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**Anthony S. Lowe,**

*Administrator, Federal Insurance and Mitigation Administration.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 679

[Docket No. 020814193-2282-02; 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:** Final rule.

**SUMMARY:** NMFS issues a final rule to extend the applicability date of the existing regulations for the interim North Pacific Groundfish Observer Program (Observer Program), which otherwise expire December 31, 2002, through 2007. This final rule also amends regulations governing the Observer Program. These changes 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:** Amendments to § 679.50 are effective December 31, 2002.

Amendments to § 679.2, 679.79(a)(3), and 679.43(e) are effective January 1, 2003.

**ADDRESSES:** Copies of the Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis (EA/RIR/FRFA) prepared for this action may be obtained by contacting the Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802, Attn: Lori Durall. Send comments on information collection requirements 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 Salveson, 907-586-7228; or [sue.salveson@noaa.gov](mailto:sue.salveson@noaa.gov).

**SUPPLEMENTARY INFORMATION:** NMFS manages the groundfish fisheries in the exclusive economic zone off Alaska under the FMPs. The North Pacific Fishery Management Council (Council) prepared the FMPs under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1801, *et seq.* Regulations governing U.S. fisheries and implementing the FMPs appear at 50 CFR parts 600 and 679.

#### **Background**

Groundfish fisheries in waters of the Gulf of Alaska (GOA) and Bering Sea and 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. These quotas may be apportioned among areas, seasons, gear types, processor and catcher vessel sectors, cooperatives, and individual fishermen. Both retained and discarded catch are credited against these annual quotas, which generally 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 these purposes.

Observer requirements have been in place in Alaska since the mid-1970s,

when the 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. Because 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 the Alaskan groundfish fisheries. A domestic Observer Program was developed by NMFS 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. Numerous changes to the Observer Program have been implemented to promote continued collection of quality data. These changes have ranged from relatively minor adjustments to the Program to changes that would address fundamental concerns. Minor adjustments, for example, may address logistic or data acquisition concerns. Changes that would address fundamental concerns, however, may address issues of data quality, the distribution of costs for observer coverage, and accountability of observer providers and observers for maintaining specified performance standards. Several attempts for long term restructuring of the Observer Program to address these fundamental issues have failed. One attempt to rectify these failures has been the Council's recommendation for establishment of an interim Observer Program in anticipation of developing a long term restructuring plan. The existing observer Program expires at the end of 2002.

At its April 2002 meeting, the Council recommended an extension of the interim Observer Program through 2007, 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. As in past years, the Council's recommended action is intended to allow additional time for the development and analysis of alternatives that would address

numerous issues facing the Observer Program, including ways to improve the quality of data collected by observers and to redistribute costs for observer coverage. The Council intends to select and implement a preferred alternative to address those issues and concerns by January 1, 2008. The Council's recommended action would also 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 authorizing NMFS 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 these 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 contribute to 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 misallocations resulting from the underharvest of total allowable catch (TAC). In recent years, the reliance on observer data for individual vessel accounting has been of particular importance in the management of the Western Alaska Community Development Quota (CDQ) program and American Fisheries Act (AFA) fisheries.

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.

On September 16, 2002, a proposed rule to extend the Observer Program through December 31, 2007, with modifications, was published in the **Federal Register** for a 30-day public

review and comment period that ended October 11, 2002. Four letters of comments were received during the comment period that cumulatively contained 40 unique comments on the proposed rule. These comments and NMFS' responses are summarized under Response to Comments. The proposed rule discusses the history of the Observer Program, describes various attempts to modify its infrastructure to address long term concerns about data quality and accountability, and details descriptions of and justification for the changes to the Observer Program that are implemented under this action. These changes are summarized below.

*Initial Permitting or Certification Determination.* This final rule establishes an application procedure for both observers and observer providers and creates 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 certification or permit.

The denial of an observer certification or observer provider permit will be appealable. The Alaska Region's Office of Administrative Appeals (OAA) will review denials for both observers and observer providers upon request. Each decision from the OAA will be referred to the Regional Administrator. If the Regional Administrator does not act to overturn the OAA decision within 30 days, the OAA decision becomes the final agency action. Final agency action can be further appealed to the U.S. District Court. The specific processes for appeals of a denial of an observer provider permit or an observer certification are summarized below (See Observer Provider Permit Application and Observer Certification Process).

*Permit vs. Certification for Observer Providers.* This final rule changes 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 will 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.

*Observer Provider Permit Application Requirements.* Under the final rule, 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 will not be required to submit a new application, and the owner(s) will be issued a permit based on their existing record. These observer providers will 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 must comply with all applicable regulations promulgated by NMFS while participating in the Observer Program. Former NMFS-certified providers need only comply with those regulations in force at the time of their participation in the program.

Because accurate identification of the business' ownership is required for issuance of the permit, each existing NMFS-certified provider will be required to correct or update any changes to ownership, management, and/or contact information set forth under § 679.50(i)(1)(ii)(A) and (B) of this final rule within 30 days of receiving a permit. Subsequent changes in ownership of an observer provider that involve a new person will require the observer provider to submit a new permit application prior to the effective date of the new ownership arrangement.

A new applicant for an observer provider permit will 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 applicable regulations; (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 are fully described and justified in the proposed rule (67 FR 58452, September 16, 2002) and are summarized below 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.

(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.

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 the final rule at § 679.50(i)(3). NMFS will provide an acknowledgment template form, which applicants may 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.

(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, and the arrangements to be used to achieve such responsibilities and duties.

The final rule also requires 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 final rule change. Signed statements from new board members or corporation officers under § 679.50(i)(1)(ii)(C) or (D) also will be required (See changes from the proposed rule to the final rule). These requirements will help facilitate the communication between NMFS and observer providers and help ensure ongoing credibility and accountability of observer providers.

*Observer Provider Permit Application Evaluation.* The Regional Administrator will appoint NMFS' staff members to a review board that will evaluate applications for an observer provider permit. The board will evaluate each application to determine whether it is complete and whether established criteria are met (see below). The board 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 will be used to evaluate an application are listed below; the proposed rule (57 FR 58452, September 16, 2002) explained why each criterion is needed.

(1) Absence of conflict of interest.

Observer providers cannot have a conflict of interest as defined under § 679.50(i)(3) of this final rule.

(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.

(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.

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

The review board will 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 will issue an observer provider permit to the applicant. The applicant will then be authorized to provide observers to industry and will 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 will 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 will 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. No right to administrative appeal for the OAA decision is available. 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 will be required to be exercised within 30 days. If the Regional Administrator does not act to overturn the OAA decision within 30 days, the OAA decision becomes the final agency action. Final agency actions can be further appealed to the U.S. District Court. As part of the change to this appeals process under this final rule, regulations at § 679.43 are 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 will remain effective through December 31, 2007, unless: (1) the observer provider company has a new owner, which requires that a new permit application process be initiated under § 679.50(i)(1)(vi) of the final 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 final rule; or (3) the permit issued to an observer provider is suspended or revoked under § 679.50(i)(1)(viii) of the final rule.

If a permit lapses after a period of 12 months of inactivity as described above,

NMFS will issue an IAD to the permit holder stating that NMFS records indicate that the permit has lapsed and that the permit holder has the opportunity to appeal the determination. The IAD will also detail the appeals process available to the permit holder. Permit holders who appeal

this IAD will be issued an interim permit so they can operate while their appeal is reviewed.

**Observer Provider Sanctions.** This final rule changes the process for observer provider permit revocation or suspension from an administrative process conducted by the Observer Program Office and the Alaska Regional Office to an enforcement process. Exclusive use of the agency's enforcement process for permit sanctions will enhance the agency's ability to obtain compliance with its regulations and create a consistent permit suspension and revocation process. Under this process, 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 may issue a Notice of Violation and Assessment (NOVA) 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 NOVA and Notice of Permit Sanction procedures are established at 15 CFR part 904. This final rule removes 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 will cease to maintain a separate process for suspension or revocation of an observer provider permit. 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 are required 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 processors in Alaska that harvest or process

groundfish and require observer coverage. NMFS provides certification training throughout the calendar year, depending on the availability of trainers 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 will be considered to have met certification requirements under this final rule. NMFS will issue each of these observers a new certification and certification training endorsement prior to their first deployment after December 31, 2002, unless NMFS determines that the observer has not been deployed, performed sampling duties, and debriefed successfully in the preceding 18 months. Under the final rule, these observers would be required to obtain subsequently the appropriate endorsements (described below) to their certification prior to each subsequent deployment. These observers will 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.

**Observer Certification Process.** This final rule modifies existing procedures and adds certain new requirements. The Observer Program will 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 final rule, NMFS will 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 certification training class; and (3) meet all pre-deployment requirements set forth in the final rule, including education requirements at § 679.50(i)(2)(i)(A)(1) through (4), a signed statement that discloses any criminal convictions under § 679.50(i)(2)(x)(A)(1)(iv), and a physical examination as required under § 679.50(i)(2)(x)(C).

The observer provider is required to submit substantiating information for certification, with one exception, to NMFS at least 5 business days prior to the beginning of a scheduled observer training. If the required observer information is not submitted 5 business 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 recertified 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 will be made by a certification official within the Observer Program, appointed by the Regional Administrator. As is current practice, certification will 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 will be verbally notified on or before the last day of training. Within 10 business days of the verbal notification, the candidate and his or her observer provider will be notified in writing. The written notification will 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 will 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.

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 are amended under this final rule 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 will 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.** This final rule replaces the current system of pre-deployment certification with a system of certification endorsements. Under this action, observers will receive a certification that will expire with the expiration of the 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 will be required to deploy as an observer:

(1) Certification training endorsement. A certification training endorsement will signify the successful completion of the training course required to obtain observer certification. This endorsement will be granted with the initial issuance of an observer certification and will be required for any deployment as an observer in the BSAI or GOA groundfish fisheries. This endorsement will 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 will 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 will 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 will be required to receive a deployment endorsement to his or her certification prior to any subsequent deployments that year. An observer will 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 will be specified in writing by the Observer Program Office during the observer's most recent debriefing.

(4) Level 2 and Level 2 "Lead" endorsements. Observers wishing to deploy aboard vessels participating in CDQ fisheries and in AFA fisheries as "level 2" observers currently are required to meet specific levels of observer experience and to successfully complete additional training to obtain a "CDQ" certification. Under this final rule, these requirements would not change, with one nomenclature exception. The term "CDQ certification" will 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 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 will be changed to an endorsement for the reasons stated above. Similar changes for current Level 2 "lead" observer certifications are made as well. A level 2 "lead" endorsement reflects specific experience on different types of vessels using different gear types.

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 will require that an observer receive an evaluation by NMFS that indicates that the observer's performance met Observer Program expectations for the previous 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. The final rule will maintain initial observer suspension and decertification determinations within the purview of the Observer Program but moves appeals of these determinations to the OAA to provide more assurance of objectivity in final decision making. The Observer Program will 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 this final rule, the Regional Administrator will 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 will detail the reasons for and the terms of the action. The notice will 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 suspension/decertification officer will create a written record. If the observer does not contest the proposal to decertify or suspend the certificate, the observer suspension/decertification officer's initial decision will become final.

If the observer wants to appeal an adverse initial determination by the observer suspension/decertification officer(s), the decision will be referred to the OAA. The OAA will 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 will be referred to the Regional Administrator. 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. The Regional Administrator will be required to exercise this discretion within 30 days. If the Regional Administrator does not act to overturn the OAA decision within 30 days, the OAA decision becomes the final agency action. Final agency actions can be further appealed to the U.S. District Court.

The OAA system will 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 will 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 will continue to be handled by GCEL/AK, with appeals directed to ALJs. Successful prosecution of these cases will 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 will be very rare actions. Only one such observer case has been referred to GCEL/AK.

*Observer and Observer Provider Responsibilities.* The final rule modifies existing observer and observer provider responsibilities to clarify NMFS' intent and to eliminate ambiguities. Five new observer provider responsibilities, described below, also are established to better address observer and observer provider performance issues of particular concern.

*New observer provider responsibilities.* Five new provisions are established to require (1) that a new observer drug and alcohol policy provided by NMFS to observer providers is included in written contracts or contract addendums between observer providers and 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 be completed prior to an observer's assignment being changed; and (5) that observer providers provide observer candidates with a NMFS-produced pamphlet describing the duties of an observer. The NMFS-produced pamphlet describing the duties and working environment of the observer will be available prior to 2003 and will be required to be issued to observer candidates by observer providers during candidate interviews under this final rule.

A full description of the new responsibilities and reasons for them are set forth in the preamble to the proposed rule (67 FR 58452, September 16, 2002) and are not repeated here. NMFS did propose an additional requirement, which is included in the final rule, that will require observer providers to have a signed written contract or contract addendum 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 final rule authorizes 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. NMFS expects this action to improve its 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, observers, and observer providers.

The Magnuson-Stevens Act provisions authorizing collection of information for purposes of conservation and management of a fishery provide statutory authority to place observers aboard vessels. 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 final rule modifies the definition of an observer to include NMFS staff and individuals authorized by NMFS and provides 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.

Staff observers will provide information that could be used to better train, support, and debrief groundfish observers. Staff observer deployments will 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. Further discussion and justification of this program is presented in the preamble to the proposed rule (67 FR 58452, September 16, 2002).

*Observer Coverage Requirements and Observer Procurement.* This final rule requires vessels, shoreside processors, or stationary floating processors to carry NMFS staff or other individuals

authorized by NMFS upon written request by the agency. These individuals will 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 will be made with consideration of 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 will also be considered.

A majority of staff deployments to vessels and processors are expected to satisfy requirements for observer coverage as specified in §§ 679.7(f)(4) and 679.50(c) and (d). A determination on whether any staff deployment will meet coverage requirements for a specific vessel or processor will be made by NMFS in advance of each staff deployment. Notification of the determination will be made in writing to the vessel owner and/or operator, as well as to any observer provider contracted by the vessel to provide observer coverage. This determination largely will 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 do 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 may 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 also will notify affected observer providers to the extent that the deployment of NMFS staff or other authorized individuals would affect prior arrangements for observer coverage. NMFS will not have regulatory authority to order a vessel to port to commence such a deployment. However, a vessel selected for a deployment will be required to work with NMFS to develop deployment logistics. This will 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 will be responsible for

transportation and shoreside lodging costs associated with staff deployments.

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

### Response to Comments

Four letters were received during the public review and comment period on the proposed rule. These letters contained 40 unique comments that are summarized and responded to below.

Comment 1: The permit process for the observer providers needs to include observer input as part of the evaluation process. In our opinion, the permit is analogous to a Federal contract and services provided under such contracts are evaluated at regular intervals. We do not feel that a permitted provider should be exempt from similar evaluations.

Response: NMFS disagrees that issuance of an observer provider permit is analogous to a Federal contract. NMFS does value the input from observers concerning the performance of their observer providers and has given observers the opportunity to provide that input through an anonymous exit survey at the end of each cruise. A portion of this survey questions observers specifically about their observer provider's performance. At least once a year, NMFS summarizes this information and reviews it with each provider. NMFS will continue this type of review under the new regulations. NMFS has not conducted formal evaluations of observer provider performance for many years and does not intend to begin doing so. NMFS will continue to address performance issues as they arise with individual providers. Comment 2: Previously, the regulations included a caveat to lower hiring standards if an insufficient number of applications were submitted from candidates with bachelor degrees. Is this regulation no longer applicable?

Response: A December 30, 1997, final rule extended the Observer Program through 1998 and included a change to the non-codified elements of the Observer Program that outline observer qualifications. For prospective observers, the change established: (1) minimum education and experience requirements, (2) specific coursework and skills requirements, and (3) that

candidates successfully complete a screening test of basic mathematics, algebra, and computer skills. Since this was a new, non-codified requirement, NMFS included a caveat that if a sufficient number of candidates meeting these requirements were not available, the observer provider could seek approval from NMFS to substitute individuals with either a senior standing in an acceptable major, or an Associate of Arts degree in fisheries, wildlife science, equivalent degree, or other relevant experience or training.

The caveat was inserted to help providers during the transition to higher standards, but the education and experience requirements have been in place for over 4 years and NMFS feels the observer providers are finding and recruiting qualified applicants. For that reason, the non-codified exception to these requirements has been removed and is no longer applicable.

Comment 3: At § 679.50 (i)(2)(vii), the proposed rule states, "Unless alternative arrangements are approved by the Observer Program Office, an observer provider must not: (B) deploy an observer for more than 90 days;". It would be useful to define when deployment time starts and stops. Our current understanding is that the countdown begins the day the observer boards his or her first vessel and ends the day the observer disembarks his or her last vessel. With the current wording, deployment time could be defined as starting when an observer leaves the site of their briefing for the field and continuing until they leave the field to debrief.

Response: Deployment is defined at § 679.2. The definition reads, "Deployment means the period between an observer's arrival at the point of embarkation and the date the observer disembarks for travel to debriefing." To further clarify, arrival at the point of embarkation is when an observer boards his or her first vessel or arrives onsite at his or her first processor.

Comment 4: We have requested that safety training for prior observers be modified to coincide with requirements of sea-going NMFS staff, other survey staff such as IPHC, or other observer programs. This request does not appear to be addressed in the proposed rule. We would like to see this policy modified within the Observer Program regardless of whether it appears in the final rule.

Response: Safety training is an important priority in the Observer Program. In September and October 2002, NMFS held four meetings on observer safety to gather ideas. Participants in these meetings included

representatives from the Association for Professional Observers, observers, observer providers, NMFS staff, and Observer Training Center (OTC) staff. Once compiled, the results of each meeting will be used to modify and improve the safety training observers receive. In addition, NMFS has been working with the OTC to evaluate observer training and to explore options for offering returning observers advanced training.

Comment 5: Paragraph one on page 58468 of the proposed rule states, "The proposed regulation would require that observers complete a NMFS electronic vessel and/or processor survey prior to their final debriefing..." Did you mean "prior to being deployed in a non-groundfish fishery?"

Response: NMFS agrees that the proposed rule preamble language was not completely accurate. However, the proposed regulatory text did correctly require that observers complete a NMFS electronic vessel and/or processor surveys before performing other jobs or duties which are not part of NMFS groundfish observer requirements.

Comment 6: The proposed rule states development and implementation of research projects are a component that will justify NMFS placement of staff on board vessels. We support this justification but request the agency publish an annual report or summary of these projects. We have requested specific information on data needs and priorities from NMFS for almost a decade to no avail. Some people feel the lack of agency articulation regarding data needs is a major stumbling block in redesigning/restructuring the Observer Program.

Response: If requested by the Council, NMFS will provide periodic reports on NMFS staff involvement in the development and implementation of research projects that this rule making will allow. NMFS may also pursue other outlets such as the Alaska Fisheries Science Center's Quarterly Report. The broader issue of requesting specific information on data needs and priorities is beyond the scope of this rule making. Nonetheless, NMFS is committed to working with the Council and other interested parties in providing information necessary to support long term planning for the Observer Program. Also see response to Comment 30.

Comment 7: It concerns us to find proposed regulations in the **Federal Register** that had previously been rejected, were significantly altered after being accepted by the Council, or were entirely new and not previously discussed in a public forum.

Response: NMFS acknowledges that the development of regulatory text after Council action, and the subsequent agency and NOAA General Counsel review of draft text, resulted in numerous changes or additions to regulatory text to meet or clarify intent. NMFS disagrees that regulatory provisions were included in the proposed rule that had been "rejected" by the Council. The opportunity for prior public notice and comment on the proposed regulations is intended to give additional opportunity for public review of policy and intent beyond the Council process and how that intent is incorporated in proposed rule making. While not all detailed issues may be addressed in the Council process, they must be addressed by NMFS during the public rule making process. This process complies with the Magnuson-Stevens Act, the Administrative Procedure Act, and other applicable law.

Comment 8: Section 679.50 (h) Procurement of observer services. As written in the proposed rule, this regulation has no qualification or certification process for NMFS staff assigned to vessels. Significant potential exists for untrained individuals to be assigned to vessels in lieu of qualified observers.

Response: It would serve no purpose for NMFS to deploy untrained individuals in lieu of observers. NMFS intends to deploy NMFS staff and other qualified persons who meet or exceed the requirements an observer must meet. Most if not all individuals being considered for deployment are former groundfish observers who currently train or debrief groundfish observers.

Comment 9: Without a cap on the number of days NMFS can deploy staff on vessels, the possibility arises that NMFS could use this regulation to alter the Observer Program extensively without further deliberation in the Council process. The potential impact on free enterprise has not been considered, nor the enforcement and monitoring implications to the vessels.

Response: NMFS presented several options to the Council that would have limited the number of annual deployment days. Following deliberation on these options, the Council selected no annual cap. NMFS does not have the budget or staff to extensively impact free enterprise with respect to providing observer services and intends to deploy NMFS staff or qualified persons in lieu of observers only when necessary. NMFS fails to see how the lack of a cap on NMFS deployments has enforcement and monitoring implications for vessels.

Comment 10: We would like to request that NMFS notify the observer provider that a vessel they provide coverage for will be required to carry NMFS staff at the same time NMFS notifies the vessel or processor.

Response: NMFS agrees that observer providers need as much advance notice as possible when a vessel or processor will carry NMFS staff in lieu of an observer. NMFS will make these notifications to observer providers.

Comment 11: The owner and operator's right to contact NMFS in writing to request assistance in improving observer data quality and resolving observer issues at § 679.50 (e)(3) should be extended to observers and observer providers.

Response: Observers and observer providers may contact NMFS with requests and the appropriate changes have been made to § 679.50 (e)(3).

Comment 12: In the preamble on page 58457 NMFS would require all observer applicants to meet all pre-deployment requirements established by the Observer Program. We are uncertain what these requirements are and how they would affect the observer providers and observers.

Response: The preamble to the proposed rule states that 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. The pre-deployment requirements were described in the proposed rule in two places, at § 679.50 (i)(2)(i)(A)(1-4) on page 58473 and § 679.50 (i)(2)(x)(A)(1)(iv) and (i)(2)(x)(C) on page 58474. The preamble to the final rule clarifies that these requirements are set forth in regulations.

Comment 13: NMFS states they will notify observer candidates in writing if the candidate fails the training class. We would like to request that NMFS also notify the observer providers in writing if an observer candidate fails.

Response: NMFS has amended § 679.50 (j)(1)(iii)(B)(4)(ii) to clarify NMFS' responsibilities if an observer candidate fails training. On or before the last day of training, NMFS will verbally notify the observer candidate whether he or she has failed training and also provide the reasons for failure. Within 10 business days, NMFS will notify the observer candidate in writing. The notification will indicate the reasons the candidate failed and whether the candidate can retake the training.

NMFS is not able to provide either verbal or written notification of this

type to observer providers under the Privacy Act unless the observer candidate has signed a written waiver authorizing the disclosure of this information to an observer provider. However, contract provisions between observer providers and observer candidates could include such a waiver so that NMFS could release this information to observer providers. Similarly, observer candidates could provide their observer provider any written correspondence from NMFS. Given Privacy Act constraints and options to observer providers to obtain this information under consent of an observer candidate, NMFS is not pursuing a regulatory change that would authorize the release of verbal or written notification to observer providers.

Comment 14: Under the proposed regulation change an observer candidate will be notified whether he or she will be allowed to retake the training class should he or she fail training. We request that NMFS clarify the criteria for applicants retaking the NMFS training class.

Response: Historically, NMFS has not allowed candidates to retake training if they failed the NMFS certification training. NMFS has allowed candidates to retake training if they withdrew from training to address personal issues that developed during the course of the training or to address deficiencies noted prior to the end of training. NMFS will continue to allow candidates who meet the two conditions noted above to retake training. Outside of those conditions, candidates may fail for a host of reasons ranging from behavior problems to lack of technical skills. For this reason, each observer candidate must be evaluated on a case-by-case basis taking into account the reasons behind their failure. Regardless of whether NMFS decides an observer can or cannot retake the certification training, NMFS' decision can be appealed by the observer under the new regulations.

Comment 15: Under the proposed rule, NMFS would require observer providers to contact the Observer Program within 5 days after completion of an observer's deployment to schedule a debriefing. Please clarify if that is 5 calendar days or 5 business days?

Response: NMFS has clarified the requirement at § 679.50(i)(2)(x)(E) as 5 business days.

Comment 16: We would like clarification as to how NMFS-provided pamphlets and other literature describing observer duties and the Observer Program's drug and alcohol policy may be distributed to observer candidates. Does each candidate need to be mailed or faxed a hard copy or can

this information be provided electronically (e.g., e-mail or web site)? We are also unsure what the content of the pamphlet on observer duties will be.

Response: The informational pamphlet on observer duties and the Observer Program's drug and alcohol policy will be available in hard copy upon request and on the Observer Program's web site. NMFS agrees that this information can be provided to observer candidates electronically. The pamphlet on observer duties will describe what role observers fill, the job training, living and working conditions, observer job duties, and basic requirements to qualify as an observer.

Comment 17: The proposed rule requires observer providers to distribute copies of the NMFS drug and alcohol policies to their observers. We are not opposed to having or distributing such policies, but we would like the opportunity to comment on such policies before distributing them.

Response: NMFS solicited comments from a variety of sources and distributed a draft of the Drug and Alcohol policy to all observer providers on August 26, 2002. NMFS requested comments by September 15, 2002, but no comments were received by the deadline. One observer provider commented after the deadline and their comments will be taken into account as we finalize the policy. If subsequent input on this policy suggest the policy should be modified, NMFS will consider doing so.

Comment 18: The proposed rule requires a statement from observer (provider) applicants "describing any criminal convictions" by the applicant, which are later described in § 679.50(i)(1)(iii)(A)(2) as: (i) embezzlement, theft, forgery, bribery, falsification, destruction of records, making false statements, receiving stolen property, or (ii) 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. While we understand the rationale behind this regulation, this was never discussed as part of the application process and we recommend it be removed from the rule.

Response: Criminal conviction disclosure will be in place for persons wishing to become new observer providers and any new persons in the management, organizational structure, and ownership structure of an observer provider. Without this information, NMFS could not be assured of having knowledge of new applicants, managers or owners, and it is in the public interest for NMFS to screen these applicants. This screening process

includes an evaluation of their criminal convictions because convictions relating to embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements or receiving stolen property could influence a person's ability to fulfill the expectations of an observer provider and predispose an applicant toward future compliance issues. Given these factors, NMFS needs to have the ability to assess persons relative to potential regulatory compliance issues and protect the fishing industry and observers from individuals whose credibility and accountability to the program are questionable. Also see response to Comment 7.

Comment 19: In reference to observer candidates disclosing criminal convictions, we are concerned that this regulation, in its present form, has not been discussed with the observer providers. We are also concerned about the use and intent of this regulation. Will some applicants not be admitted to training and could prior observers lose their job? We would like to see specific information and guidelines as to how NMFS will use this information. The types of convictions an observer must disclose is vague, the regulation should be refined to include either felonies as discussed with the Council or be expanded similar to the observer provider disclosure.

Response: This regulation was discussed at length during the Council process. Observers whose certification was current prior to this rule taking effect will not be required to disclose their history unless their certification lapses and they need to reapply for certification (see § 679.50(j)(iii)). Applicant disclosure of criminal convictions will be used to screen applicants and may be grounds for not admitting individuals to training. NMFS received specific guidance from the Council on this issue and the Council motion suggested NMFS screen applicants on a case-by-case basis and that applicants disclose their past criminal record without regard to the type of conviction. The outcome of each screening will be based on the nature of the criminal conviction as it relates to the job NMFS expects observers to perform.

Comment 20: Some of the background provided as supplementary information for this rule making is clearly out of date. For instance (from the proposed rule, pg. 58452), "Competitive pressure to reduce coverage costs to the industry keeps observer salaries low, resulting in reduced observer availability." Observer salaries will range from \$3,900 per month for new observers to \$5,610 per

month for experienced observers in 2003. Also, "Instability in the fishing and observer provider industries has created situations in the past where observers were not paid for work performed." That would have been 1994 or so: if observer morale is still low, as the background alleges, events of 1994 can not be blamed.

Response: NMFS agrees that some of the issues experienced within the Observer Program in past years no longer appear to be a problem. However, we have no assurance that similar issues will not be encountered again in the future. A strong, credible Observer Program is of paramount importance to the monitoring and management of the North Pacific fishery resources. Recognition of this fact continues to provide the initiative for improvements to this program, including this final rule.

Comment 21: The new permitting, certification, and decertification procedures for observers and observer providers appear in large part to be a continuation of current practice dressed up in new terminology. We want to point out that any new system of "observer certification endorsements" needs to be implemented in such a way as to allow the "certification official" to issue these endorsements on the very afternoon an observer completes training or briefing. If the new system is not able to meet this time line, it will result in an Observer Program that is less efficient and less responsive to industry needs which will cost industry more money.

Response: NMFS understands the need for timely decisions for all observer endorsements under the new system. The system will be set up such that the certification official can issue endorsements the same day observers successfully complete training or briefing, which will ensure they are available for immediate deployment.

Comment 22: The proposed rule calls for providers to replace lost or damaged gear, but that raises the question as to whether gear that wears out due to normal use is also our responsibility. It would also be helpful if the Observer Program would provide us with a list of required and optional gear that NMFS provides for observers and with a list of vendors and replacement cost for each item in the event we need to purchase replacement gear. Would the observer provider replace the gear itself or simply reimburse NMFS? How and when will NMFS notify us that gear has been lost or damaged? We request that NMFS be required to notify providers within 5 business days of receiving an observer's gear of any items in need of

replacement. This will allow us to recoup costs from our observers if gear was lost or damaged due to negligence.

Response: Upon request, NMFS can provide a list of required and optional gear that includes a list of accountable items. NMFS does not expect observer providers to replace gear that wears out due to normal use. NMFS does not have a way of accepting reimbursements for lost or damaged gear. Instead, observer providers are expected to purchase replacement gear and have it shipped to the nearest Observer Program facility. If an accountable gear item is lost or damaged NMFS will notify observer providers within 5 business days of learning accountable gear has been lost or damaged. Included with that notification will be a list of vendors and estimated cost for replacement.

Comment 23: This proposed rule requires observer providers to provide observers as requested by vessels and processors who need to fulfill their observer coverage requirements. Will we be required to respond to any such request, even if it is made by a vessel who failed to pay us last year? By a vessel we abandoned as unsafe last month? By a vessel who calls only two weeks or two days before needing an observer? By a vessel with which we have no contract? The answer we will give to any of these questions is "No", but the question is, by so answering, will we be in violation? If the answer to that question is "Yes", then the proposed text needs to be re-written. We suggest the wording to this regulation be changed to, "An observer provider must provide an observer for deployments as requested by vessels and processors, with which the provider has a current signed contract, to fulfill vessel and processor requirements..." Similar wording was proposed in an earlier draft, but it has been changed. This change is necessary to protect the provider from being penalized for not providing observers for vessels that have not been offered a contract.

Response: The proposed rule does not change existing regulatory text addressing the expectation that observer providers supply observers as requested by vessels and processors to fulfill industry observer coverage requirements. As in the past, NMFS and NOAA will take into account any and all mitigating factors (such as those outlined in the comment) prior to making a decision to pursue an enforcement action against an observer provider. While NMFS supports private contract arrangements between observer providers and their clientele, NMFS is not optimistic about a contract requirement being able to unilaterally

assure industry that observers always will be available when necessary to satisfy coverage requirements, particularly if a lack of planning results in last minute requests. NMFS also recognizes countervailing needs of observer providers and vessel or processor owners and operators who require observer services to maintain compliance with observer coverage requirements. Observer providers cannot be forced to enter into a contract arrangement with a person they believe represents inappropriate business or safety risks. Conversely, industry members need assurance that observer services will be available when they need them so that fishing operations are not negatively impacted. NMFS is optimistic that the existing program can be enhanced in the future to address these issues and is working with the Council and its Observer Advisory Committee to develop alternatives for analysis.

Comment 24: The proposed rule requires that a written contract exist between observer providers and observers. Most observers are currently employed by providers who have a contract with the Alaska Fisheries Division of the United Industrial Workers. These providers have contracts with the union, not with individual observers. To be accurate, the text should require either "written contracts" for non-union providers or "written contract addendums" for union providers.

Response: NMFS recognizes there are both union and non-union observer providers and has made a change to the regulation language at § 679.50(i)(2)(i)(C) to include both contracts and contract addendums.

Comment 25: During the Council process it was decided that language would be added that allows for observers to verbally agree to a contract extension. In some cases observers are working different contracts (i.e., ADF&G Shellfish, NMFS Marine Mammal). Observer providers may ask a prior observer to switch between assignments in the field. Providers should only be required to provide new contracts if there is a substantial change in contract language or during the first contract for a new calendar year. We suggest the language, "The contract must be signed by the observer and observer provider prior to the observer's deployment..." be replaced with, "The contract must be signed by the observer and observer provider prior to the observer's initial deployment in a new calendar year..."

Response: For each cruise an observer participates in it is important there be a signed contract or contract addendum

between the observer and observer provider. As pointed out in Comment 24, not all observer providers have a contract with the union, therefore, without this regulation NMFS has no assurances that observers will have the protection of a contract. In addition, regulations such as § 679.50(i)(2)(v) rely on there being a contract between the observer and observer provider.

Comment 26: Observers often line up work while they are traveling and without access to fax, e-mail, or mail. In addition, observers often arrive in Seattle and depart for Anchorage that same evening, and in such cases we should not be expected to get a contract addendum to them until they are already in briefing. In other cases, observers who have been granted a briefing waiver and are being deployed on an emergency basis (to take the place of an injured or ill observer for instance) do not stop in Seattle or Anchorage before reaching their port of embarkation. In these cases we should not be expected to get a contract addendum to them until early in their field deployment. As written, this requirement for a contract between an observer and their provider will decrease the flexibility we have developed to cope with unforeseen coverage problems. We are bound by our contract with the union whether or not we have a signed addendum with an observer; as a union contractor, we find this regulation unnecessary.

Response: Regulations at § 679.50(i)(2)(C) require that a written contract must be signed prior to an observer's deployment. According to § 679.2, a deployment begins upon arrival at the point of embarkation (see also response to Comment 3). Except for emergency situations, as outlined in the comment, obtaining a signed written contract should not be problematic for observer providers. At least one observer provider has an office in each of the major ports or cities observers travel through on their way to deployments (i.e., Anchorage, Seattle, Kodiak and Dutch Harbor). Given the fact that an observer must travel through at least one of these locations in order to reach a vessel or processor, NMFS believes observer providers will have ample opportunity to get a contract or contract addendum to observers prior to their deployment. See also response to Comments 24 and 25.

Comment 27: We are opposed to the proposed regulation that NMFS would require observer providers to obtain a signed contract from the observer prior to deployment. We had a teleconference on this issue and after much discussion, NMFS said they would not pursue this

regulation. This proposed regulation was not included in the changes proposed to the Council so they have not had an opportunity to comment on it.

Response: NMFS would like to clarify. The meeting referred to in the comment occurred on November 7, 2001, which was very early on in the regulatory process. At this meeting NMFS agreed to not pursue a requirement that observer providers have a signed contract with each observer before the observer enters training or briefing. NMFS agreed to this for the reasons outlined in Comment 26. The regulation was resurrected in a new format, which requires a signed contract prior to deployment, as the regulations were developed for reasons outlined in the response to Comment 25. See also response to Comment 7.

Comment 28: In the section of the proposed regulations that deals with new physical ailments prior to observer deployment, we believe the word "not" has been misplaced. We believe the regulation should read, "An observer provider must assign to vessels or shoreside or floating processors only observers: who have not informed the observer provider at the time of embarkation that he or she is experiencing any new physical ailments or injury since submission of the physician's statement..." By rewording the regulation observers will only be required to contact their provider if there is a problem, which will cut down on unnecessary communication expenses and free up time better spent dealing with observers who have informed us of an illness or injury. We think it is a mistake to single out "physical" ailments for reporting. Mental illness needs to be included in whatever language is settled upon.

Response: NMFS agrees and has made the necessary word change and added mental illness to § 679.50(i)(2)(iii)(B).

Comment 29: Observers are responsible for informing us in a timely manner if they are sick or injured, and we are responsible for having their illness or injury addressed before they return to work, whether on the same or another vessel. Under our approach, medical personnel determine whether an observer can work or not. Usually the medical personnel and the observer are in agreement as to the observer's fitness, but where there is disagreement, the situation is most likely to be one where the observer thinks they can go on working, but medical staff disagree. The proposed text, which would allow the provider to take an observer's word as to their fitness, could lead us to deploy observers who are less fit as a group

than the observers who get deployed under our current approach.

Response: NMFS agrees. See response to comment 28.

Comment 30: We view this regulatory package as yet another short-term band-aid for problems that require a long-term solution. The background statement indicates the Observer Advisory Committee and Council have failed to develop a new plan. The agency needs to take the lead to revamp the Observer Program by instituting the Research Plan (or something similar) with or without the Council's approval. The Council process has not produced a solution in over a decade; why should we expect this to change within the next five years?

Response: NMFS agrees that long term solutions to several longstanding issues within the Observer Program have been difficult to identify, develop, and implement. NMFS recognizes that a leadership role exists for the agency in providing long term changes to the Observer Program and is committed to refocusing effort toward this goal. NMFS recognizes, however, that effective change will require support from the Council and intends to work within the public Council process to develop and ultimately implement necessary changes. Notwithstanding lack of action since repeal of the Research Plan in 1995, we remain optimistic that meaningful changes can and will be pursued over the next 5-year period.

Comment 31: The proposed rule states, "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." This language is confusing since many vessels require 100 percent observer coverage and the general prohibitions of the Magnuson-Stevens Act (MSA) at § 600.725(s) state that vessels may not "fish without an observer when the vessel is required to carry an observer." The proposed rule seems to conflict with the MSA.

Response: NMFS would like to clarify statements made in the preamble to the proposed rule. 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. From the perspective of the Coast Guard, this program is voluntary as the Coast Guard does not require commercial fishing vessels to undergo these inspections. NMFS, however, mandates otherwise in regulations that require fishing vessels

carrying observers to obtain a Coast Guard inspection in order to be issued a valid commercial fishing vessel safety decal. Thus, while the Coast Guard program is voluntary, obtaining a valid safety decal is mandatory under NMFS regulations for vessels carrying observers. NMFS disagrees that this approach conflicts with the Magnuson-Stevens Act.

Comment 32: While we would prefer that staff be able to verify fishing vessel safety decals, it just is not possible for staff to be in every single port where we deploy observers. If an observer verifies the decal, will that alone meet this NMFS requirement? If our records indicated that an observer verified the decal last week or last month and that it is still current, does that suffice, or does the next observer need to call it in too? Would it be more efficient to have safety decal information provided by the Observer Program and/or the Coast Guard about who has current stickers and/or safety concerns/complaints?

Response: On page 58467 of the proposed rule, NMFS outlined who could verify fishing vessel safety decals to satisfy this requirement. One of the options allows observer provider employees, including observers, to verify the presence of a valid decal and convey that information to the observer provider via phone, fax, or e-mail. As outlined above, this verification must be conveyed to the observer provider prior to the observer(s) embarking. A decal must be verified before every observer or set of observers embarks on a vessel. In addition to decals expiring, they can be revoked by the Coast Guard if safety violations are noted. For this reason, NMFS believes the most efficient way to verify safety decal information is for the observer provider to do it prior to each observer embarking on a vessel.

Comment 33: A fishing vessel safety decal does not ensure a vessel is currently safe. Decals are good for two years! Having a Coast Guard safety decal is not an effective solution to the problem at hand. We feel the regulations should be strengthened on the backside of the issue. What steps does an observer provider take if an observer reports an unsafe vessel? Our policy has always been to support the observer should he or she decide not to board a vessel due to safety concerns.

Response: NMFS agrees that having a valid fishing vessel safety decal does not guarantee a vessel is safe. However, it does mean that the vessel has undergone an inspection by Coast Guard personnel who are specialists in fishing vessel safety. If an observer reports an unsafe vessel to their provider, regulations at § 679.50(i)(2)(x)(1)(3)

require the observer provider to report any concerns about vessel safety or marine casualty to the Observer Program within 24 hours. NMFS has a long history of working with the Coast Guard to investigate and correct safety issues. Observer providers and other entities are encouraged to forward specific safety suggestions to the Coast Guard. Also see response to Comment 4.

Comment 34: NMFS should focus on improving the communication between NMFS, providers, USCG, and vessels to create a database of safety issues. NMFS must notify providers if observers or NMFS staff raise safety concerns about a vessel. NMFS should develop training protocols to ensure observers can verify vessel safety. The proposed regulation on verifying fishing vessel safety decals does not adequately address the issue, and it will be difficult to enforce. It seems the main purpose of this regulation is to protect NMFS' liability interests and not the real issue of vessel safety.

Response: NMFS has worked very closely with the Coast Guard, NMFS Enforcement, observer providers, and the fishing industry when vessel safety issues arise. This cooperation will continue in the future. NMFS continues to develop observer safety training and works in cooperation with the Coast Guard to ensure observers are able to identify and verify safety equipment when they board a vessel. Safety issues identified by NMFS staff and observers are documented and passed on to the appropriate authorities for resolution. Specific recommendations on how to improve observer safety are welcome. Also see responses to Comment 4 and Comments 31 - 33.

Comment 35: The regulation requiring mid-cruise data reviews has been debated endlessly, and we agree with the final wording in principle, but we request it be amended to read, "The observer does not at any time during their deployment travel through a location where Observer Program staff are available and able to complete in a timely manner an in-person data review." We are concerned that if NMFS staff are not able to complete mid-cruises in a timely manner (e.g., due to office closures, observers arriving in Anchorage after business hours, etc.) that observers, vessels, and observer providers will be forced to wait. We would also like NMFS to clarify that the observer providers will not have to change their normal logistics if doing so would adversely affect the deployment of observers. For example, there will be situations where an observer will fly through Anchorage but only to make a connecting flight to another port.

Response: As worded, this regulation states that NMFS staff must be available for an observer to complete an in-person mid-deployment data review. If an observer will be traveling on a weekend, holiday, or after business hours through a location where the Observer Program has staff, NMFS has committed to making staff available for in-person mid-deployment data reviews. NMFS staff expect observer providers to advise them in advance in these situations. If after such notification NMFS staff are not available, the observer provider would be required to ensure their observer complete a phone or fax mid-deployment data review as described in the observer manual. In certain situations it may be necessary for NMFS to affect normal deployment logistics if an observer's errors were so egregious that the agency felt they could only be dealt with in-person. NMFS does not believe this will happen very often, but affecting logistics for an in-person data review would be in the public's interest if it does.

Comment 36: In the preamble, NMFS states, "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 is true of pollock but not of cod, rockfish, flatfish, etc. In its current form, this topic has not been addressed and will place unnecessary financial burden on both observer providers and industry.

Response: The preamble language of the proposed rule was too vague and did not adequately describe the new regulation. However, the regulatory text was correct. At § 679.50(i)(2)(vii)(D) the regulations state, "An observer provider must not: (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." NMFS asserts that in the pollock fishery an observer samples the catch typically as it enters the plant, but observers delivering from other fisheries typically do not have duties at the plant other than transmitting their data to NMFS. The regulation clearly describes that observers must be allowed to sample and transmit their data, neither of which will place an unnecessary burden on observer providers or industry.

Comment 37: There was no discussion of a NMFS-provided pamphlet to be distributed to physicians by the observer provider at any time during the Council process. We have not had time to review this regulation with

the Council or NMFS and are uncertain what function it would serve. We feel it would duplicate unnecessarily information that is already provided to observers, observer providers, and physicians. We request this regulation be removed for proper review.

Response: NMFS did not specifically discuss the distribution of the pamphlet to physicians with the Council. NMFS did, however, discuss the necessity for this pamphlet to be distributed to potential observers. The purpose of the pamphlet, in part, is to provide consistent, factual information about observing to observer candidates so that they can make an informed decision as to whether observing is for them. NMFS feels that physicians, who judge an observer candidate's fitness for this job, should have that same information. Regulations at § 679.50(i)(2)(x)(C) require 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..." NMFS feels distribution of the NMFS-provided pamphlet to physicians by observer providers is the most effective way to ensure they make informed decisions on observer fitness. See also response to Comment 16.

Comment 38: Within the proposed regulation at § 679.50(j)(2)(ii)(D)(3) we are unclear what "substantially affected" means in this context. For example, if an observer has a boyfriend/girlfriend that works on a vessel, can the observer be deployed to a different vessel within the same fishing company? Please clarify and provide examples.

Response: If the performance or non-performance of an observer's duties would benefit or harm the value or substance of vessel or processing plant personnel or the profits such individuals receive, it would meet the definition of "substantially affected." NMFS encourages observer providers to seek guidance from NMFS for unique situations to better ensure that conflict of interest standards are not violated.

Comment 39: With respect to observer provider responsibilities in the proposed rule, item 2 under § 679.50(i)(2)(i)(C) requires the observer's signed contract to contain, as a condition of continued employment, a provision that catch messages be submitted to the Observer Program at least every 7 days. If an observer has been deployed to shoreside fisheries and is not able to submit their catch message prior to their next assignment (due to waiting for a fish ticket, paperwork not complete, no access to communications equipment at the plant,

etc.) and the observer is deployed to a vessel that will not return to port within seven days so the catch message may be submitted, is the observer in breach of contract? We request NMFS clarify what "unless otherwise specified by the Observer Program" means as it relates to this proposed wording.

Response: NMFS has specified that catch messages be received at least every 7 days because that schedule typically satisfies the quota tracking needs. In certain situations (e.g., a fishery is about to close), NMFS requests that observers submit their catch messages twice per week or daily to allow for a more exact estimation of when fishing needs to cease before the quota is exceeded. The wording, "unless otherwise specified by the Observer Program" is necessary to accommodate more frequent data needs in these situations. As outlined in the comment, situations exist when an observer cannot submit their catch message at

least every 7 days, and NMFS fully understands this. When catch messages are not being received at least every 7 days, NMFS will examine the situation and make a determination as to whether the observer is being negligent in the performance of their duties and therefore not fulfilling an element of their contract. This information will be provided to the observer provider.

Comment 40: NMFS would like to require that observer providers submit in a weekly deployment/logistics report the location of unassigned observers. This is another new requirement added with no previous discussion. We would like NMFS to provide information as to why this is important and how it will be used. An unassigned observer's location may change several times before the next weekly report is submitted. Why does NMFS need to know where these individuals are?

Response: Following the Council process and during the development of

these regulations, NMFS recognized that groundfish observers work as observers in other fisheries and sometimes have breaks in the middle of a cruise. NMFS also recognized that it did not always know where these observers were. At times NMFS needs to locate these individuals to get data that has not been received, correct data that may be erroneous, or put them in contact with NMFS Enforcement for a violation they witnessed. While NMFS understands that an observer's location may be in flux, the agency feels it is important to know where observers with an open cruise are or at least have an idea of where they are throughout their cruise so they may be contacted.

**Changes From the Proposed rule to the Final Rule**

Several changes from the proposed rule to the final rule are implemented under this action. These changes and the reasons for them are listed below.

PROPOSED RULE CITATION AND TEXT	FINAL RULE CITATION AND TEXT	REASONS FOR CHANGE
<p>§ 679.50(e)(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.</p>	<p>§ 679.50(e)(3) ..... Vessel, shoreside processor, and stationary floating processor owners and operators, as well as observers and observer providers 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, P.O. Box 15700, Seattle, Washington 98115-0070 or transmitted by facsimile to 206-526-4066..</p>	<p>Changed as a response to Comment 11 and an update to the mailing address of the NMFS Observer program</p>
<p>§ 679.50(e)(1), (h), and (h)(1)-(2)</p>	<p>Replace the term "carry" with "use" .....</p>	<p>The proposed rule terminology referring to vessels and shoreside processors "carrying" observers or NMFS staff or individuals authorized by NMFS, is not technically correct with respect to shoreside processors. Thus, replacing word "used" with "carry" in the regulatory text will more uniformly apply to both vessels and shoreside processors.</p>
<p>§ 679.50(h)(1) and (2)</p>	<p>Add the phrase "or for other conservation and management purposes" to the end of each paragraph.</p>	<p>This addition is necessary to acknowledge that the possibility exists that the deployment of NMFS staff or an individual authorized by NMFS may result in deployments to vessels or processors beyond those currently required at § 679.50(c) and (d), or § 679.7(f)(4). Vessels and processors currently not required to carry observers under § 679.50(c) and (d) or § 679.7(f)(4) would not be subject to deployment of NMFS staff or other authorized individuals for purposes of paragraph (h) of this section in this final rule.</p>

PROPOSED RULE CITATION AND TEXT	FINAL RULE CITATION AND TEXT	REASONS FOR CHANGE
<p>§ 679.50(i)(1)(v) (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.</p>	<p>§ 679.50(i)(1)(v) ..... (v) Agency determination on an application--(A) Approval of an application. Upon determination by the review board that the application is complete and all evaluation criteria are met, an IAD is made to approve the application and the observer provider permit application review board will issue an observer provider permit to the applicant..</p>	<p>This revision simply reflects a technical edit to clarify regulatory text.</p>
<p>§ 679.50(i)(2)(i)(B)(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.</p>	<p>§ 679.50(i)(2)(i)(B)(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 or at the Observer Program's web site at <a href="http://www.afsc.noaa.gov/refm/observers/default.htm">http://www.afsc.noaa.gov/refm/observers/default.htm</a>.</p>	<p>Changed as a response to Comment 16 to clarify that Observer Program documents and policy guidance also can be obtained from the Observer Program website.</p>
<p>§ 679.50(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:</p>	<p>§ 679.50(i)(2)(i)(C) ..... For each observer employed by an observer provider, either a written contract or a written contract addendum must exist that is signed by the observer and observer provider prior to the observer's deployment and that must contains the following provisions for continued employment:</p>	<p>Changed as a response to Comment 24</p>
<p>§ 679.50(i)(2)(iii)(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</p>	<p>§ 679.50(i)(2)(iii)(B) ..... Who have not informed the provider prior to at the time of embarkation that he or she is not experiencing a mental illness or a physical ailment or injury developed 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.</p>	<p>Changed as a response to Comment 28. A similar provision also was added to the list of responsibilities of observer providers at § 679.50(i)(2)(i)(C)(4) that requires providers to include a provision in their contract or contract addendum with observers that observers inform them of any newly developed mental or physical ailment prior to embarkation.</p>
<p>§ 679.50(i)(2)(x)(E) Observer debriefing registration. The observer provider must contact the Observer Program within 5 days after the completion of an observer's deployment</p>	<p>§ 679.50(i)(2)(x)(E) ..... Observer debriefing registration. The observer provider must contact the Observer Program within 5 business days after the completion of an observer's deployment.</p>	<p>Changed as a response to Comment 15.</p>
<p>§ 679.50(i)(2)(x)(G) Copies of contracts with observer providers and observers.</p>	<p>§ 679.50 (i) (2) (x) (G) ..... Copies of observer provider contracts with entities requiring observer services and with observers..</p>	<p>The revision to the heading of this paragraph (G) is edited to more accurately reflect the content of the regulatory text in this paragraph</p>
<p>§ 679.50(i)(2)(x)(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.</p>	<p>§ 679.50(i)(2)(x)(H) ..... Change in observer provider management and contact information. Except for changes in ownership addressed under paragraph (i)(1)(vi) of this section, an observer provider must submit notification of any other change to the information submitted on the provider's permit application under paragraph (i)(1)(ii)(A) through (D) 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. Any information submitted under (i)(1)(ii)(C) or (i)(1)(ii)(D) of this section will be subject to NMFS review and determinations under (i)(1)(iii) through (viii) of this section..</p>	<p>Changes in observer provider management information, including changes to board members or corporate officers who provide input into company decisions and operating protocol, must be assessed relative to potential conflict of interest and culpability as set forth under (i)(1)(ii)(C) and (D). This is necessary for the same reasons this information is important in the original observer provider application process.</p>

PROPOSED RULE CITATION AND TEXT	FINAL RULE CITATION AND TEXT	REASONS FOR CHANGE
<p>§ 679.50(i)(3)(iii)                      Limitations on conflict of interest. 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.</p>	<p>§ 679.50(i)(3)(iii) .....                      Limitations on conflict of interest. Must not solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value from anyone who conducts fishing or fish processing 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..</p>	<p>Many activities are regulated by NMFS, but only regulated fishing and fish processing activities are related to the conflict of interest issue being considered. Thus, the intended effect of this revision to the proposed rule is to narrow the scope of activities that could lead to conflict of interest concerns.</p>
<p>(j)(1)(iii)(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.</p>	<p>(j)(1)(iii)(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, unless NMFS determines that the observer has not been deployed, or has not performed sampling duties, or has not been debriefed successfully in the preceding 18 months..</p>	<p>This change is necessary to limit automatic re-certification to only those prior observers who were deployed within the 18 months preceding their first deployment after December 31, 2002. An 18-month time frame is reasonable, given the changes in fisheries and fishery regulations that typically occur over this time period that could affect the applicability of certification training received prior to 2003.</p>
<p>(j)(1)(iii)(B) (4) (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.</p>	<p>(j)(1)(iii)(B)(4)(ii) .....                      If a candidate fails training, he or she will be verbally notified of the unsatisfactory status of his or her training in writing on or before the last day of training. Within 10 business days of the verbal notification, the observer candidate will be notified in writing. The written notification will indicate why the candidate failed the training; whether the candidate can retake the training, and whether the candidate may or may 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..</p>	<p>Change in response to Comment 13 and to provide a more realistic time frame for written notification.</p>
<p>§ 679.50 (j) (1) (v) (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* * *</p>	<p>§ 679.50(j)(1)(v)(A) Certification training endorsement. A certification training endorsement signifies the successful completion of the training course required to obtain observer certification this endorsement. A certification training endorsement is required ***.</p>	<p>Technical edit to clarify the subject of the regulatory text.</p>

PROPOSED RULE CITATION AND TEXT	FINAL RULE CITATION AND TEXT	REASONS FOR CHANGE
<p>§ 679.50 (j) (3) (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.</p>	<p>§ 679.50(j)(3)(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 can be made effective upon issuance of the IAD in cases of willfulness or those cases in which public health, interest, or safety require such actions. In such cases, the suspension/decertification official will state in the IAD that suspension or decertification is effective at time of issuance and the reason for the action..</p>	<p>NMFS is revising the proposed rule regulatory text to more accurately reflect the specific legal process for suspension and decertification of certified observers at time of issuance of an IAD under 5 U.S.C. 558.</p>

**Classification**

This final rule contains collection-of-information requirements subject to the Paperwork Reduction Act 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 to provide copies of college transcripts and disclosure statements to their observer provider; 15 minutes for observer providers to submit to NMFS copies of observer candidates' 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; 2 hours for report of observer harassment, observer safety concerns, or observer performance problems; 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).

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

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

NMFS prepared a FRFA, which describes the impact this final rule may have on small entities. The FRFA incorporates the Initial Regulatory Flexibility Analysis (IRFA) and its findings. A copy of the FRFA is available from NMFS (see ADDRESSES). No comments on the IRFA were received during the comment period that would result in findings that differ from those previously described. A description of the impacts of this action on small entities was summarized in the proposed rule (67 FR 58452, September 16, 2002).

**List of Subjects in 50 CFR Part 679**

Alaska, Fisheries, Recordkeeping and reporting requirements.

Dated: November 27, 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 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 who is awarded NMFS observer certification to carry out observer responsibilities under this part, and 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 of this part.

\* \* \* \* \*

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 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. In § 679.50 make the following amendments:

a. 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)(4)(vi)(C);

b. 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);

c. 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).

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

e. Remove paragraph (j); redesignate paragraphs (e) through (i) as (f) through (j), respectively; add a new paragraph (e); and revise the section heading and the newly redesignated paragraphs (h), (i), and (j) to read as follows:

**§ 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 use, 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, as well as observers and observer providers, 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, P.O. Box 15700, 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 use 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 use 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 or for other conservation and management purposes.

(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 use 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 or for other conservation and management purposes.

(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.

(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, except that 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. 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 (i)(1)(ii)(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 paragraph (i)(1) of this section. 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) Satisfactory 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*. Upon determination by the review board that the application is complete and all evaluation criteria are met, an IAD is made to approve the application and the observer provider permit application review board will issue an observer provider permit to the applicant.

(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 and 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 or at the Observer Program's web site at <http://www.afsc.noaa.gov/refm/observers/default.htm>.

(C) For each observer employed by an observer provider, either a written

contract or a written contract addendum must exist that is signed by the observer and observer provider prior to the observer's deployment and that contains 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;

(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 and the observer completes a phone or fax mid-deployment data review as described in the observer manual; and

(4) The observer inform the observer provider prior to the time of embarkation if he or she is experiencing any new mental illness or 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;

(ii) *Ensure that observers complete duties in a timely manner.* An observer provider must ensure that observers employed by that observer provider 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 not informed the provider prior to the time of embarkation that he or she is experiencing a mental illness or a physical ailment or injury developed 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.

(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 in a single deployment;

(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; or

(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 business 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 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 business 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 observer provider contracts with entities requiring observer services and with 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 (c)(1)(iv) of this section;

(2) Vessels required to have observer coverage as specified at paragraphs (c)(1)(ii), (c)(1)(v), and (c)(1)(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.* Except for changes in ownership addressed under paragraph (i)(1)(vi) of this section, an observer provider must submit notification of any other change to the information submitted on the provider's permit application under paragraphs (i)(1)(ii)(A) through (D) 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. Any information submitted under (i)(1)(ii)(C) or (i)(1)(ii)(D) of this section will be subject to NMFS review and determinations under (i)(1)(iii) through (viii) 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 (h)(2)(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 fishing or fish processing 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 their 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, unless NMFS determines that the observer has not been deployed, or has not performed sampling duties, or has not been debriefed successfully in the preceding 18 months.

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

(4) Have 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 verbally notified of the unsatisfactory status of his or her training on or before the last day of training. Within 10 business days of the verbal notification, the observer candidate will be notified in writing. The written notification will indicate why the candidate failed the training; whether the candidate can 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 and 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 this endorsement. A certification training 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 can be made effective upon issuance of the IAD in cases of willfulness or those cases in

which public health, interest, or safety require such actions. In such cases, the suspension/decertification official will state in the IAD that suspension or decertification is effective at time of issuance and the reason for the action.

(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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