraph (a)(3) is revised to read as follows:

§ 679.7 Prohibitions.

* * * * *

(a) * * *

(3) *Groundfish Observer Program.* (i) Fish or process groundfish except in compliance with the terms of the Groundfish Observer Program as provided by subpart E of this part.

(ii) Except where observer services are provided by NMFS staff or other individuals authorized by NMFS under § 679.50(e), provide observer services to the North Pacific Groundfish fisheries without an observer provider permit issued under § 679.50(i)(1).

* * * * *

4. In § 679.43, paragraph (e) is revised to read as follows:

§ 679.43 Determinations and appeals.

* * * * *

(e) *Address of record-- General.* NMFS will establish as the address of record the address used by the applicant in initial correspondence to the NMFS concerning the application. Notifications of all actions affecting the applicant after establishing an address of record will be mailed to that address, unless the applicant provides NMFS, in writing, with any changes to that address. NMFS bears no responsibility if a notification is sent to the address of record and is not received because the

applicant's actual address has changed without notification to NMFS.

* * * * *

5. Amend § 679.50 as follows:

a. Paragraph (j) is removed; paragraphs (e) through (i) are redesignated as (f) through (j), respectively; a new paragraph (e) is added; and the newly redesignated paragraphs (h), (i), and (j) are revised to read as follows:

b. Revise the references “(h)(1)(i)(D) and (E)” to read “(j)(1)(v)(D) and (E)” in paragraphs (c)(4)(i), (c)(4)(ii), and (c)(4)(vi) (B), and (C);

c. Revise the reference “(h)(1)(i)(D)” to read “(j)(1)(v)(D)” in paragraphs (c)(4)(iv), (c)(4)(v) (A), and (d)(4)(i);

d. Revise the reference “(h)(1)(i)(E)” to read “(j)(1)(v)(E)” in paragraphs (c)(4)(iii), (c)(4)(v)(B), and (c)(4)(vi)(A);

e. Revise the reference “(h)(1)(i)(E)(1)” to read “(j)(1)(v)(E)” in paragraph (c)(6)(ii).

§ 679.50 Groundfish Observer Program applicable through December 31, 2007.

* * * * *

(e) *NMFS staff observers.* (1) Any vessel, shoreside processor, or stationary floating processor required to comply with observer coverage requirements under paragraph (c) or (d) of this section or under § 679.7(f)(4) must carry, upon written notification by the agency, NMFS staff or an individual authorized by NMFS for purposes of coverage requirements as specified in paragraphs (c) and (d) of this section or for other conservation and management purposes.

(2) Prior to deployment of NMFS staff or individuals authorized by NMFS, the agency will provide written notification to the owner or operator of a vessel, shoreside processor, or stationary floating processor whether observer coverage credit will be granted for that deployment.

(3) Vessel, shoreside processor, and stationary floating processor owners and operators may contact NMFS in writing to request assistance in improving observer data quality and resolving observer sampling issues. Requests may be submitted to: NMFS Observer Program Office, 7600 Sand Point Way NE, BIN C15700 Building 4, Seattle, Washington 98115-0070 or transmitted by facsimile to 206-526-4066.

* * * * *

(h) *Procurement of observer services.* Owners of vessels, shoreside processors, or stationary floating processors required to carry observers under paragraphs (c) and (d) of this section must arrange for observer services from a permitted observer provider, except that:

(1) Owners of vessels, shoreside processors, or stationary floating processors are required to procure observer services directly from NMFS when the agency has determined and notified them under paragraph (e) of this section that their vessel, shoreside processor, or stationary floating processor will carry NMFS staff or an individual authorized by NMFS in lieu of an observer provided through a permitted observer provider to satisfy requirements under paragraphs (c) and (d) of this section.

(2) Owners of vessels, shoreside processors, or stationary floating processors are required to procure observer services directly from NMFS and a permitted observer provider when NMFS has determined and notified them under paragraph (e) of this section, that their vessel, shoreside processor, or stationary floating processor will carry NMFS staff or individuals authorized by NMFS, in addition to an observer provided through an observer provider to satisfy requirements under paragraphs (c) and (d) of this section.

(i) *Observer provider permitting and responsibilities--*(1) *Observer provider permits--*(i) *General.* (A) Persons seeking to provide observer services under this section must obtain an observer provider permit from NMFS.

(B) *New observer providers.* An applicant seeking an observer provider permit must submit a completed application by fax or mail to the Observer Program Office at the address listed in paragraph (e)(3) of this section. A change in ownership of an existing observer provider after January 1, 2003, requires a new permit application under paragraph (i)(1)(vi) of this section if the change involves a new person.

(C) *Existing observer providers as of 2002.* NMFS-certified providers who deployed observers under the North Pacific Groundfish Observer Program in 2002 are exempt from the requirement to apply for a permit and will be issued an observer provider permit. Such observer providers must submit to the Observer Program Office within 30 days of receiving the observer provider permit issued under this paragraph any changes or corrections regarding information required under paragraphs (i)(1)(ii)(A) and (B) of this section.

(ii) *Contents of application.* An application for an observer provider permit shall consist of a narrative that contains the following:

(A) Identification of the management, organizational structure, and ownership structure of the applicant's business, including identification by name and general function of all controlling management interests in the company,

including but not limited to owners, board members, officers, authorized agents, and staff. If the applicant is a corporation, the articles of incorporation must be provided. If the applicant is a partnership, the partnership agreement must be provided.

(B) *Contact information--*(1) *Owner(s) information.* The permanent mailing address, phone and fax numbers where the owner(s) can be contacted for official correspondence.

(2) *Business information.* Current physical location, business mailing address, business telephone and fax numbers, and business e-mail address for each office.

(3) *Authorized agent.* For observer providers with ownership based outside the United States, identify an authorized agent and provide contact information for that agent including mailing address and phone and fax numbers where the agent can be contacted for official correspondence. An authorized agent means a person appointed and maintained within the United States who is authorized to receive and respond to any legal process issued in the United States to an owner or employee of an observer provider. Any diplomatic official accepting such an appointment as designated agent waives diplomatic or other immunity in connection with the process.

(C) A statement signed under penalty of perjury from each owner, or owners, board members, and officers if a corporation, that they are free from a conflict of interest as described under paragraph (i)(3) of this section.

(D) A statement signed under penalty of perjury from each owner, or owners, board members, and officers if a corporation, describing any criminal convictions, Federal contracts they have had and the performance rating they received on the contract, and previous decertification action while working as an observer or observer provider.

(E) A description of any prior experience the applicant may have in placing individuals in remote field and/or marine work environments. This includes, but is not limited to, recruiting, hiring, deployment, and personnel administration.

(F) A description of the applicant's ability to carry out the responsibilities and duties of an observer provider as set out under paragraph (i)(2) of this section, and the arrangements to be used.

(iii) *Application evaluation.* (A) The Regional Administrator will establish an observer provider permit application review board to review and evaluate an application submitted under this paragraph (i)(1). The board will be

comprised of NMFS staff. Issuance of a permit will be based on the completeness of the applicant's application, as well as the following evaluation criteria for each owner, or owners, board members, and officers if a corporation:

(1) Absence of conflict of interest as defined under paragraph (i)(3) of this section;

(2) Absence of criminal convictions related to:

(i) Embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements or receiving stolen property, or

(ii) The commission of any other crimes of dishonesty, as defined by Alaska State law or Federal law that would seriously and directly affect the fitness of an applicant in providing observer services under this section;

(3) Performance ratings on any Federal contracts held by the applicant; and

(4) Absence of any history of decertification as either an observer or observer provider;

(B) The evaluation by the review board will provide a basis for the board's initial agency determination (IAD) on whether the application is complete and all evaluation criteria are met.

(iv) *Evidentiary period.* The observer provider permitting review board will specify, by letter via certified return-receipt mail, a 60-day evidentiary period during which a candidate may provide additional information or evidence to support the application, if the application is found to be deficient.

(v) *Agency determination on an application.*—(A) *Approval of an application.* If an IAD is made to approve the application, the observer provider permit application review board will issue an observer provider permit to the applicant upon determination by the review board that the application is complete and all evaluation criteria are met.

(B) *Denial of an application.* An application will be denied if the observer provider permit application review board determines that the information provided in the application was not complete or all the evaluation criteria were not met. The observer provider permit application review board will prepare and send a written IAD to the applicant upon evaluation of a completed application. The IAD will identify any deficiencies in the application or any information submitted in support of the application. An applicant who receives an IAD that denies his or her application may appeal under § 679.43. An applicant

who appeals the IAD will not be issued an interim observer provider permit. An applicant who appeals an IAD will not receive a permit unless the final resolution of that appeal is in favor of the applicant.

(vi) *Transferability.* An observer provider permit is not transferable. An observer provider that experiences a change in ownership that involves a new person must submit a new permit application and cannot continue to operate until a new permit is issued under this paragraph.

(vii) *Expiration of Permit.* (A) The observer provider permit will expire after a period of 12 continuous months during which no observers are deployed by the provider under this section to the North Pacific groundfish industry.

(B) The Regional Administrator will provide a written determination to an observer provider if NMFS deployment records indicate that the permit has expired. An observer provider who receives a written IAD of permit expiration may appeal under § 679.43. A permit holder who appeals the IAD will be issued an extension of the expiration date of the permit until after the final resolution of that appeal.

(viii) *Sanctions.* Procedures governing sanctions of permits are found at subpart D of 15 CFR part 904.

(2) *Responsibilities of observer providers.* Observer providers must:

(i) *Provide qualified candidates to serve as observers.* (A) To be qualified, a candidate must have:

(1) A Bachelor's degree or higher from an accredited college or university with a major in one of the natural sciences;

(2) Successfully completed a minimum of 30 semester hours or equivalent in applicable biological sciences with extensive use of dichotomous keys in at least one course;

(3) Successfully completed at least one undergraduate course each in math and statistics with a minimum of 5 semester hours total for both; and

(4) Computer skills that enable the candidate to work competently with standard database software and computer hardware.

(B) Prior to hiring an observer candidate, the observer provider must:

(1) Provide to the candidate copies of NMFS-provided pamphlets and other literature describing observer duties; and

(2) Provide to the candidate a copy of the Observer Program's drug and alcohol policy. Observer job pamphlets and the drug and alcohol policy are available from the Observer Program Office at the address listed in paragraph (e)(3) of this section.

(C) A written contract must exist between the observer provider and each observer employed by the observer provider. The contract must be signed by the observer and observer provider prior to the observer's deployment and must contain the following provisions for continued employment:

(1) That the observer comply with the Observer Program's drug and alcohol policy;

(2) That all the observer's in-season catch messages between the observer and NMFS are delivered to the Observer Program Office at least every 7 days, unless otherwise specified by the Observer Program; and

(3) That the observer completes in-person mid-deployment data reviews, unless:

(i) The observer is specifically exempted by the Observer Program, or

(ii) The observer does not at any time during their deployment travel through a location where Observer Program staff are available for an in-person data review. The written contract must further require that the observer complete a phone or fax mid-deployment data review as described in the observer manual.

(ii) *Ensure that observers complete duties in a timely manner:* An observer provider must ensure that observers employed by it do the following in a complete and timely manner:

(A) Once an observer is scheduled for a final deployment debriefing under paragraph (i)(2)(ix)(E) of this section, submit to NMFS all data, reports required by the Observer Manual, and biological samples from the observer's deployment by the completion of the electronic vessel and/or processor survey(s);

(B) Complete NMFS electronic vessel and/or processor surveys before performing other jobs or duties which are not part of NMFS groundfish observer requirements;

(C) Report for his or her scheduled debriefing and complete all debriefing responsibilities; and

(D) Return all sampling and safety gear to the Observer Program Office.

(iii) *Observer vessel and processor assignment.* An observer provider must assign to vessels or shoreside or floating processors only observers:

(A) With valid North Pacific groundfish observer certifications and endorsements to provide observer services;

(B) Who have informed the provider at the time of embarkation that he or she is not experiencing any new physical ailments or injury since submission of the physician's statement as required in paragraph (i)(2)(ix)(C) of this section

that would prevent him or her from performing their assigned duties; and

(C) Who have successfully completed all NMFS required training and briefing before deployment.

(iv) *Response to industry requests for observers.* An observer provider must provide an observer for deployment as requested by vessels and processors to fulfill vessel and processor requirements for observer coverage under sections (c) and (d) of this section. An alternate observer must be supplied in each case where injury or illness prevents the observer from performing his or her duties or where the observer resigns prior to completion of his or her duties.

(v) *Observer salaries and benefits.* An observer provider must provide to its observer employees salaries and any other benefits and personnel services in accordance with the terms of each observer's contract.

(vi) *Observer deployment logistics.* An observer provider must provide all logistics to place and maintain the observers aboard the fishing vessels or at the site of the processing facility. This includes all travel arrangements, lodging and per diem, and any other services required to place observers aboard vessels or at processing facilities.

(vii) *Observer deployment limitations.* Unless alternative arrangements are approved by the Observer Program Office, an observer provider must not:

(A) Deploy an observer on the same vessel or at the same shoreside or stationary floating processor for more than 90 days in a 12-month period;

(B) Deploy an observer for more than 90 days;

(C) Include in a single deployment of an observer assignments to more than four vessels, including groundfish and all other vessels, and/or shoreside processors; and

(D) Move an observer from a vessel or floating or shoreside processor before that observer has completed his or her sampling or data transmission duties.

(viii) *Vessel safety decal verification.* An observer provider must verify that a vessel has a valid USCG safety decal as required under paragraph (g)(1)(ii)(B) of this section before an observer may get underway aboard the vessel. One of the following acceptable means of verification must be used to verify the decal validity:

(A) an employee of the observer provider, including the observer, visually inspects the decal aboard the vessel and confirms that the decal is valid according to the decal date of issuance; or

(B) the observer provider receives a hard copy of the USCG documentation

of the decal issuance from the vessel owner or operator.

(ix) *Communications with observers.*

An observer provider must have an employee responsible for observer activities on call 24 hours a day to handle emergencies involving observers or problems concerning observer logistics, whenever observers are at sea, stationed at shoreside or floating processor facilities, in transit, or in port awaiting vessel or processor reassignment.

(x) *Communications with the Observer Program Office.* An observer provider must provide all of the following information to the Observer Program Office by electronic transmission (e-mail), fax, or other method specified by NMFS.

(A) *Observer training and briefing.* Observer training and briefing registration materials. This information must be submitted to the Observer Program Office at least 5 working days prior to the beginning of a scheduled observer certification training or briefing session. Registration materials consist of the following:

(1) Observer training registration, including:

(i) Date of requested training;

(ii) A list of observer candidates. The list must include each candidate's full name (i.e., first, middle and last names), date of birth, and sex;

(iii) A copy of each candidate's academic transcripts and resume; and

(iv) A statement signed by the candidate under penalty of perjury which discloses the candidate's criminal convictions.

(2) Observer briefing registration, including:

(i) Date and type of requested briefing session and briefing location; and

(ii) List of observers to attend the briefing session. Each observer's full name (first, middle, and last names) must be included.

(B) *Projected observer assignments.*

Prior to the observer or observer candidate's completion of the training or briefing session, the observer provider must submit to the Observer Program Office a statement of projected observer assignments that include the observer's name; vessel, shoreside processor, or stationary floating processor assignment, gear type, and vessel/processor code; port of embarkation; target species; and area of fishing.

(C) *Physical examination.* A signed and dated statement from a licensed physician that he or she has physically examined an observer or observer candidate. The statement must confirm that, based on that physical

examination, the observer or observer candidate does not have any health problems or conditions that would jeopardize that individual's safety or the safety of others while deployed, or prevent the observer or observer candidate from performing his or her duties satisfactorily. The statement must declare that, prior to the examination, the physician was made aware of the duties of the observer and the dangerous, remote, and rigorous nature of the work by reading the NMFS-prepared pamphlet, provided to the candidate by the observer provider as specified in paragraph (i)(2)(i)(B)(1) of this section. The physician's statement must be submitted to the Observer Program Office prior to certification of an observer. The physical exam must have occurred during the 12 months prior to the observer's or observer candidate's deployment. The physician's statement will expire 12 months after the physical exam occurred. A new physical exam must be performed, and accompanying statement submitted, prior to any deployment occurring after the expiration of the statement.

(D) *Observer deployment/logistics reports.* A deployment/logistics report must be submitted by Wednesday, 4:30 pm, Pacific local time, of each week with regard to each deployed observer deployed by the observer provider during that week. The deployment/logistics report must include the observer's name, cruise number, current vessel, shoreside processor, or stationary floating processor assignment and vessel/processor code, embarkation date, and estimated or actual disembarkation dates. If the observer is currently not assigned to a vessel, shoreside processor, or stationary floating processor, the observer's location must be included in the report.

(E) *Observer debriefing registration.* The observer provider must contact the Observer Program within 5 days after the completion of an observer's deployment to schedule a date, time and location for debriefing. Observer debriefing registration information must be provided at the time of debriefing scheduling and must include the observer's name, cruise number, vessel, or shoreside or stationary floating processor assignment name(s) and code(s), and requested debriefing date.

(F) *Certificates of Insurance.* Copies of "certificates of insurance", that name the NMFS Observer Program leader as the "certificate holder", shall be submitted to the Observer Program Office by February 1 of each year. The certificates of insurance shall verify the following coverage provisions and state

that the insurance company will notify the certificate holder if insurance coverage is changed or canceled.

(1) Maritime Liability to cover "seamen's" claims under the Merchant Marine Act (Jones Act) and General Maritime Law (\$1 million minimum).

(2) Coverage under the U.S. Longshore and Harbor Workers' Compensation Act (\$1 million minimum).

(3) States Worker's Compensation as required.

(4) *Commercial General Liability.*

(G) *Copies of contracts with observer providers and observers.* Observer providers must submit to the Observer Program Office a completed and unaltered copy of each type of signed and valid contract (including all attachments, appendices, addendums, and exhibits incorporated into the contract) between the observer provider and those entities requiring observer services under paragraphs (c) and (d) of this section. Observer providers must also submit to the Observer Program Office upon request, a completed and unaltered copy of the current or most recent signed and valid contract (including all attachments, appendices, addendums, and exhibits incorporated into the contract and any agreements or policies with regard to observer compensation or salary levels) between the observer provider and the particular entity identified by the Observer Program or with specific observers. Said copies must be submitted to the Observer Program Office via fax or mail within 5 business days of the request for the contract at the address or fax number listed in paragraph (e)(3) of this section. Signed and valid contracts include the contracts an observer provider has with:

(1) Vessels required to have observer coverage as specified at paragraphs (c)(1)(i) and (iv) of this section;

(2) Vessels required to have observer coverage as specified at paragraphs (c)(1)(ii), (v), and (vii) of this section;

(3) Shoreside processors or stationary floating processors required to have observer coverage as specified at paragraph (d)(1) of this section;

(4) Shoreside processors or stationary floating processors required to have observer coverage as specified at paragraph (d)(2) of this section; and

(5) Observers.

(H) *Change in observer provider management and contact information.* An observer provider must submit notification of any change to the information submitted on the provider's permit application under paragraph (i)(1)(ii)(A) or (B) of this section. Within 30 days of the effective date of such

change, this information must be submitted by fax or mail to the Observer Program Office at the address listed in paragraph (e)(3) of this section.

(I) Reports of the following must be submitted in writing to the Observer Program Office by the observer provider via fax or email address designated by the Observer Program Office within 24 hours after the observer provider becomes aware of the information:

(1) Any information regarding possible observer harassment;

(2) Any information regarding any action prohibited under § 679.7(g) or § 600.725(o), (t) and (u);

(3) Any concerns about vessel safety or marine casualty under 46 CFR 4.05–1 (a)(1) through (7), or processor safety;

(4) Any observer illness or injury that prevents the observer from completing any of his or her duties described in the observer manual; and

(5) Any information, allegations or reports regarding observer conflict of interest or breach of the standards of behavior described at (h)(2)(i) or (ii) of this section.

(xi) *Replacement of lost or damaged gear.* An observer provider must replace all lost or damaged gear and equipment issued by NMFS to an observer under contract to that provider. All replacements must be in accordance with requirements and procedures identified in writing by the Observer Program Office.

(3) *Limitations on conflict of interest.* Observer providers:

(i) Must not have a direct financial interest, other than the provision of observer services, in a North Pacific fishery managed under an FMP for the waters off the coast of Alaska, including, but not limited to,

(A) Any ownership, mortgage holder, or other secured interest in a vessel, shoreside or floating stationary processor facility involved in the catching, taking, harvesting or processing of fish,

(B) Any business involved with selling supplies or services to any vessel, shoreside or floating stationary processing facility participating in a fishery managed pursuant to an FMP in the waters off the coast of Alaska, or

(C) Any business involved with purchasing raw or processed products from any vessel, shoreside or floating stationary processing facilities participating in a fishery managed pursuant to an FMP in the waters off the coast of Alaska.

(ii) Must assign observers without regard to any preference by representatives of vessels, shoreside processors, or floating stationary

processors other than when an observer will be deployed.

(iii) Must not solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value from anyone who conducts activities that are regulated by NMFS, or who has interests that may be substantially affected by the performance or nonperformance of the official duties of observer providers.

(j) *Observer certification and responsibilities--(1) Observer Certification--(i) Applicability.* Observer certification authorizes an individual to fulfill duties as specified in writing by the NMFS Observer Program Office while under the employ of a NMFS-permitted observer provider and according to certification endorsements as designated under paragraph (j)(1)(v) of this section.

(ii) *Observer certification official.* The Regional Administrator will designate a NMFS observer certification official who will make decisions for the Observer Program Office on whether to issue or deny observer certification.

(iii) *Certification requirements.* (A) *Existing Observers.* Observers who completed sampling activities between June 30, 2001, and December 31, 2002, and have not had his or her certification revoked during or after that time period, will be considered to have met certification requirements under this section. These observers will be issued a new certification prior to their first deployment after December 31, 2002.

(B) *New Observers.* NMFS will certify individuals who:

(1) Are employed by a permitted observer provider company at the time of the issuance of the certification;

(2) Have provided, through their observer provider,;

(i) Information identified by NMFS at paragraphs (i)(2)(x)(A)(1)(iii) and (iv) of this section and in writing from the Observer Program; and

(ii) Information identified by NMFS at paragraph (i)(2)(x)(C) of this section regarding the observer candidate's health and physical fitness for the job;

(3) Meets all education and health standards as specified in paragraphs (i)(2)(i)(A) and (i)(2)(x)(C) of this section, respectively;

(4) Has successfully completed a NMFS-approved training as prescribed by the Observer Program.

(i) Successful completion of training by an observer applicant consists of meeting all attendance and conduct standards issued in writing at the start of training; meeting all performance standards issued in writing at the start of training for assignments, tests, and other evaluation tools; and completing

all other training requirements established by the Observer Program.

(ii) If a candidate fails training, he or she will be notified in writing on or before the last day of training. The notification will indicate: the reasons the candidate failed the training; whether the candidate can retake the training, and under what conditions, or; whether the candidate will not be allowed to retake the training. If a determination is made that the candidate may not pursue further training, notification will be in the form of an IAD denying certification, as specified under paragraph (j)(1)(iv)(A) of this section.

(5) Have not been decertified under paragraph (j)(3) of this section.

(iv) *Agency determinations on observer certification--(A) Denial of a certification.* The NMFS observer certification official will issue a written IAD denying observer certification when the observer certification official determines that a candidate has unresolvable deficiencies in meeting the requirements for certification as specified in paragraph (j)(1)(iii) of this section. The IAD will identify the reasons certification was denied and what requirements were deficient.

(B) *Appeals.* A candidate who receives an IAD that denies his or her certification may appeal pursuant to § 679.43 of this part. A candidate who appeals the IAD will not be issued an interim observer certification. A candidate who appeals an IAD will not receive a certification unless the final resolution of that appeal is in the candidate's favor.

(C) *Issuance of an observer certification.* An observer certification will be issued upon determination by the observer certification official that the candidate has successfully met all requirements for certification as specified in paragraph (j)(1)(iii) of this section.

(v) *Endorsements.* The following endorsements must be obtained, in addition to observer certification, in order for an observer to deploy as indicated.

(A) *Certification training endorsement.* A certification training endorsement signifies the successful completion of the training course required to obtain observer certification. This endorsement is required for any deployment as an observer in the Bering Sea and Aleutian Islands groundfish fisheries and the Gulf of Alaska groundfish fisheries and will be granted with the initial issuance of an observer certification. This endorsement expires when the observer has not been deployed and performed sampling

duties as required by the Observer Program Office for a period of time, specified by the Observer Program, after his or her most recent debriefing. Renewal can be obtained by the observer successfully completing certification training once more. Observers will be notified of any changes to the endorsement expiration period prior to that change taking place. Observers who have been issued certificates under paragraph (j)(1)(iii)(A) of this section will be issued a new certification training endorsement upon issuance of their observer certification prior to their first deployment after December 31, 2002.

(B) *Annual general endorsements.* Each observer must obtain an annual general endorsement to their certification prior to his or her first deployment within any calendar year subsequent to a year in which a certification training endorsement is obtained. To obtain an annual general endorsement, an observer must successfully complete the annual briefing, as specified by the Observer Program. All briefing attendance, performance, and conduct standards required by the Observer Program must be met.

(C) *Deployment endorsements.* Each observer who has completed an initial deployment after certification or annual briefing must receive a deployment endorsement to their certification prior to any subsequent deployments for the remainder of that year. An observer may obtain a deployment endorsement by successfully completing all pre-cruise briefing requirements. The type of briefing the observer must attend and successfully complete will be specified in writing by the Observer Program during the observer's most recent debriefing.

(D) *Level 2 endorsements.* A certified observer may obtain a Level 2 endorsement to their certification. A Level 2 endorsement is required for purposes of performing observer duties aboard vessels or stationary floating processors or at shoreside processors participating in the CDQ or AFA fisheries as prescribed in paragraphs (c) and (d) of this section. A Level 2 endorsement to an observer's certification may be obtained by meeting the following requirements:

(1) Be a prior observer in the groundfish fisheries off Alaska who has completed at least 60 days of observer data collection;

(2) Receive an evaluation by NMFS for his or her most recent deployment that indicated that the observer's performance met Observer Program expectations for that deployment;

(3) Successfully complete a NMFS-approved Level 2 observer training as prescribed by the Observer Program; and

(4) Comply with all of the other requirements of this section.

(E) An observer who has achieved a Level 2 endorsement to their observer certification as specified in paragraph (j)(1)(v) (D) of this section may additionally receive a Level 2 "lead" observer endorsement by meeting the following requirements:

(1) A Level 2 "lead" observer on a catcher/processor using trawl gear or a mothership must have completed two observer cruises (contracts) and sampled at least 100 hauls on a catcher/processor using trawl gear or on a mothership.

(2) A Level 2 "lead" observer on a catcher vessel using trawl gear must have completed two observer cruises (contracts) and sampled at least 50 hauls on a catcher vessel using trawl gear.

(3) A Level 2 "lead" observer on a vessel using nontrawl gear must have completed two observer cruises (contracts) of at least 10 days each and sampled at least 60 sets on a vessel using nontrawl gear.

(vi) Expiration of a certification. The observer certification will expire on December 31, 2007.

(2) Standards of observer conduct--(i) Limitations on conflict of interest. (A) Observers:

(1) Must not have a direct financial interest, other than the provision of observer services, in a North Pacific fishery managed pursuant to an FMP for the waters off the coast of Alaska, including, but not limited to,

(i) Any ownership, mortgage holder, or other secured interest in a vessel, shoreside or floating stationary processor facility involved in the catching, taking, harvesting or processing of fish,

(ii) Any business involved with selling supplies or services to any vessel, shoreside or floating stationary processing facility participating in a fishery managed pursuant to an FMP in the waters off the coast of Alaska, or

(iii) Any business involved with purchasing raw or processed products from any vessel, shoreside or floating stationary processing facilities participating in a fishery managed pursuant to an FMP in the waters off the coast of Alaska.

(2) May not solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value from anyone who either conducts activities that are regulated by NMFS or has interests that may be substantially affected by the

performance or nonperformance of the observers' official duties.

(3) May not serve as observers on any vessel or at any shoreside or floating stationary processing facility owned or operated by a person who previously employed the observers.

(4) May not solicit or accept employment as a crew member or an employee of a vessel, shoreside processor, or stationary floating processor in a North Pacific fishery while employed by an observer provider.

(B) Provisions for remuneration of observers under this section do not constitute a conflict of interest.

(ii) *Standards of Behavior.* Observers must avoid any behavior that could adversely affect the confidence of the public in the integrity of the Observer Program or of the government, including but not limited to the following:

(A) Observers must perform their assigned duties as described in the Observer Manual or other written instructions from the Observer Program Office.

(B) Observers must accurately record their sampling data, write complete reports, and report accurately any observations of suspected violations of regulations relevant to conservation of marine resources or their environment.

(C) Observers must not disclose collected data and observations made on board the vessel or in the processing facility to any person except the owner or operator of the observed vessel or processing facility, an authorized officer, or NMFS.

(D) Observers must refrain from engaging in any illegal actions or any other activities that would reflect negatively on their image as

professional scientists, on other observers, or on the Observer Program as a whole. This includes, but is not limited to:

(1) Violating the drug and alcohol policy established by and available from the Observer Program;

(2) Engaging in the use, possession, or distribution of illegal drugs; or

(3) Engaging in physical sexual contact with personnel of the vessel or processing facility to which the observer is assigned, or with any vessel or processing plant personnel who may be substantially affected by the performance or non-performance of the observer's official duties.

(3) *Suspension and Decertification*--(i) *Suspension and decertification review official.* The Regional Administrator will establish an observer suspension and decertification review official(s), who will have the authority to review observer certifications and issue initial administrative determinations of observer certification suspension and/or decertification.

(ii) *Causes for suspension or decertification.* The suspension/decertification official may initiate suspension or decertification proceedings against an observer:

(A) When it is alleged that the observer has committed any acts or omissions of any of the following:

(1) Failed to satisfactorily perform the duties of observers as specified in writing by the NMFS Observer Program; or

(2) Failed to abide by the standards of conduct for observers as prescribed under paragraph (j)(2) of this section;

(B) Upon conviction of a crime or upon entry of a civil judgement for:

(1) Commission of fraud or other violation in connection with obtaining or attempting to obtain certification, or in performing the duties as specified in writing by the NMFS Observer Program;

(2) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(3) Commission of any other offense indicating a lack of integrity or honesty that seriously and directly affects the fitness of observers.

(iii) *Issuance of initial administrative determination.* Upon determination that suspension or decertification is warranted under paragraph (j)(3)(ii) of this section, the suspension/decertification official will issue a written IAD to the observer via certified mail at the observer's most current address provided to NMFS under § 679.43(e). The IAD will identify whether a certification is suspended or revoked and will identify the specific reasons for the action taken. If the IAD issues a suspension for an observer certification, the terms of the suspension will be specified. Suspension or decertification is effective immediately as of the date of issuance, unless the suspension/decertification official notes a compelling reason for maintaining certification for a specified period and under specified conditions.

(iv) *Appeals.* A certified observer who receives an IAD that suspends or revokes his or her observer certification may appeal pursuant to § 679.43.

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