

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

[Docket No. 070209029-7029-01; I.D. 112906A]

RIN 0648-AU58

Fisheries of the Exclusive Economic Zone Off Alaska; Groundfish Observer Program

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS issues a proposed rule to amend regulations implementing the North Pacific Groundfish Observer Program (Observer Program). This action is necessary to avoid expiration of these regulations on December 31, 2007, and ensure uninterrupted observer coverage in North Pacific groundfish fisheries. The proposed rule is intended to promote the goals and objectives of the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area and the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMPs).

DATES: Written comments must be received by March 23, 2007.

ADDRESSES: Send comments to Sue Salvesson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. Comments may be submitted by any of the following methods:

- Mail: to P.O. Box 21668, Juneau, AK 99802;
- Hand delivery to the Federal Building: 709 West 9th Street, Room 420A, Juneau, AK, 99802;
- Fax: (907) 586-7557;
- E-mail: 0648-AU58obs@noaa.gov.

Include in the subject line of the email the following identifier: Observer Program Extension 0648-AU58. E-mail comments, with or without attachments, are limited to five megabytes; or

- Webform at the Federal e-Rulemaking Portal: <http://www.regulations.gov>.

Copies of the Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) prepared for this action may be obtained from the mailing address above or by calling the Sustainable Fisheries Division, Alaska Region, NMFS, at 907-586-7228.

FOR FURTHER INFORMATION CONTACT: Jason Anderson, 907-586-7228, or jason.anderson@noaa.gov.

SUPPLEMENTARY INFORMATION:**Background**

NMFS manages the U.S. groundfish fisheries of the Bering Sea and Aleutian Islands Management Area (BSAI) and Gulf of Alaska (GOA) in the Exclusive Economic Zone (EEZ) under the FMPs. The North Pacific Fishery Management Council (Council) has prepared the FMPs pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Regulations implementing the FMPs appear at 50 CFR part 679. General regulations that pertain to U.S. fisheries appear at subpart H of 50 CFR part 600.

Groundfish fisheries in the GOA and BSAI are managed under quotas set annually for groundfish species and for several other species that groundfish fishery participants are prohibited from retaining. Management programs under the FMPs allocate specific quotas among areas, seasons, gear types, processor and catcher vessel sectors, cooperatives, and individual fishermen. Annual quotas are based on NMFS stock assessments and Council recommendations. The Alaska Region NMFS is responsible for monitoring the catch of these quotas, and for closing the fisheries when quotas are reached. Stock assessments, quota monitoring, and management require an accounting for all groundfish and prohibited species catch, including discarded catch.

Observer requirements for fisheries off Alaska have been in place since the mid-1970s, when the Magnuson Fishery Conservation and Management Act (re-authorized in 1996 as the Magnuson-Stevens Act) was implemented and NMFS began to monitor U.S. EEZ foreign groundfish fisheries. The Secretary of Commerce (Secretary) and the Council recognized that living marine resources cannot be effectively managed without the types of information that are either available only or most efficiently through an observer program. Therefore, when foreign vessel fisheries ended in 1991, the Council developed and the Secretary approved a domestic Observer Program that authorized the placement of observers on domestic fishing vessels and at shoreside processing plants participating in Alaskan groundfish fisheries. The domestic Observer Program was 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). Observer coverage requirements have remained mostly unchanged since approval of the program.

The current Observer Program has an integral role in the management of North Pacific fisheries. The information collected by observers provides the best available scientific information for managing the fisheries and developing measures to minimize bycatch in furtherance of the purposes and national standards of the Magnuson-Stevens Act. Observers collect catch data used by managers for quota monitoring and management of groundfish and prohibited species, biological data and samples used by scientists for stock assessment analyses, information used by managers to document and reduce fishery interactions with protected resources, and information and samples used by scientists in marine ecosystem research. The Observer Program also provides information, analyses, and support in the development of proposed policy and management measures. Further, observers interact with the fishing industry on a daily basis and the Observer Program strives to promote constructive communication between the agency and interested parties. Observations are used by managers and enforcement personnel to document the effectiveness of the management programs of various entities, including NMFS, the U.S. Coast Guard, and the U.S. Fish and Wildlife Service.

High quality observer data are a cornerstone of Alaska groundfish fisheries management. However, the quality and utility of observer data suffer due to the current structure of procuring and deploying observers. Under the current program, coverage levels vary with the size of the vessel or the quantity of fish processed. Vessel owners and operators choose when and where to carry observers, and fishery managers do not control when and where observers are deployed. To address these concerns, the Council directed NMFS to develop an alternate program structure. Since the early 1990's, the Council and NMFS have explored alternative program structures as part of three separate actions. However, the Council identified problems with each of these actions and none were adopted. While the Council was developing and considering options for an alternate program structure, the Council recommended, and the Secretary approved, several extensions of the Observer Program regulations. A thorough discussion of the history of the Observer Program, including past efforts to restructure and extend the Observer Program, is provided in the EA/RIR/

IRFA prepared for this action (see **ADDRESSES**), and is not repeated here.

In October 2002, the Council tasked its observer advisory committee (OAC) to develop a problem statement and alternatives for restructuring the Observer Program. In April 2003, the Council adopted a suite of alternatives that contemplated restructuring the Observer Program in a stepwise approach, beginning in the GOA. However, as NMFS began evaluating these alternatives, it became apparent that certain operational and data quality issues would be difficult to resolve in a revised program under which NMFS contracted directly with observers for observer services in the GOA, but retained the current system for procuring observer services in the BSAI.

From December 2003 through June 2005, the Council refined the suite of alternatives, and in June 2005 adopted the current alternatives for analysis. These alternatives include options to restructure the Observer Program for all groundfish and halibut vessels fishing in the GOA only, for halibut vessels and certain sectors fishing in both the GOA and BSAI, and for all groundfish and halibut fisheries. Shoreside and stationary floating processors were included under each alternative depending on their location and management program. In addition to the "no-action" alternative under which the Observer Program would expire, the Council also asked staff to analyze an alternative that would remove the December 31, 2007, expiration date and continue current observer coverage regulations without an expiration date.

While the Council intended to adopt a preferred alternative by January 1, 2008, several issues arose during the course of analysis of the alternatives that has made this difficult. First, due to uncertainty about the applicability of overtime pay provisions of the Fair Labor Standards Act to contracted observers, staff were unable to adequately analyze observer costs under any of the restructure alternatives. Second, the Research Plan authority to assess a fee for observer coverage could not be exclusively applied to a subset of the North Pacific groundfish fisheries vessels. Therefore, all the action alternatives except Alternative 2 (extension of the current program) required new statutory authorization for fee collection from a portion of the fleet or to implement different fee mechanisms for different sectors, as were considered in the analysis.

Because observer costs cannot be adequately calculated and the uncertainty that Congress would authorize fee collection, NMFS

recommended that the Council adopt Alternative 2 as its preferred alternative. The Council concurred and adopted Alternative 2 at its February 2006 meeting. The Council also amended the problem statement to reflect that, while Alternative 2 does not address most of the issues in the problem statement, it ensures Observer Program viability, and the continued collection of information necessary to manage the North Pacific fisheries. While the costs of the restructuring alternatives cannot be adequately calculated at this time, the analysis prepared for this action includes restructuring alternatives to provide context to the Council's adoption of Alternative 2.

Expiration of the Observer Program would result in significant costs to groundfish fishery participants. Without data collected by observers, NMFS would be forced to adopt a much more conservative approach towards managing the groundfish fisheries of the GOA and BSAI. Such an approach could lead to early fisheries closures because there would be no observer data for total allowable catch (TAC) and prohibited species catch limit calculations. NMFS would likely rely on more population models to generate allowable biological catch and TAC recommendations. In addition, failure to maintain a groundfish observer program in the North Pacific would violate the terms of a variety of statutes, including the Endangered Species Act (ESA). The ESA requires observer coverage as a reasonable and prudent measure for certain management actions. These are non-discretionary measures under current biological opinions and are prescribed under the incidental take statements for endangered marine mammals, salmon, and seabirds.

Also in June 2006, the Council decided it would consider a new amendment proposing restructuring alternatives for the Observer Program when (1) legislative authority is established for fee-based alternatives; (2) the cost issues described above are clarified (by statute, regulation, or guidance) to allow estimated costs associated with the fee-based alternatives; or (3) the Council responds to changes in conditions that cannot be anticipated now.

On January 12, 2007, the President signed the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (Pub. Law No. 109-479). The reauthorized Magnuson-Stevens Act includes language that would appear to allow the Council to adopt a fee collection program as considered in the analysis. However, the exact nature of the fee program

authorized by the Magnuson-Stevens Act must be determined, the Council must consider a new amendment to restructure the current Observer Program, and NMFS must undergo rulemaking to implement a new Observer Program. Therefore, implementing a fee collection and restructured Observer Program prior to the December 31, 2007, expiration date would be difficult. Additionally, the observer cost issues described above remain unresolved.

Revisions to Observer Program Regulations

For the reasons described above, NMFS proposes to remove the December 31, 2007, expiration date from the heading of 50 CFR 679.50 and from regulations at § 679.50(j)(1)(vi). The current Observer Program would continue until the Council recommends and the Secretary approves and implements further action to amend the program. Continuation of the current Observer Program is necessary to prevent interruption of many current management programs.

Classification

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

NMFS prepared an IRFA as required by section 603 of the Regulatory Flexibility Act. The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the objectives and legal basis for this action are contained in the preamble and are not repeated here. A copy of the IRFA is available from NMFS (see **ADDRESSES**). A summary of the analysis follows.

This proposed rule would extend the effective date of regulations governing the Observer Program beyond December 31, 2007, the current expiration date. Extending the Observer Program beyond December 31, 2007, is necessary for uninterrupted continuation of many of the current management programs. The entities that would be directly regulated by this proposed action are groundfish and halibut harvesters and processors of the BSAI and GOA EEZ. These entities include the halibut vessels, groundfish catcher vessels, groundfish catcher processor vessels, and shoreside processors active in these areas. It also includes organizations to which direct allocations of groundfish are made, such as the BSAI community development quota (CDQ) groups and the American Fisheries Act (AFA) fishing sectors.

The IRFA identified the following small entities that would be impacted

by this rule. Based on 2005 data, 23 of the 87 catcher/processors active in the North Pacific groundfish fisheries would be considered small entities. All five North Pacific observer provider companies and the six CDQ groups would be considered small entities. Estimates of the number of shoreside processors that are small entities include all Alaska processors that reported processing groundfish to NMFS in 2002. Due to insufficient ownership and affiliation information, it is not possible, at this time, to determine how many of the 73 shoreside processors qualify as small entities. However, at least eight shoreside processors would be considered large entities because of American Fisheries Act (AFA) affiliations. Finally, 807 groundfish and halibut catcher vessels have gross revenues less than \$4 million, and would be considered small entities.

Alternative 1 is the no action alternative. Under this alternative, the current Observer Program would continue to be the only system under which groundfish observers would be provided in the BSAI and GOA groundfish fisheries. Regulations authorizing the current program expire at the end of 2007.

No additional recordkeeping and reporting requirements are associated with this action.

Alternative 2 is the preferred alternative, and would extend the existing program. Under this alternative, the 2007 sunset date for the existing program would be removed and the program would be extended indefinitely with no changes to the overall service delivery model until the Council took further action.

Alternative 3 would restructure the Observer Program for GOA groundfish and all halibut fisheries, while BSAI groundfish fisheries would be administered under the current system. A new ex-vessel value fee program would be established to fund coverage for GOA groundfish vessels, GOA-based processors, and halibut vessels operating throughout Alaska. Regulations that divide the fleet into zero, 30 percent, and 100 percent coverage categories would no longer apply to vessels and processors in the

GOA. Fishermen and processors would no longer be responsible for obtaining their own observer coverage. Rather, NMFS would determine when and where to deploy observers based on data collection and monitoring needs, and would contract directly for observers using fee proceeds and/or direct Federal funding.

Alternative 4 would restructure the Observer Program for all fisheries with coverage less than 100 percent. All vessels and processors assigned to Tiers 3 and 4 would participate in the new program throughout Alaska and pay an ex-vessel value based fee. In general, this alternative would apply to all halibut vessels, all groundfish catcher vessels less than 125 ft (38.1 m) in length overall and all non-AFA shoreside processors. All vessels and processors assigned to Tiers 1 and 2 (100 percent or greater coverage) would continue to operate under the current "pay-as-you-go" system throughout Alaska.

Alternative 5 would restructure the Observer Program for all groundfish and halibut fisheries off Alaska. This alternative would establish a new fee-based groundfish observer program in which NMFS has a direct contract with observer providers for all GOA and BSAI groundfish and halibut vessels. Under this alternative, vessels with 100 percent or greater coverage requirements would pay a daily observer fee and vessels with coverage requirements less than 100 percent would pay an ex-vessel value based fee.

As noted in the preamble above, Alternative 1 would result in significant costs to the fleet.

The impacts to small entities of the Alternatives 2 through 5, expressed as a percentage of the ex-vessel value of groundfish and halibut landed, are presented in the EA/RIR/IRFA prepared for this action and are summarized here. Current observer costs expressed as a percentage of ex-vessel landed catch value can be considered a reasonable estimate of the costs to each sector of the fleet under Alternative 2 (rollover of the existing program). In the BSAI management area for the years 2000 through 2003, these costs averaged 2.54 percent for catcher/processors, 1.49 percent for catcher vessels, and 0.89

percent for all processors, including motherships. In the GOA management area for these same years, these costs averaged 1.11 percent for catcher/processors, 1.71 percent for catcher vessels, and 0.65 percent for all processors.

Although adoption of Alternative 3, 4 or 5 would require new statutory authority that currently does not exist, adoption of any of these alternatives as presented in the EA/RIR/IRFA would require selection of a low, middle, or high ex-vessel fee percentage. Estimated costs expressed as a percentage of ex-vessel value of groundfish and halibut landings for the low, middle, and high endpoint options for Alternative 3 are 0.52 percent, 0.70 percent, and 1.05 percent, respectively. Estimated costs in terms of a percent of ex-vessel value for Alternative 4 are 0.69 percent, 0.83 percent, and 1.15 percent. Finally estimated costs in terms of a percent of ex-vessel value for Alternative 5 are 0.69 percent, 0.83 percent, and 1.15 percent.

The analysis did not reveal any Federal rules that duplicate, overlap, or conflict with the proposed action.

List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: February 15, 2007.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS proposes to amend 50 CFR part 679 as follows:

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

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

Authority: 16 U.S.C. 773 *et seq.*; 1540(f); 1801 *et seq.*; 1851 note; 3631 *et seq.*

2. In § 679.50, paragraph (j)(1)(vi) is removed and the section heading is revised to read as follows:

§ 679.50 Groundfish Observer Program.

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