

Dated: January 24, 2007.

**William T. Hogarth,**

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

For the reasons set out in the preamble, 50 CFR parts 224 and 660 are proposed to be amended as follows:

**PART 224—ENDANGERED MARINE AND ANADROMOUS SPECIES**

1. The authority citation for part 224 continues to read as follows:

**Authority:** 16 U.S.C. 1531–1543 and 16 U.S.C. 1361 *et seq.*

2. In § 224.104, paragraph (c) is revised to read as follows:

**§ 224.104 Special requirements for fishing activities to protect endangered sea turtles.**

\* \* \* \* \*

(c) Special prohibitions relating to sea turtles are provided at § 223.206(d).

**PART 660—FISHERIES OFF THE WEST COAST STATES**

3. The authority citation for part 660 continues to read as follows:

**Authority:** 16 U.S.C. 1801 *et seq.*

4. In § 660.713, paragraph (c)(2) is revised to read as follows:

**§ 660.713 Drift gillnet fishery.**

\* \* \* \* \*

(c)(2) *Pacific loggerhead conservation area.* No person may fish with, set, or haul back drift gillnet gear in U.S. waters of the Pacific Ocean east of the 120° W. meridian from June 1 through August 31 during a forecasted, or occurring, El Nino event off the coast of southern California.

(i) *Notification of an El Nino event.* The Assistant Administrator will publish in the **Federal Register** a notification that an El Nino event is occurring, or is forecast to occur, off the coast of southern California and the requirement of a closure under this paragraph (c)(2). Furthermore, the Assistant Administrator will announce the requirement of such a closure by other methods as are necessary and appropriate to provide actual notice to the participants in the California/Oregon drift gillnet fishery.

(ii) *Determination of El Nino conditions.* The Assistant Administrator will rely on information developed by NOAA offices which monitor El Nino events, such as NOAA's Climate Prediction Center and the West Coast Office of NOAA's Coast Watch program, in order to determine whether an El Nino is forecasted or occurring for the coast of southern California. The Assistant Administrator will use the monthly sea surface temperature anomaly charts to determine whether

there are warmer than normal sea surface temperatures present off of southern California during the months prior to the closure month for years in which an El Nino event has been declared by the NOAA Climate Prediction Center. Specifically, the Assistant Administrator, will use sea surface temperature data from the third and second months prior to the month of the closure for determining whether El Nino conditions are present off of southern California.

(iii) *Reopening.* If, during a closure as described within this paragraph (c)(2), sea surface temperatures return to normal or below normal, the Assistant Administrator may publish a **Federal Register** notice announcing that El Nino conditions are no longer present off the coast of southern California and may terminate the closure prior to August 31.

\* \* \* \* \*

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 600**

**RIN 0648-AU46**

[Docket No. 070118011-7011-01; I.D. 062906A]

**Magnuson-Stevens Act Provisions; General Provisions for Domestic Fisheries; Observer Health and Safety**

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** This proposed rule would enhance the safety of observers and the efficiency of their deployment. The proposed rule would clarify prohibited actions regarding observers, reinforce that an observer may not be deployed or stay aboard an unsafe vessel, clarify when a fishing vessel is inadequate for observer deployment and how an owner or operator can resolve discrepancies, improve communications between observer programs and fishing vessel owners and operators, and provide for an alternate safety equipment examination of certain small fishing vessels. This proposed rule is necessary to maintain and improve the safety and effectiveness of fishing vessel observers in carrying out their duties as authorized by the Magnuson-Stevens

Fishery Conservation and Management Act (Magnuson-Stevens Act) and the fishery management plans and regulations adopted under the Magnuson-Stevens Act.

**DATES:** Comments must be received by 5 p.m., EST, on March 1, 2007.

**ADDRESSES:** You may submit comments on this proposed rule or its Initial Regulatory Flexibility Analysis (IRFA), identified by 0648-AU46, by any of the following methods:

• E mail: [0648-AU46@noaa.gov](mailto:0648-AU46@noaa.gov). Include in the subject line of the e mail comment the following document identifier: "Observer Safety Measures." Comments sent via e mail, including all attachments, must not exceed a 10 megabyte file size.

• Federal e Rulemaking portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

• Mail: Lisa Desfosse, Team Leader, National Observer Program, National Marine Fisheries Service, 1315 East-West Highway, Rm 12525, Silver Spring, MD 20910

• Fax: 301-713-4137.

Copies of the Regulatory Impact Review prepared for this action may be obtained from Lisa Desfosse. Requests should indicate whether paper copies or electronic copies on CD-ROM are preferred. These documents are also available at the following website: <http://www.st.nmfs.noaa.gov/st4/nop/index.html>.

**FOR FURTHER INFORMATION CONTACT:** Lisa Desfosse at 301-713-2328.

**SUPPLEMENTARY INFORMATION:**

**Background**

The Magnuson-Stevens Act, as amended; (16 U.S.C. 1801 *et seq.*), the Marine Mammal Protection Act, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the Endangered Species Act, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the Atlantic Tunas Convention Act, as amended (ATCA; 16 U.S.C. 971 *et seq.*) authorize the Secretary of Commerce (Secretary) to station observers aboard commercial fishing vessels to collect scientific data required for fishery and protected species conservation and management, to monitor incidental mortality and serious injury of marine mammals and other species listed under the ESA, and to monitor compliance with existing Federal regulations. In addition, under the South Pacific Tuna Act of 1988 (SPTA, 16 U.S.C. 973 *et seq.*), NMFS may require observers in the South Pacific Tuna Fishery.

Regulations governing health and safety of observers are codified at 50 CFR 600.725 and 600.746. These

regulations apply to any vessel designated to carry an observer as part of a mandatory or a voluntary observer program under the Magnuson-Stevens Act, MMPA, ESA, ATCA, SPTA, or any other U.S. law. The proposed rule is necessary to maintain and improve the safety and effectiveness of observers in carrying out their duties as authorized by the Magnuson-Stevens Act, and the fishery management plans and regulations adopted under the Magnuson-Stevens Act.

Specifically, the proposed rule would clarify and update prohibitions, change paragraph headings to better reflect contents, make pre-trip vessel safety checks mandatory, adopt a NMFS alternate safety equipment examination using a vessel safety checklist of U.S. Coast Guard (USCG) safety requirements for vessels under 26 ft (8 m) in length under the limited circumstances in which a USCG Commercial Fishing Vessel (CFV) Safety Examination cannot be conducted, and change the observer safety requirements to apply from the time a vessel is notified that it has been selected to carry an observer, rather than commencing at the moment the observer begins boarding the vessel. The proposed rule would improve the clarity of the regulations for vessel owners and operators, strengthen the ability of NMFS to enforce observer safety requirements, reduce the likelihood and associated costs of delayed fishing trips or missed observer days at sea, and improve NMFS observer data by reducing vessel selection bias associated with missed observer trips and inability to cover smaller vessels.

#### **Observer Samples and Observer Protection**

This proposed rule would expand the prohibitions of § 600.725, revising paragraphs (t) and (u) to prohibit tampering with or destroying an observer's samples or equipment, or interfering with a NMFS approved observer. This change is necessary because observers have reported that fishing vessel crews have interfered with their sampling programs by throwing samples or equipment overboard or otherwise destroying or tampering with samples or equipment. The current regulations do not expressly prohibit tampering with samples or equipment. The changes would also reflect that NMFS observers are now sometimes assigned to shoreside plants by removing the words "aboard a vessel." The proposed rule modifies paragraph (p) to reflect the addition of the NMFS alternative safety examination option and to clarify that

passing safety examination conditions must be maintained.

The proposed rule also adds paragraph (w), which makes it unlawful for a person to: "fail to maintain safe conditions for the protection of observers including compliance with all USCG and other applicable rules, regulations, or statutes applicable to the vessel and which pertain to safe operation of the vessel." This language reinforces that vessel owners or operators are responsible for assuring that USCG regulations are followed at all times an observer is aboard their vessel.

#### **Observer Safety**

The proposed rule changes the heading of § 600.746(b) from "Observer Requirement" to "Observer Safety" to better reflect the subject matter of the section. Currently, § 600.746(b) states that an observer is not required to board, or stay aboard, a vessel that is inadequate or unsafe as described in paragraph (c) of the section. The definition was intended to provide the observer with discretion not to board a vessel. This language is open to misinterpretation in that it would seem not to allow an observer to board a vessel to determine if the vessel is unsafe. This action proposes to replace the term "is not required" and replace it with "will not be deployed," clarifying the original intent of the regulation that observers not depart in or stay aboard vessels inadequate for observer deployment. Further, the term "inadequate or unsafe" in these rules would be changed to "inadequate for observer deployment." This change would clarify that, while NMFS cannot determine the absolute safety of a vessel, NMFS can require standards of accommodation and safety on a vessel prior to an observer deploying in that vessel.

#### **Proof of Examination**

Under the current regulations at § 600.746(c), a vessel is inadequate or unsafe for carrying an observer unless the vessel's owner or operator can: (1) show proof to NMFS of either a current USCG CFV Safety Examination decal or a USCG certificate of examination; and (2) notify NMFS of that compliance when requested. This proposed rule would amend the current regulations to allow the owner or operator to show proof of passing the USCG CFV Safety Examination when the decal may have been lost due to window replacement, other repair, or accident. The proposed rule also adds language to paragraph (d)(1), clarifying that the decal must have been issued in the past two years,

or at an interval consistent with current USCG regulations. This change is necessary to give the proposed rule flexibility in the event that USCG changes its safety decal inspection interval to a longer or shorter period.

#### **Accommodations and Safety Requirements**

This proposed rule would update the accommodations requirement in the regulations. Each NMFS region will provide this information to vessel owners or operators in a manner appropriate to that region or fishery, as established by the appropriate Regional Administrator. The proposed rule would also clarify that both the accommodations requirement and either the USCG CFV Safety Examination requirement or alternate examination procedure set out in paragraph (g) of this section must be satisfied for the vessel to be considered adequate under the requirements of paragraph (c).

#### **Vessel Pre-trip Safety Check**

Recent fishing vessel casualties have highlighted the importance of safety equipment in preventing or reducing the severity of accidents on board fishing vessels. The current regulations at § 600.746(c)(3) encourage, but do not require, observers to use the pre-trip safety check, including the check for USCG required safety equipment. A vessel may have met the requirements for issuance of a current USCG CFV Safety Examination decal, or passed an appropriate USCG inspection. However, the equipment required for issuance of the decal or passing of the inspection may not be present or within its inspection parameters prior to the initial deployment of the observer (for example, the vessel may only have enough personal flotation devices for the crew, not including the observer).

This proposed rule would require that the vessel's captain or the captain's designee accompany the observer in making a safety check to verify compliance with safety requirements prior to the initial observer deployment. The checklist used by the observer will include the six items listed in the current regulation, plus additional fishery-area and vessel specific items required by the USCG. The vessel's captain or designee would also accompany the observer in a walk through the vessel to ensure that no obviously hazardous conditions exist aboard the vessel. This pre-trip check may be incorporated into the vessel safety orientation provided by the vessel to the observer as required by 46 CFR 28.270.

The proposed rule would also clarify that an emergency position indicating radio beacon (EPIRB), when required, must be registered to the vessel where it is located, and that survival craft, when required, must have sufficient capacity to accommodate the total number of persons, including the observer(s), that will embark on the voyage.

#### **NMFS Alternate Safety Equipment Examination**

The current regulations do not allow for an alternative to the USCG CFV Safety Examination in cases where NMFS observers are required to board smaller vessels in remote areas (primarily in Alaska). Although these small vessels generally comply with the USCG CFV Safety Examination standards, their small size precludes them from traveling to a location where a CFV safety examination can be performed, and USCG personnel, in certain circumstances, may not be available to travel to all remote locations to conduct an examination. This proposed rule would provide an alternative method for vessels less than 26 ft (8 m) in length to meet the safety requirement by passing an alternate safety equipment examination that is consistent with the USCG safety standards for commercial fishing vessels under 26 ft. USCG safety requirements for commercial fishing vessels are at 46 CFR part 28. A NMFS approved observer, NMFS employee, or an authorized observer provider would conduct the alternate safety examination. This alternate safety examination would only be valid for the trip for which the vessel was selected to carry an observer. This alternate safety examination would allow observer programs to increase coverage of remote fisheries, which would provide more comprehensive scientific information. Vessels would still be required to comply with applicable regional requirements governing observer accommodations, which may address adequacy, health, and safety concerns beyond the scope of USCG standards.

#### **Duration**

The current regulations at § 600.746(e) state that the requirements of this section apply to the time of the observer's boarding, at all times the observer is aboard, and at the time the observer is disembarking from the vessel. This proposed rule would amend the current regulations by adding the phrase "at the time of written or verbal selection of the vessel to carry an observer" by the observer program. This would make it clear that vessels are

required to comply with the observer safety requirements from the time the vessel is selected to carry an observer, which is days or weeks in advance of the actual deployment date of an observer to the selected vessel, until the observer disembarks the vessel at the end of the observed trip. This amendment should accelerate the process of placing observers aboard vessels, reduce vessel selection bias associated with missed observer trips, and reduce the costs of fishing trip delay by providing an additional assurance that the selected vessel complies with the regulations on the day the observed fishing trip is scheduled. It will also give NMFS authority to enforce the safety requirements prior to the deployment of an observer by, for example, checking vessels for compliance with safety requirements.

#### **Classification**

NMFS has preliminarily determined that the rule is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

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

#### *Initial Regulatory Flexibility Analysis (IRFA)*

Section 603 of the Regulatory Flexibility Act (RFA) requires that NMFS prepare an IRFA describing the economic impact this proposed rule, if adopted, would have on small entities. These economic impacts are discussed below. A description of the action, why it is being considered, the objectives of, and the legal basis for this action are found in the Background and SUMMARY sections of the preamble. This rule does not duplicate, overlap, or conflict with any relevant federal rules. There are no reporting, recordkeeping, or other compliance costs associated with this rulemaking.

#### *Description and Number of Entities Affected*

NMFS has defined all fish-harvesting or hatchery businesses that are independently owned and operated, not dominant in their field of operation, with annual receipts not in excess of \$4,000,000, as small businesses. NMFS estimates that approximately 8,925 commercial fishing vessels could be required to carry an observer in NMFS-regulated fisheries. Current, precise data on the number of commercial fishing vessels that are "small entities" is not presently available because year-to-year participation by such entities in any

given fishery is variable, due to economic, regulatory, climatic, and other forces. However, an estimate of 8,755–8,825 vessels was derived by combining the best estimates from data available to each of the regional programs.

The proposed rule clarifies an existing NMFS requirement that vessels display a USCG CFV Safety Examination decal. The decal is obtained after passing a USCG inspection of the vessel for compliance with USCG safety regulations. The inspection is scheduled at a time convenient to the vessel owner or operator, and is free of charge (except to some processor vessels). NMFS has not identified any disproportionate economic impacts between small and large entities for this action. Furthermore, there are no disproportionate economic impacts among groups of entities based on types of gear, areas fished, or vessel size.

#### *Preferred Alternative*

The benefits of the preferred alternative include increased safety for all crew members and observers. Potential costs to vessel owners or operators include the costs associated with putting the vessel in safe condition. However, this is already required by the existing NMFS regulations and is based on safety regulations promulgated and enforced by the USCG. Therefore, this rule should not impose new compliance costs.

This proposed rule does not require that vessel operators expend more than the existing rules require (e.g. for the purchase of an additional personal floatation device). However, failure of a vessel to comply with this proposed rule may cause loss of fishing time. The cost of a lost fishing day will vary among fisheries. For example, a fishing day at sea in a multispecies fishery in the Northeast region has been valued at an average of \$364, but this figure would vary in other fisheries, depending upon the value of the fishery, the type of management regime governing that fishery, and the degree to which a vessel derives its income from that fishery. The risk of loss of fishing time due to this proposed rule is minimal, because vessel owners are already required to comply with USCG safety regulations and to obtain a USCG CFV Safety Decal. NMFS anticipates that vessel owners will voluntarily ensure that their vessels comply with the safety requirements to avoid the loss of fishing time.

Vessels would incur a small cost in allocating the captain or other crew member's time to accompany the

observer on the pre-trip safety check, but this could be readily integrated into existing procedures, such as the existing requirement to orient the observer to the vessel (46 CFR 28.270). Additional benefits of this proposed rule include the avoidance of the loss of human life and the economic costs of non-lethal injury.

#### *"No Action" and Other Alternatives*

Under the "no action" alternative to this proposed rule, no new costs would be incurred. However, the difference between the cost of "no action" and the cost of the preferred alternative is minimal and NMFS believes that most of the affected vessels already voluntarily follow the USCG safety regulations and comply with the existing NMFS requirement for a USCG CFV Safety Decal.

Another alternative discussed by NMFS is to allow the observer to assess, in addition to the safety requirements set out in the proposed rule, a range of considerations, such as food and accommodation quality, competence of the vessel captain and crew, and drug or alcohol use by the captain or crew. This option would broaden the safety protections of observers, but would also enable the observer to make subjective, individual determinations that not all vessels would be able to economically meet for all observers. The risk of loss of fishing days under this alternative is greater than the preferred alternative.

Finally, NMFS considered making a NMFS employee or an authorized observer provider the judge of the adequacy of a vessel. NMFS does not believe that a NMFS employee or an observer provider is more likely to discover safety issues than the observer, so this alternative does not improve safety. This alternative also has the potential to increase the risk of lost fishing days while safety concerns are resolved, particularly if there is disagreement between the observer and NMFS or the observer provider about whether the vessel is adequate.

A copy of the IRFA is available from NMFS (see **ADDRESSES**).

#### **List of Subjects in 50 CFR Part 600**

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: January 24, 2007.

**William T. Hogarth,**

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

For the reasons set out in the preamble, 50 CFR part 600 is proposed to be amended as follows:

#### **PART 600—MAGNUSON—STEVENS ACT PROVISIONS**

1. The authority citation for part 600 continues to read as follows:

**Authority:** 5 U.S.C. 561 and 16 U.S.C. 1801 *et seq.*

2. In § 600.725, paragraphs (p), (t), and (u) are revised and paragraph (w) added to read as follows:

##### **§ 600.725 General prohibitions.**

\* \* \* \* \*

(p) Fail to show proof of passing the USCG Commercial Fishing Vessel Safety Examination or the NMFS alternate safety equipment examination, or fail to maintain the vessel safety conditions necessary to pass the examination, when required by NMFS pursuant to § 600.746.

\* \* \* \* \*

(t) Assault, oppose, impede, intimidate, or interfere with a NMFS-approved observer.

(u)(1) Prohibit or bar by command, impediment, threat, coercion, interference, or refusal of reasonable assistance, an observer from conducting his or her duties as an observer; or  
(2) Tamper with or destroy samples or equipment.

\* \* \* \* \*

(w) Fail to maintain safe conditions for the protection of observers including compliance with all USCG and other applicable rules, regulations, or statutes applicable to the vessel and which pertain to safe operation of the vessel.

3. In § 600.746, paragraphs (b) through (f) are revised and paragraphs (g) and (h) are added to read as follows:

##### **§ 600.746 Observers.**

\* \* \* \* \*

(b) *Observer safety.* An observer will not be deployed on, or stay aboard, a vessel that is inadequate for observer deployment as described in paragraph (c) of this section.

(c) *Vessel inadequate for observer deployment.* A vessel is inadequate for observer deployment and allowing operation of normal observer functions if it:

(1) Does not comply with the applicable regulations regarding observer accommodations (see 50 CFR parts 229, 285, 300, 600, 622, 635, 648, 660, and 679);

(2) Has not passed a USCG Commercial Fishing Vessel Safety Examination, or

(3) For vessels less than 26 ft (8 m) in length, has not passed an alternate safety equipment examination, as described in paragraph (g) of this section.

(d) *Display or show proof.* A vessel that has passed a USCG Commercial Fishing Vessel Safety Examination must display or show proof of one of the following:

(1) A valid USCG Commercial Fishing Vessel Safety Examination decal certifying compliance with regulations found in 33 CFR chapter I and 46 CFR chapter I, that will not expire before the end of the fishing trip, and issued within the last 2 years, or at a time interval consistent with current USCG regulations;

(2) In situations of mitigating circumstances which may prevent a vessel from displaying a valid safety decal (broken window, etc.), NMFS, the observer, or NMFS' designated observer provider may accept the associated documentation as proof of the missing safety decal in paragraph (d)(1) of this section;

(3) A certificate of compliance issued pursuant to 46 CFR 28.710;

(4) A certificate of inspection pursuant to 46 U.S.C. 3311.

(e) *Visual inspection.* Upon request by an observer, a NMFS employee, or a designated observer provider, a vessel owner or operator must provide correct information concerning any item relating to any safety or accommodation requirement prescribed by law or regulation, in a manner and according to a timeframe as directed by NMFS. A vessel owner or operator must also allow an observer, a NMFS employee, or a designated observer provider to visually examine any such item.

(f) *Vessel safety check.* Prior to the initial deployment, the vessel owner or operator or the owner or operator's designee must accompany the observer in a walk through the vessel's major spaces to ensure that no obviously hazardous conditions exist. This action may be a part of the vessel safety orientation to be provided by the vessel to the observer as required by 46 CFR 28.270. The vessel owner or operator or the owner or operator's designee must also accompany the observer in checking the following major items as required by applicable USCG regulations:

(1) Personal flotation devices/immersion suits;

(2) Ring buoys;

(3) Distress signals;

(4) Fire extinguishing equipment;

(5) Emergency position indicating radio beacon (EPIRB), when required, registered to the vessel where it is located;

(6) Survival craft, when required, with sufficient capacity to accommodate the total number of persons, including the observer(s), that will embark on the voyage; and

(7) Other fishery-area and vessel specific items required by the USCG.

(g) *Alternate safety equipment examination.* If a vessel is under 26 ft (8 m) in length, and NMFS has determined that the USCG cannot provide a USCG Commercial Fishing Vessel Safety Examination due to unavailability of inspectors or to unavailability of transportation to or

from an inspection station, the vessel will be adequate for observer deployment if it passes an alternate safety equipment examination conducted by a NMFS certified observer, observer provider, or a NMFS observer program employee, using a checklist of USCG safety requirements for commercial fishing vessels under 26 ft (8 m) in length. Passage of the alternative examination will only be effective for the single trip selected for observer coverage.

(h) *Duration.* The requirements of this section apply at the time the vessel

owner or operator is notified orally or in writing by an observer, a NMFS employee, or a designated observer provider, that his or her vessel has been selected to carry an observer. The requirements of this section continue to apply through the time of the observer's boarding, at all times the observer is aboard, and at the time the observer disembarks from the vessel at the end of the observed trip.

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