

Regulatory Impact Review
for
Regulatory Revisions to
Observer Health and Safety
Regulations

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Regulatory Impact Review

1.0 OBJECTIVES

The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), as amended (16 U.S.C. 1801 et seq.), the Marine Mammal Protection Act (MMPA), as amended (16 U.S.C. 1361 et seq.), and the Atlantic Tunas Convention Act, as amended (16 U.S.C. 971 et seq.) authorize the Secretary to station observers aboard commercial fishing vessels in order to collect required scientific data for the purposes of fishery and protected species conservation and management, monitoring incidental mortality and serious injury to marine mammals and to species listed under the Endangered Species Act (ESA), and monitoring compliance with existing Federal regulations. In addition, pursuant to the laws implementing the Pacific Islands Parties Treaty (16 U.S.C. 973 et seq.), observers may be required in the South Pacific Tuna Fishery.

The majority of U.S. observer programs are mandatory under the MMPA, or have mandatory coverage authorized by fishery management plans developed under the Magnuson-Stevens Act. Under mandatory programs, observer coverage levels are either prescribed by legislation or there is a regulatory mandate to carry an observer if requested to do so by NOAA Fisheries (National Marine Fisheries Service). Vessels fishing under one of these mandatory programs must have an observer(s) aboard, whenever designated to carry one by NMFS, in order to fish legally.

While nearly all of the observer programs are mandatory, some fishery data are collected through voluntary programs. Under voluntary programs, vessel owners and operators have no legal obligation or requirement to carry an observer pursuant to provisions of the Magnuson-Stevens Act, MMPA, or ESA, but voluntarily carry observers to collect data essential for making fishery conservation and management decisions.

The Magnuson-Stevens Act and NMFS place a high priority on the safety, health, and well-being of observers while stationed aboard fishing vessels participating in both mandatory and voluntary programs. The Magnuson-Stevens Act (16 U.S.C. 1881b(a)) (sec. 403(a)) directs that

...the Secretary shall promulgate regulations, after notice and opportunity for public comment, for fishing vessels that carry observers. The regulations shall include guidelines for determining-

- (1) when a vessel is not required to carry an observer on board because the facilities of such vessel for the quartering of an observer, or for carrying out observer functions, are so inadequate or unsafe that the health or safety of the observer or the safe operation of the vessel would be jeopardized; and
- (2) actions which vessel owners or operators may reasonably be required to take to

render such facilities adequate and safe.

The six regional programs deploy observers on vessels in order to carry out the requirements of the Magnuson-Stevens Act and other laws. However, the National Observer Program's objective is to develop and support national standards and policies to create high quality, cost effective, efficient, and productive observer programs. These national regulations will ensure consistent safety standards for all U.S. observers.

2.0 DESCRIPTION

Observer programs are an integral part of federal fisheries management in the United States. Observers aboard fishing vessels and in fish processing facilities document the species, amount and in some cases, the size and sex of the fish caught or processed. Just as importantly for management, they document the bycatch in the fishery (those fish that are caught, but, because of either economic or regulatory requirements, are returned to the sea). Finally, observers may have a primary or secondary function of documenting catches and other interactions with protected species. Protected species include marine mammals, endangered and threatened species listed under the Endangered Species Act such as sea turtles, and seabirds.

All six NMFS regions have observer programs encompassing all parts of the U.S. exclusive economic zone (EEZ), and for some fisheries on the high seas outside the EEZ. Presently, up to 8925 fishing vessels could be required to carry observers in U.S. domestic fisheries.¹ At present, no foreign vessels are authorized to fish in the U.S. EEZ; however, foreign vessels would also have to carry observers.

3.0 PROBLEM STATEMENT

This action is intended to address continuing observer safety concerns regarding how to determine if a vessel's safety condition is adequate to embark an observer. Observer health and safety regulations were first promulgated May 18, 1998. They apply to any vessel designated to carry an observer as part of a mandatory or a voluntary observer program. Since their promulgation, there have been continuing concerns about the circumstances that would allow an observer (or other person) to determine if a fishing vessel's condition is adequate to allow an observer to safely embark in the vessel and what, if any, options exist for a vessel that has been found inadequate. This action would clarify and/or revise existing requirements to address these issues.

¹ This is almost certainly an overestimate. For several fisheries, data are only available regarding the number of permits, not the number of vessels. Because one vessel may have multiple permits, it would be counted multiple times. Also, many fishing vessels were destroyed in the 2005 Gulf hurricanes. The proportion of destroyed vessels that have valid federal fisheries permits, or that are included in the estimates of fleet size is presently unknown, so may also contribute to an overestimate of the number of vessels potentially affected by this regulation.

The rule refers to existing regulations in other CFR parts. This was done in order to avoid repetition. The referenced parts include U.S. Coast Guard (USCG) and regional regulations. Regional regulations are included because NMFS recognizes that conditions vary between regions and require tailored regulations that take those differences into account.

4.0 ALTERNATIVES

NMFS considered 6 alternatives in evaluating the need for revisions to the observer health and safety regulations. Four alternatives were fully analyzed. Two alternatives were considered but rejected because they did not provide for adequate vessel safety.

4.1 Alternatives Considered

4.1.1 Alternative 1: Preferred Alternative.

The preferred alternative would require that an observer refuse to board a vessel that the observer has found to be in violation of USCG safety requirements as determined by a pre-trip safety check, conducted by the observer and with the vessel's captain or the captain's designee present. The first step in the safety check would be to check for the presence of a current Commercial Fishing Vessel (CFV) Safety Decal. The Safety Decal is already required by the existing observer safety regulations. An observer would not be permitted to embark a vessel in the absence of a current decal or other proof that one was obtained, but later damaged or destroyed. Under this alternative, an observer would be allowed to embark a commercial fishing vessel that is less than 26 ft (8 m) in length without a decal, provided the vessel has passed an alternate safety equipment examination conducted by the observer, the observer provider, or NMFS.

If the decal is present and current, the safety check would focus on six major safety items and a brief walk through the vessel's major spaces to ensure that no obviously hazardous conditions exist. The six major safety items that the observer would check are: personal flotation devices/immersion suits, ring buoys, distress signals, fire extinguishing equipment, emergency position indicating radio beacon when required, and survival craft when required. Additional checklist items may be included and developed by each observer program, in consultation with USCG, to be fishery-area and vessel specific, and will include only items required by the USCG.

Should the observer find, on the basis of the pre-trip safety check, that a vessel in a mandatory observer coverage program is inadequate and consequently refuse to embark the vessel, the vessel would not be permitted to fish legally without the observer.

In order to minimize the possibility that a vessel might lose fishing days due to failure to obtain the Safety Decal or pass the pre-trip safety check, the rule would change the timing of the safety requirements to begin upon notification that the vessel has been selected for observer coverage.

Currently, the safety requirements take effect on the day that the fishing trip is scheduled to begin.

4.1.2 Alternative 2: No Action.

Under Alternative 2, the “no action” alternative, vessels that carry observers would be required to comply with safety standards similar to those that would be applicable under the preferred alternative. However, there would be no requirement for the vessel’s captain to accompany the observer in conducting a pre-trip safety check nor would the check be mandatory. The wording concerning whether an observer can embark on an unsafe vessel would remain unclear as to whether the observer has discretion to stay aboard a vessel he/she determines is unsafe. Further, small vessels would not have an alternative to obtaining a Safety Decal. Finally, the timing of the safety requirements would remain the same, beginning on the day of required observer coverage.

4.1.3 Alternative 3.

Alternative 3 would prescribe new standards for a wide range of safety and accommodations issues. Basic standards for determining a vessel's safety and adequacy would be based on USCG safety requirements and NMFS regional observer requirements in Alternative 1. In addition to those basic USCG standards, this alternative would result in new regulations addressing a wide range of accommodations issues such as quality of accommodations, quality and adequacy of food, cleanliness of the galley, competence of the vessel's operator and/or crew, drug and alcohol use by the operator and/or crew, etc., which, if not met, would authorize an observer not to board a fishing vessel. This alternative would also require that an observer refuse to embark on a vessel that the observer has found in violation of the NMFS safety requirements, as described in the Preferred Alternative.

4.1.4 Alternative 4.

Alternative 4 would prescribe basic standards for determining safety and adequacy as described in the preferred alternative, but either a NMFS employee or an authorized observer provider would be authorized to make the pre-trip safety check to determine whether or not the observer will board the vessel.

This alternative would use the same evaluation criteria (USCG dockside safety examination, pre-trip safety check, presence of a current CFV Safety Decal, etc.) as the preferred alternative, but would require NMFS and/or an observer provider to decide whether a vessel is safe and adequate. The rationale for this approach is that it would avoid putting the observer into a situation where vessel owner, operator, and crew might exert pressure to coerce the observer to declare the vessel safe in spite of conditions that the observer believed to be unsafe. It would also avoid the potential for a "vindictive" observer to abuse discretion in making safety checks.

4.2 Alternatives Considered But Rejected.

4.2.1 Alternative 5.

Alternative 5 would provide an automatic waiver of the requirement for observer coverage for those situations in which an observer refused to board a vessel for safety reasons. The waiver would be valid until the vessel had undergone a USCG examination--either at sea or in port. NMFS believes that this alternative would void the intent of the rule. It would not make the vessel safe for the observer on the fishing trip that the observer was assigned to observe, and it could provide an opportunity for vessel operators to avoid taking observers by incurring safety violations such as not having a personal flotation device for the observer.

4.2.2 Alternative 6.

Alternative 6 would apply the regulations only to those classes of vessels that have consistently failed to provide safe working conditions for observers. Vessel classes with proven safety records would be exempt from the provisions of this rule. NMFS believes this alternative to be infeasible because vessel safety is an individual vessel issue, not one that can be addressed by aggregating vessel types.

5.0 ECONOMIC AND SOCIOECONOMIC IMPACTS OF THE ALTERNATIVES: ANALYSIS OF ALTERNATIVES

This section provides information about the economic and socioeconomic impacts of the alternatives including identification of the individuals or groups that may be affected by the action, the nature of these impacts, quantification of the economic impacts if possible, and discussion of the trade offs between qualitative and quantitative costs and benefits.

5.1 Costs and Benefits of the Alternatives

5.1.1 Alternative 1: Preferred.Error! Bookmark not defined.

The benefits of the Preferred Alternative would include increased safety for all crewmembers and for observers by confirming that the vessel is in compliance with USCG safety requirements. Current regulations encourage, but do not require, pre-trip safety checks. They authorize, but do not require, observers to refrain from embarking on vessels that have unsafe conditions. The Preferred Alternative would remove the discretion of the observer to board a vessel not in compliance with the regulations. Further, this alternative reinforces the existing requirement that the vessel maintain required safety equipment throughout the time the observer is aboard the vessel.

The potential costs to a vessel for embarking an observer on that vessel are threefold. First is the cost of putting the vessel in a safe condition and maintaining that condition so that the vessel not only passes the USCG safety examination, but it also retains its safe condition throughout the duration of the observed fishing trip. The requirement that a vessel meet USCG safety requirements when taking an observer is a requirement of the 1998 observer health and safety regulations and is, therefore, not new. The requirement to display a Safety Decal as proof of having passed the Coast Guard examination is likewise not new. These safety requirements are already in existence, therefore they are not a cost attributable to this action. The USCG Commercial Fishing Vessel Safety Examination itself is done at no cost to the vessel (except in the case of processor vessels, which are required to get the inspection) and can be scheduled for a time that is convenient for the vessel owner and/or operator. This alternative would require minor modifications in the existing observer safety training in order to cover the details of the pre-trip safety check, and minor administrative costs may be associated with the production and transmission of the completed safety checklist. However, the cost of integrating this training into the already existing observer training programs would be minimal and significantly less than developing a separate training regimen for NMFS and/or observer provider inspectors as described under Alternative 4.

Some small additional costs may be incurred by the vessel owner or operator in that the vessel captain will have to dedicate a few minutes of his/her time to performing the pre-trip safety check with the observer. However, the safety check would be short in duration and could likely be easily integrated into the vessel's existing pre-trip procedures, including the vessel safety orientation required by 46 CFR 28.270. At least some observer programs are already including the pre-trip safety check in their procedures.

The second cost is for any additional safety equipment needed by the vessel in order to accommodate the observer, such as additional personal flotation devices, or larger life rafts to accommodate the usual crew plus an observer. These costs have been previously analyzed as part of the rulemakings establishing the regional observer programs and existing observer safety regulations. Because this action is limited to the determination of adequate conditions to embark an observer, no additional analysis has been conducted.

Another possible cost associated with this alternative is lost 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. In the event that an observer finds a vessel to be unsafe, the vessel could be delayed pending resolution of the observer's concerns. The length of such possible delays would vary depending on the type of safety concern identified and the means of remedying it. For example, if a vessel is missing a personal flotation device, the delay would presumably be short--an additional personal flotation device could be obtained and the observer would board. On the other hand, it is possible that an observer could find that the vessel does not have a CFV Safety Decal, or identify a safety concern so serious that a new USCG examination would be required. In such a case, the fishing

trip could be delayed for several days depending on the ability to schedule the examination and the type of remedial measures required to render the vessel safe.

However, NMFS does not anticipate that many vessels would lose fishing days as a result of this rule. Vessel owners are already required to comply with USCG safety regulations and observers are already given discretion to not board vessels that do not meet the existing safety requirements, including obtaining the Safety Decal. This rule simply removes the observer's discretion in deciding whether to stay aboard an inadequate vessel and makes the pre-trip safety check mandatory rather than merely suggested. NMFS anticipates that vessel owners and operators will voluntarily ensure that their vessels comply with the safety requirements in order to prevent delays in starting fishing trips. The proposed rule further seeks to minimize the possibility of lost fishing days by making the safety requirements apply at the time of notification of observer coverage instead of on the day the fishing trip begins.

To mitigate problems some smaller vessels have in obtaining a Commercial Fishing Vessel Safety Examination, NMFS proposes an alternative examination by a certified NMFS observer, NMFS employee, or designated observer provider, for USCG Category 1 vessels (vessels less than 26 ft (8 m) in length) that will allow the observer to embark on vessels that pass the examination.

The benefit of the action can be quantified as the willingness to pay for preservation of human lives, as well as the cost savings associated with avoiding various non-lethal injuries to vessel crews and observers. The total benefit of avoiding death or injury due to an ill-equipped vessel will depend upon the specific nature of the incident and the number of crew and/or observers involved.

5.1.2 Alternative 2: No Action.

There would be no new costs to the industry under this alternative, but there would be continued risk of unsafe conditions on board vessels to which observers were assigned. There would be no requirement for the vessel's captain to accompany the observer in conducting a pre-trip safety check, nor would the check be mandatory. The wording concerning whether an observer can embark on an unsafe vessel would remain unclear as to whether the observer has discretion to stay aboard. Further, small vessels would not have an alternative to obtaining a safety decal and, for vessels in fisheries that require observers, the vessels could not go fishing. Finally, the timing of the safety requirements would remain the same.

5.1.3 Alternative 3.

This alternative is broader in scope than the Preferred Alternative. It would require, in addition to the safety requirements in the Preferred Alternative, that the observer consider such things as quality of accommodations, quality and adequacy of food, cleanliness of the galley, competence of the vessel's operator and/or crew, drug and alcohol use by the operator and/or crew, etc.,

before deciding to embark on the vessel. Although this alternative would broaden the safety protection for observers, it is not preferred because of the degree to which an observer would be authorized to make subjective, individual, qualitative determinations.

Because of the variability of working conditions on fishing vessels, some vessels could not reasonably or economically meet the expectations of all observers. Therefore, the risk of this alternative resulting in delays of fishing trips is greater than under the preferred alternative.

5.1.4 Alternative 4.

The benefit of having NMFS or an authorized observer provider make the safety and adequacy decision is that it would avoid the potential conflict involved when an observer must inform the captain and crew, with whom the observer will be spending time at sea, that a fishing trip is going to be delayed. However, this alternative would also have the potential to delay a fishing voyage pending resolution of safety concerns, particularly if the observer and the NMFS employee or the observer provider disagree on the adequacy of a vessel. It is just as possible that a NMFS employee or observer provider would discover safety issues in need of attention as an observer would. In addition, under this alternative, an observer who believes a vessel to be unsafe may be instructed to board because NMFS or the observer provider believes the vessel to be safe. There would also be costs to NMFS and/or the observer provider in the form of having a representative on site each time an observer boards a vessel. NMFS and/or the observer provider would also experience the cost of training additional employees to make the pre-trip safety check.

This alternative is not preferred because it would put a third party in a position of judging a vessel's safety and perhaps force an observer to board a vessel that the observer feels is unsafe.

Significance Under EO 12866

Under Executive Order 12866, a regulatory action is “significant” if it is likely to:

1. Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
2. Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
3. Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
4. Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.

This action is not likely to have an effect on the economy of \$100 million or more. The action does not create any serious inconsistencies or interference with another agency. The action uses the existing USCG safety requirements as the standard that must be met. The action does not alter any of the budgetary impacts of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients. Finally, the action does not raise any novel legal or policy issues. It simply clarifies existing requirements and makes other administrative changes to existing rules.