

Draft for Secretarial Review

REGULATORY IMPACT REVIEW/
INITIAL REGULATORY FLEXIBILITY ANALYSIS

for a regulatory amendment to alter rules governing
the housing of BSAI and GOA groundfish observers

Date: June 2003

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Abstract: This RIR/IRFA evaluates the costs and benefits, and the impacts on regulated small entities, of a proposed regulatory amendment to modify the rules governing the housing of fishery observers in the groundfish fisheries of the Bering Sea and Aleutian Islands and the Gulf of Alaska. This RIR/IRFA addresses the requirements of Presidential Executive Order (E.O.) 12866 and of Section 603 of the Regulatory Flexibility Act.

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EXECUTIVE SUMMARY

Regulatory Impact Review

This Regulatory Impact Review (RIR) evaluates a regulatory amendment to alter rules governing the housing of Bering Sea and Aleutian Islands (BSAI) and Gulf of Alaska (GOA) groundfish fishery observers so as to provide more flexibility to fishing operations. This RIR is required under Presidential Executive Order (E.O.) 12866 (58 *FR* 51735; October 4, 1993).

This proposed rule amends the current regulations at 679.50 (1)(i)(2)(vi)(B) and (C) to: (1) apply rules governing housing for observers assigned to a stationary floating processor, and (2) to permit an observer to be housed on a vessel he or she will be assigned to for more than 24 hours before the vessel's departure from port, if the time is necessary to coordinate the vessel observer's deployment logistics and vessel departure plans.

Current regulations at 679.50(i)(2)(vi)(B) govern the housing requirements for observers assigned to shoreside processing facilities and for observers between vessel or shoreside assignments while still under contract to an observer provider. The action would extend the requirement to observers deployed to stationary floating processors and to observers between deployments to shoreside plants, floating processors, or vessels, while still under contract. Current regulations specify that observers must "...be provided with accommodations at a licensed hotel, motel, bed and breakfast, or with private land-based accommodations..." The action would add stationary floating processors to this list. It is common practice for observers deployed to catcher vessels delivering to floating processors to be housed on the floating processors in between vessel assignments. This action would change the regulation to account for this practice. No operational changes will follow from this change and it will have no costs. It will clarify regulations.

Current regulations at 679.50(i)(2)(vi)(C) prevent an observer from being housed on a vessel to which he or she has been assigned for more than 24 hours prior to the vessel's initial departure from port. The action would modify this to limit the period to "The time period prior to the vessel's departure from port necessary to coordinate the vessel observer's deployment logistics and vessel departure plans." This relaxes the 24 hour period. Vessel operators are often unable to predict exactly when they will be able to leave port for a fishing trip. Among other factors, actual departure dates and times are often dependent on weather conditions. This action is meant to provide fishing operations with planning flexibility to deal with these uncertainties, and to give observer providers improved opportunities to serve their customers. The action would have an effect equivalent to the lengthening of a fishing trip. Observers would receive normal contracted compensation for the additional days. Moreover, fishing operations would pay for the extra days of observer availability. This would provide an incentive to the fishing operation to only contract for the additional observer days that were absolutely necessary to deal with the departure uncertainty.

This action will not have an annual effect on the economy of \$100 million or more, nor meet any of the other threshold criteria contained in this element of E.O. 12866. NMFS has not identified any factors that would (a) "Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency"; (b) "Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof"; or (c) "Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the executive order."

Initial Regulatory Flexibility Analysis

This Initial Regulatory Flexibility Analysis (IRFA) evaluates the impacts of this action on directly regulated small entities in compliance with the requirements of Section 603 of the Regulatory Flexibility Act (RFA).

For the proposed actions, the small regulated entities would include: (1) fishing vessels with observer coverage requirements and total gross revenues of <\$3.5 million, annually, from all the operation's commercial activity taken together; (2) processing facilities with observer coverage requirements and fewer than 500 employees, when all their affiliated operations, worldwide, are combined; (3) the CDQ groups; and (4) observer providers. Therefore, there could be about 330 small regulated entities, although this number declines to about 215 if the catcher vessels in the AFA pollock cooperatives are excluded, as the RFA "affiliation" criteria suggest they appropriately be.

The preferred alternative does not appear to have adverse impacts on small entities. The alternative clarifies the regulatory basis for the current practice of housing catcher vessel observers on floating processors between deployments, and provides fishing operations better opportunities to deal with the uncertainties associated with departure from port. Both of these are beneficial impacts.

This regulation does not impose new record keeping or reporting requirements on the regulated small entities. This analysis did not reveal any Federal rules that duplicate, overlap or conflict with the proposed action.

The status quo is the alternative to the preferred action. The status quo would not lead to a clarification of the regulations, nor provide fishing operations with additional flexibility to deal with the uncertainties of departure from port. The status quo was rejected because it would not accomplish the objectives of the action, and because it would have a relatively larger adverse impact on small entities.

1.0 REGULATORY IMPACT REVIEW

1.1 Introduction

This Regulatory Impact Review (RIR) evaluates a regulatory amendment to alter rules governing the housing of BSAI and GOA groundfish fishery observers so as to provide more flexibility to fishing operations.

1.2 What is a Regulatory Impact Review?

This RIR is required under Presidential Executive Order (E.O.) 12866 (58 *FR* 51735; October 4, 1993). The requirements for all regulatory actions specified in E.O. 12866 are summarized in the following statement from the order:

In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nonetheless essential to consider. Further, in choosing among alternative regulatory approaches agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

E.O. 12866 requires that the Office of Management and Budget review proposed regulatory programs that are considered to be “significant”. A “significant regulatory action” is one that is likely to:

- 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, local or tribal governments or communities;
- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.

1.3 Statutory authority

NMFS manages the U.S. groundfish fisheries of the Gulf of Alaska (GOA) and the Bering Sea and Aleutian Islands Management Area (BSAI) in the Exclusive Economic Zone under separate Fishery Management Plans (FMPs) for GOA and BSAI groundfish. The North Pacific Fishery Management Council (Council) 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.

1.4 Purpose and need for action

A final rule to amend regulations governing observer coverage requirements for vessels and shoreside processors in the North Pacific Groundfish Fisheries (called the “observer omnibus” rule) was published in the *Federal Register* on January 7, 2003 (68 FR 715). The intent of the rule was to address concerns about (1) shoreside processor observer coverage; (2) shoreside processor observer logistics; and (3) observer coverage requirements for vessels fishing with groundfish pot gear.

The observer rules, as amended, included provisions restricting observers from being housed on vessels for more than 24 hours before vessels were to depart from port, and for more than 24 hours after they returned.

In January 2003, following publication of the final rule, NMFS North Pacific Observer Program staff received comments from two separate observer providers concerned with their ability to effectively deploy observers under the current regulations. Saltwater Inc. noted that:

“...what is the expected procedure as far as NMFS is concerned regarding the boarding time not to exceed 24 hours prior to the initial departure from port. Specifically, I currently have a 100% vessel sitting at the dock waiting for their price strike to settle. They requested the observer to fly in on Jan 18 in anticipation of leaving port on the 19th for the trawl season opening on Jan 20. Because the plant has not settled on price they are still at the dock, still with their observer on board. Under the omni (*sic*) rule, would that observer then need to be at a bunkhouse waiting by the phone and unable to leave the bunkhouse as the vessel will be leaving within a half hour of settling on a price? or will the observers be permitted to continue to lodge on the vessel under such circumstances? Will we need to request a waiver under those circumstances? or something else? What about vessels who request their observers to fly 2 or 3 days before leaving port to avoid problems with weather and flights?” (Email from Anne Vanderhoeven to Bob Maier, January 22, 2003)

In a similar comment, Alaskan Observers, Inc. noted:

“We often won't be able to tell if we've violated the requirement that observers not be on a boat for longer than 24 hours before departure until after the fact. It isn't unusual for a vessel's skipper to say they're leaving early morning on Saturday, so we put the observers on Friday evening; Sunday morning they finally get out of town. Also, at the start of a fishery (as in the period January 15 through 18) we often knowingly fly observers in three or four days early, since we know from experience weather is going to hold many of them up. When they do arrive, they move onto their vessels as the vessels arrive in town. The observers are on the boats they will be observing on; they are reporting noon positions; but they may be on them for more than a day. If we were to respond to this regulation by flying the observers only one day before a vessel's scheduled departure, we'd create chaos (more than there is already in January)...we don't understand the reasoning for leaving it up to an observer as to whether or not they stay on a boat for a night prior to disembarking after the vessel arrives for offload. When an observer has a reason to get off--if the observer's sick, for instance, or there are harassment issues on a boat--we (often literally) meet the boat at the dock and get them off. If an observer just wants to sleep in a hotel, but has no other reason for wanting off, then the choice has been ours as a company, and not left up to the individual observer...” (Email from Dave

Edick to Bob Maier, January 9, 2003)

In order to account for possible weather delays and other potential logistics problems, both observer providers described a common practice whereby observers were flown to their port of departure three or four days before the vessel was scheduled to depart. As observers arrive, they move onto their assigned vessels and await departure. Because, under current regulations, observers may not be housed on vessels they are assigned to until 24 hours prior to their departure time, potential logistical problems are created for observer providers and vessels.

NMFS recognizes that observers are deployed to catcher vessels delivering to floating processors and it is common for observers to be housed on these floating processors in between vessel assignments. Current regulations do not account for this circumstance.

Regulations at 679.50 (i) (2) (vi) (C) would be amended to clarify that these housing requirements apply to observers under contract.

This proposed rule also clarifies current regulations at 679.50 (i) (2) (vi) (C). During review of these regulations, NMFS noticed that 679.50 (i) (2) (vi) (C) (2) and (3) were the same. The proposed amendment to the regulations would clarify NMFS intent by accounting for two housing situations where the observer is scheduled to disembark the vessel. First, the observer could be housed on a vessel for up to 24 hours follow the completion of an offload where the observer has duties and is scheduled to disembark. This accounts for assignments to catcher boats which target pollock and the observer is required to monitor the offload for prohibited species. Second, the observer could be housed on a vessel for 24 hours following the vessel's arrival in port where the observer is scheduled to disembark. This accounts for assignments to all other vessels where the observer's duties are completed upon arrival to port.

This proposed rule would amend regulations at 679.50 (i) (2) (vi) (D) by moving text to the preamble. It is a requirement that observers are provided housing within the standards outlined in the regulations. Therefore, it is implied that alternative housing must be arranged if the conditions in paragraph D are not met. This statement is interpretive and does not change the intent of NMFS.

1.5 Alternatives considered

Alternative 1: No Action

No change is made to current regulation

Alternative 2: Change observer housing regulations

This proposed rule amends the current regulations at 679.50 (1)(i)(2)(vi)(B) and (C) to: (1) apply rules governing housing for observers assigned to a stationary floating processor, and (2) to permit an observer to be housed on a vessel he or she will be assigned to for more than 24 hours before the vessel's departure from port, if the time is necessary to coordinate the vessel observer's deployment logistics and vessel departure plans.¹

¹The specific language of the regulatory change may be found in Appendix 2 to this RIR/IRFA.

1.6 Description of fishery

The observer program²

The observer program had its origins in efforts to monitor foreign fishing in the mid-1970s. The modern domestic observer program was implemented by NMFS in 1990, following Council action in 1989.

Under the current program, groundfish fishermen are required by regulation to carry observers, and shoreside processors are required to have observers. Vessels 60 feet LOA and greater, but less than 125 feet, are required to have observers for at least 30% of all fishing days in a calendar quarter and for at least one complete fishing trip for each groundfish category it fishes in that same quarter. Vessels 125 feet LOA and greater are required to have an observer aboard for 100% of all fishing days in a calendar quarter. Vessels over 125 feet using pot gear are only subject to the 30% observer requirement, and there are no observer requirements for catcher vessels delivering unsorted catch to motherships. Shoreside processors or motherships processing 1,000 mt or more in round-weight equivalent of groundfish are required to have an observer aboard each day it receives or processes groundfish that month. Shoreside processors or motherships processing between 500 mt and 1,000 mt are only required to have 30% coverage. Some fleets have special observer requirements. For example, CDQ catcher-processors are required to carry two observers at all times, and CDQ catcher vessels over 60 feet are required to have 100% observer coverage.

Fishing operations, shoreside plants and motherships contract directly with private sector companies to obtain the observer coverage that meets their needs. Fishing and processing operations must deal with observer companies that are certified by NMFS. The NMFS certification process is designed to determine how well a company can meet the standards and responsibilities set out in regulations. Observer regulations, at 679.50, include provisions meant to govern the conditions under which observers live and work.

The information provided by observers plays an extremely important role in federal management of groundfish fisheries in the EEZ off of Alaska. NMFS manages groundfish fisheries to meet a large number total allowable catch (TAC) and prohibited species catch (PSC) quotas. Fisheries must be managed in something close to real time, and NMFS can't wait for delivery reports to come in before it makes its estimates of fishery catches. Observer data is extremely important in filling this gap. If observers are on vessels equipped with the appropriate electronic equipment, their reports can be in the hands of the Alaska Region's in-season managers within 24 hours. These data, and extrapolations from these data, make it possible for the Alaska Region to effectively manage all such quotas. NMFS must base area and/or fishery closures on projections of catch rates. In the absence of timely observer data, these projections would have to be made more conservatively and the risk of closing fisheries before quotas were fully harvested would be increased. This would lead to lower revenues for fishermen and processors, reduced supplies of product to domestic and international markets, and higher prices to consumers.

Since 1996, the NMFS North Pacific Groundfish Observer Program has been conducted under a series of

²A more detailed description of the observer program, and its role in fisheries management, may be found in Appendix A to NMFS, 2002. The discussion in this section abstracts from that appendix.

interim regulations.³ These interim regulations have been renewed several times, as the Council and NMFS have worked towards necessary fundamental changes in the observer program. Some of the issues involved have been difficult to resolve, while others are relatively more tractable. A decision was made to continue analysis and evaluation of the more difficult issues⁴, while pushing forward immediately with the simpler administrative improvements.

Several of the simpler administrative improvements were implemented in a final rulemaking effective on January 7, 2003 (68 FR 715). That rulemaking sought to refine observer coverage requirements and improve support for observers. The rule addressed concerns about (1) shoreside and stationary floating processor observer coverage; (2) shoreside processor observer logistics; (3) observer coverage requirements for vessels fishing for groundfish with pot gear; and (4) confidentiality of observer personal information.

The action that is the subject of this RIR/IRFA is a regulatory amendment that would further refine the rules governing support for observers.

More comprehensive references

Detailed descriptions of the social and economic backgrounds of the groundfish fisheries may be found in the following reports:

Draft Environmental Assessment, Regulatory Impact Review and Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) Extending and Improving the North Pacific Groundfish Observer Program Beyond 2002. (NMFS, 2002) provides the details of the regulatory changes made at the time the interim observer program was extended at the start of 2003 (and the analysis of those changes). Appendix A provides a history of the observer program and explains the use of the data gathered in the program for fisheries management. That EA/RIR/IRFA has been an important source for this RIR/IRFA.

Alaska Groundfish Fisheries. Draft Programmatic Supplemental Environmental Impact Statement (NMFS, 2001a). This report contains detailed fishery descriptions and statistics in Section 3.10, "Social and Economic Conditions," and in Appendix I, "Sector and Regional Profiles of the North Pacific Groundfish Fisheries."

"Economic Status of the Groundfish Fisheries off Alaska, 2001" (Hiatt, Felthoven and Terry, 2002), also

³The Council adopted and NMFS implemented the Interim Groundfish Observer Program (Interim Program) in 1996, which superseded the North Pacific Fisheries Research Plan (Research Plan). The requirements of the 1996 Interim Program were extended through 1997 (61 FR 56425, November 1, 1996), again through 1998 (62 FR 67755, December 30, 1997), again through 2000 (63 FR 69024, December 15, 1998), again through 2002 (65 FR 80381, December 21, 2000), and again through 2007 (67 FR 72595, December 6, 2002). The Interim Program provides the framework for the collection of data by observers to obtain information necessary for the conservation and management of the groundfish fisheries managed under the FMPs. Further, it authorizes mandatory observer coverage requirements for vessels and shoreside processors and establishes vessel, processor, and contractor responsibilities relating to the Observer Program. NMFS intends the Interim Program to be effective until a long-term program is developed and implemented that addresses several current concerns. These concerns include data integrity, observer compensation, working conditions for observers, and equitable distribution of observer costs.

⁴The more difficult matters included issues such as alternative funding mechanisms for the observer program, and revising observer coverage levels and placement.

known as the “2002 Economic SAFE Report.” This document is produced by NMFS and updated annually. The 2002 edition contains 49 historical tables summarizing a wide range of fishery information through the year 2001.

1.7 Summary of the benefits and costs

The benefits and costs of the alternatives are summarized below in Table 1. The final section of the RIR, Section 1.8, summarizes the implications for the E.O. 12866 significance analysis. These proposals are not believed to be significant within the meaning of E.O. 12866.

In general the information on operating behavior and costs that would make it possible to predict how fishermen and markets will react to the new regulation, and how their costs and revenues will change, is not available. Therefore this analysis of benefits and costs must be primarily qualitative.

This proposed rule amends the current regulations at 679.50 to: (1) apply rules governing observer housing to observers assigned to a stationary floating processor, and (2) permit an observer to be housed on a vessel he or she will be assigned to for more than 24 hours before the vessel’s departure from port, if the time is necessary to coordinate the vessel observer’s deployment logistics and vessel departure plans.

Current regulations at 679.50(i)(2)(vi)(B) govern the housing requirements for observers assigned to shoreside processing facilities and for observers between vessel or shoreside assignments while still under contract to an observer provider. The action would extend the requirement to observers deployed to stationary floating processors and to observers between deployments to shoreside plants, floating processors, or vessels, while still under contract. Current regulations specify that observers must “...be provided with accommodations at a licensed hotel, motel, bed and breakfast, or with private land-based accommodations...” The action would add stationary floating processors to this list. As noted earlier, it is common practice for observers deployed to catcher vessels delivering to floating processors to be housed on the floating processors in between vessel assignments. This action would change the regulation to account for this practice. Because this practice is, in effect, current “standard operating procedure”, no changes will follow from this proposed action and it will have no costs. It will, however, clarify regulations, bringing them into accord with industry practice.

Current regulations at 679.50(i)(2)(vi)(C) specify that an observer shall not be housed on a vessel to which he or she has been assigned for more than 24 hours prior to the vessel’s initial departure from port. The action would modify this to limit the period to “The time period prior to the vessel’s departure from port necessary to coordinate the vessel observer’s deployment logistics and vessel departure plans.” This relaxes the 24 hour period. Vessel operators are often unable to predict exactly when they will be able to leave port for a fishing trip. Among other factors, actual departure dates and times are often dependent on weather conditions. These uncertainties are illustrated in the comments quoted in Section 1.4 of this RIR. This action is meant to provide fishing operations with planning flexibility to deal with these uncertainties, and to give observer providers improved opportunities to serve their customers. The action would have the effect of lengthening a fishing trip. Observers would receive normal contracted compensation for the additional days. Moreover, fishing operations would pay for the extra days of observer availability. This would provide an incentive to the fishing operation to only contract for the additional observer days that were absolutely necessary to deal with the departure uncertainty.

Table 1. Summary of the cost and benefit analysis

	Alternative 1: status quo	Alternative 2
Impacts on resource management	Baseline	None
Benefits	Baseline	Clarification of regulations with respect to housing of observers on floating processors between deployments to catcher vessels. Increased flexibility available to fishermen for planning fishing trips in uncertain conditions. Observers may spend more time on vessels prior to departure, but would be compensated for the time at normal rates.
Costs	Baseline	No apparent costs
Net benefits	Baseline	Positive
Program objectives	Fails to fully meet	Makes it easier to meet program objectives
E.O. 12866 significance	None	None
Notes: Alternative 1 (status quo) is the no action alternative and provides the baseline against which the costs and benefits for the action alternative have been estimated.		

1.8 Summary of the significance criteria

A “significant regulatory action” under E.O. 12866 means any action that is likely to result in a rule that may:

- 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;
- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the executive order.

This action will not have an annual effect on the economy of \$100 million or more. This action affects vessels fishing for groundfish in the BSAI and the GOA. These groundfish fishing operations grossed between \$384 million and \$592 million, per year from 1997 to 2001 (Hiatt, *et al.*, Table 19).⁵ To have a \$100 million annual effect, this action would have to have an impact on costs equal to between 17% and 26% of the industry’s total gross revenues. Total direct costs of the observer program to industry are currently estimated to be about \$13 million a year (NMFS, 2002, page 90).⁶ This is about 3% of ex-vessel gross in the low revenue year cited above, and about 2% in the high revenue year. Moreover, there

⁵These gross revenue estimates include an implied ex-vessel revenue for catcher-processors.

⁶These are direct costs, calculated at \$350 per observer day. Observers are believed to impose indirect or non-monetary costs on fishing operations as well (for example, through their use of scarce bunk and deck space).

are no known costs of this action. Therefore, this action is not expected to meet the \$100 million threshold level for significance, nor meet any of the other criteria contained in this particular element of the E.O. Since NMFS has not identified any factors that would (a) “Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency”; (b) “Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof”; or (c) “Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the executive order,” this action is not expected to meet any of the threshold criteria for significance in E.O. 12866.

2.0 INITIAL REGULATORY FLEXIBILITY ANALYSIS

2.1 Introduction

This IRFA evaluates the impacts on directly regulated small entities of a regulatory amendment to alter rules governing the housing of BSAI and GOA groundfish fishery observers so as to provide more flexibility to fishing operations.

2.2 The purpose of an IRFA

The Regulatory Flexibility Act (RFA), first enacted in 1980, was designed to place the burden on the government to review all regulations to ensure that, while accomplishing their intended purposes, they do not unduly inhibit the ability of small entities to compete. The RFA recognizes that the size of a business, unit of government, or nonprofit organization frequently has a bearing on its ability to comply with a Federal regulation. Major goals of the RFA are: (1) to increase agency awareness and understanding of the impact of their regulations on small business, (2) to require that agencies communicate and explain their findings to the public, and (3) to encourage agencies to use flexibility and to provide regulatory relief to small entities. The RFA emphasizes predicting impacts on small entities as a group distinct from other entities and on the consideration of alternatives that may minimize the impacts while still achieving the stated objective of the action.

On March 29, 1996, President Clinton signed the Small Business Regulatory Enforcement Fairness Act. Among other things, the new law amended the RFA to allow judicial review of an agency’s compliance with the RFA. The 1996 amendments also updated the requirements for a final regulatory flexibility analysis, including a description of the steps an agency must take to minimize the significant economic impact on small entities. Finally, the 1996 amendments expanded the authority of the Chief Counsel for Advocacy of the Small Business Administration (SBA) to file *amicus* briefs in court proceedings involving an agency’s violation of the RFA.

In determining the scope, or ‘universe’, of the entities to be considered in an IRFA, NMFS generally includes only those entities that can reasonably be expected to be directly regulated by the proposed action. If the effects of the rule fall primarily on a distinct segment, or portion thereof, of the industry (e.g., user group, gear type, geographic area), that segment would be considered the universe for the purpose of this analysis. NMFS interprets the intent of the RFA to address negative economic impacts, not beneficial impacts, and thus such a focus exists in analyses that are designed to address RFA compliance.

Data on cost structure, affiliation, and operational procedures and strategies in the fishing sectors subject to the proposed regulatory action are insufficient, at present, to permit preparation of a “factual basis” upon which to certify that the preferred alternative does not have the potential to result in “significant economic impact on a substantial number of small entities” (5 U.S.C. 605(b)).

Because, based on all available information, it is not possible to ‘certify’ this outcome, should the proposed action be adopted, a formal IRFA has been prepared and is included in this package for Secretarial review.

2.3 What is required in an IRFA?

Under 5 U.S.C., Section 603(b) of the RFA, each IRFA is required to contain:

- A description of the reasons why action by the agency is being considered;
- A succinct statement of the objectives of, and the legal basis for, the proposed rule;
- A description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply (including a profile of the industry divided into industry segments, if appropriate);
- A description of the projected reporting, record keeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
- An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap or conflict with the proposed rule;
- A description of any significant alternatives to the proposed rule that accomplish the stated objectives of the proposed action, consistent with applicable statutes, and that would minimize any significant adverse economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives, such as:
 1. The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
 2. The clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;
 3. The use of performance rather than design standards;
 4. An exemption from coverage of the rule, or any part thereof, for such small entities.

2.4 What is a small entity?

The RFA recognizes and defines three kinds of small entities: (1) small businesses, (2) small non-profit organizations, and (3) and small government jurisdictions.

Small businesses. Section 601(3) of the RFA defines a ‘small business’ as having the same meaning as ‘small business concern’ which is defined under Section 3 of the Small Business Act. ‘Small business’ or ‘small business concern’ includes any firm that is independently owned and operated and not dominant in

its field of operation. The SBA has further defined a “small business concern” as one “organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor... A small business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust or cooperative, except that where the firm is a joint venture there can be no more than 49 percent participation by foreign business entities in the joint venture.”

The SBA has established size criteria for all major industry sectors in the U.S., including fish harvesting and fish processing businesses. A business involved in fish harvesting is a small business if it is independently owned and operated and not dominant in its field of operation (including its affiliates) and if it has combined annual receipts not in excess of \$3.5 million for all its affiliated operations worldwide. A seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation, and employs 500 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide. A business involved in both the harvesting and processing of seafood products is a small business if it meets the \$3.5 million criterion for fish harvesting operations. Finally a wholesale business servicing the fishing industry is a small business if it employs 100 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide.

The SBA has established “principles of affiliation” to determine whether a business concern is “independently owned and operated.” In general, business concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party controls or has the power to control both. The SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists. Individuals or firms that have identical or substantially identical business or economic interests, such as family members, persons with common investments, or firms that are economically dependent through contractual or other relationships, are treated as one party with such interests aggregated when measuring the size of the concern in question. The SBA counts the receipts or employees of the concern whose size is at issue and those of all its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit, in determining the concern’s size. However, business concerns owned and controlled by Indian Tribes, Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601), Native Hawaiian Organizations, or Community Development Corporations authorized by 42 U.S.C. 9805 are not considered affiliates of such entities, or with other concerns owned by these entities solely because of their common ownership.

Affiliation may be based on stock ownership when (1) A person is an affiliate of a concern if the person owns or controls, or has the power to control 50 percent or more of its voting stock, or a block of stock which affords control because it is large compared to other outstanding blocks of stock, or (2) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, with minority holdings that are equal or approximately equal in size, but the aggregate of these minority holdings is large as compared with any other stock holding, each such person is presumed to be an affiliate of the concern.

Affiliation may be based on common management or joint venture arrangements. Affiliation arises where one or more officers, directors or general partners controls the board of directors and/or the management of another concern. Parties to a joint venture also may be affiliates. A contractor or subcontractor is treated as a participant in a joint venture if the ostensible subcontractor will perform primary and vital requirements of a contract or if the prime contractor is unusually reliant upon the ostensible subcontractor. All requirements of the contract are considered in reviewing such relationship, including

contract management, technical responsibilities, and the percentage of subcontracted work.

Small organizations The RFA defines “small organizations” as any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

Small governmental jurisdictions The RFA defines small governmental jurisdictions as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000.

2.5 What is this action?

This proposed rule amends the current regulations at 679.50 (1)(i)(2)(vi)(B) and (C) to: (1) apply rules governing housing for observers assigned to a stationary floating processor, and (2) permit an observer to be housed on a vessel he or she will be assigned to for more than 24 hours before the vessel’s departure from port, if the time is necessary to coordinate the vessel observer’s deployment logistics and vessel departure plans.⁷

2.6 Reason for considering the proposed action

A final rule to amend regulations governing observer coverage requirements for vessels and shoreside processors in the North Pacific Groundfish Fisheries was published in the *Federal Register* on January 7, 2003 (68 FR 715). The intent of this rule was to address concerns about (1) shoreside processor observer coverage; (2) shoreside processor observer logistics; and (3) observer coverage requirements for vessels fishing with groundfish pot gear. This proposed rule is intended to correct and clarify the current regulations through various amendments.

In January, 2003, Observer Program staff received comments from two separate observer providers concerned with their ability to effectively deploy observers under the current regulations. In order to account for possible weather delays and other potential logistics problems, both observer providers described a common practice whereby observers were flown to their port of departure three or four days before their assigned vessel’s scheduled sailing. As observers arrive, they move onto their assigned vessels and await departure. It is a violation of current regulations for observers to be housed on vessels they are assigned to, until 24 hours prior to the vessel’s departure from port, although, in practice circumstances do not permit strict adherence to this rule. The conflict between necessary practice and current regulation has thus created potential logistical and compliance problems for observers, observer providers, and vessel operators.

Further, NMFS recognizes that observers are deployed to catcher vessels delivering to floating processors and it is common for observers to be housed on these floating processors in between vessel assignments. Current regulations do not provide for this practice.

2.7 Objectives of, and legal basis for, the proposed action

The objectives of the proposed action are as follows:

⁷The specific language of the regulatory change may be found in Appendix 2 to this RIR/IRFA.

- 1 This action is intended to ensure continued collection of high quality observer data to support the management objectives of the Fishery Management Plan (FMP) for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (BSAI) and the Fishery Management Plan for Groundfish of the Gulf of Alaska (GOA) and to promote the goals and objectives contained in those FMPs.
- 2 This action is intended to provide operational and logistical flexibility to observers, observer providers, and the fishing industry when the deployment of observers is required under current regulations governing groundfish fisheries in the BSAI and GOA and while maintaining the comfort and safety of observers.
- 3 This action is intended to clarify current regulations by allowing observers, between catcher vessel assignments, to be housed on floating processors.

2.8 Number and description of small entities affected by the proposed action

What are the regulated entities?

For the proposed actions, the small regulated entities would include: (1) fishing vessels with observer coverage requirements and total gross revenues of <\$3.5 million, annually, from all the operation's commercial activity taken together; (2) processing facilities with observer coverage requirements and fewer than 500 employees, when all their affiliated operations, worldwide, are combine; (3) the CDQ groups; and (4) observer providers.

Number of small regulated entities

The information necessary to determine if a vessel is independently owned and operated and had gross earnings of less than \$3.5 million, is not available. However, by using estimates of Alaska groundfish revenue, by vessel, it is possible to identify vessels that clearly are not small entities. In 2000, 263 catcher vessels and 86 catcher/processor vessels, respectively, used groundfish observers. Based only on estimates of Alaska groundfish revenue, it was determined that 1 of the catcher vessels and 33 of the catcher/processers were large entities. Therefore, up to 262 of the catcher vessels and 53 of the catcher/processers that had groundfish observers in 2000, could, on the basis of gross revenue, be small entities. However, with more complete revenue, ownership, and affiliation information, some of those 315 fishing vessels surely would not qualify as small entities. For example, the catcher vessels in the AFA pollock cooperatives are not considered to be small entities, due to their AFA affiliations. Their deletion from the total suggests that about 200 fishing vessels that would be directly regulated by the proposed action are "small entities", on the basis of SBA specified limits. Information on the number of vessels with observers in 1999 and 2000 is summarized in Table A.1 of the Appendix. Estimates of the numbers of fishing vessels that are not small entities are in Table A.2. Groundfish fishing vessels less than 60 ft LOA are not required to carry observers; therefore, they are not included in the estimate of approximately 200 small fishing operations. (NMFS, 2002, page 101)

All of the motherships were assumed to be large entities. Information that would allow the categorization of shoreside processors as large and small is not as readily available, partly because of the very complicated network of relationships among firms. However, it is estimated that 5 processing plants likely are small entities. This estimate is based on information from phone calls to selected plants, data from State of Alaska Department of Employment reports on employment in large Alaska business firms,

and information from NMFS staff familiar with the industry. (NMFS, 2002, page 101)

All 6 CDQ groups are non-profits and none is dominant in its field, and are therefore small by definition. Most of the 5 current observer providers are thought to be small entities. Therefore, there could be approximately 215 directly regulated small entities subject to the proposed action. (NMFS, 2002, page 101)

2.9 Impacts on regulated small entities

The preferred alternative does not appear to have any adverse impacts on small entities. The effective impacts of the preferred alternative are to clarify the regulatory basis for the current practice of housing catcher vessel observers on floating processors between deployments, and to provide fishing operations, as well as observer providers, better opportunities to deal efficiently and in a manner fully compliant with regulation, with the uncertainties associated with departure from port. Both of these are beneficial impacts.

2.10 Recordkeeping and reporting requirements

The IRFA should include “a description of the projected reporting, record keeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record...”

This regulation does not impose new record keeping or reporting requirements on the regulated small entities.

2.11 Federal rules that may duplicate, overlap, or conflict with proposed action

An IRFA should include “An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap or conflict with the proposed rule...”

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

2.12 Description of significant alternatives

An IRFA should include “A description of any significant alternatives to the proposed rule that accomplish the stated objectives of the Magnuson-Stevens Act and any other applicable statutes and that would minimize any significant economic impact of the proposed rule on small entities.” The status quo is the alternative to the preferred action. The status quo would not lead to a clarification of the regulations or provide fishing operations with additional flexibility to deal with the uncertainties of departure from port, while complying with the law. The status quo was rejected because it would not accomplish the objectives of the action, and because it would have a relatively adverse impact on small entities.

3.0 REFERENCES

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National Marine Fisheries Service (NMFS). 2002. Draft Environmental Assessment, Regulatory Impact Review and Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) Extending and Improving the North Pacific Groundfish Observer Program Beyond 2002. NMFS, Alaska Regional Office. August 6, 2002.

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APPENDIX 1: NUMBER OF ENTITIES

Table A.1 Numbers of vessels and plants with observers, observer deployment days, and estimated observer costs (\$1,000) by year and type of operation, 1999 and 2000.

	1999			2000		
	Count	Obs. Days	Cost	Count	Obs. Days	Cost
Catcher vessels						
Hook and line						
60-124	47	894	312.90	46	902	315.70
>124	1	11	3.85	2	17	5.95
H&L total	48	905	316.75	48	919	321.65
Pot						
60-124	55	711	248.85	59	864	302.40
>124	20	254	88.90	20	244	85.40
Pot total	75	965	337.75	79	1,108	387.80
Trawl						
60-124	98	3,552	1,243.20	106	4,272	1,495.20
>124	31	4,096	1,433.60	30	4,336	1,517.60
Trawl total	129	7,648	2,676.80	136	8,608	3,012.80
Catcher-vessel total	252	9,518	3,331.30	263	10,635	3,722.25
Catcher/processors						
Hook and line						
60-124	12	1,660	581.00	12	1,847	646.45
>124	25	5,585	1,954.75	26	6,474	2,265.90
H&L total	37	7,245	2,535.75	38	8,321	2,912.35
Pot						
>60	8	368	128.80	9	426	149.10
Pot total	8	368	128.80	9	426	149.10
Fillet trawler						
>124	4	1,154	403.90	4	1,195	418.25
H&G trawler						
60-124	9	840	294.00	9	860	301.00
>124	15	4,089	1,431.15	15	4,532	1,586.20
Surimi trawler						
>124	11	3,495	1,223.25	11	3,996	1,398.60
Trawl total	39	9,578	3,352.30	39	10,583	3,704.05
Catcher/processor total	84	17,191	6,016.85	86	19,330	6,765.50
Motherships	3	490	171.50	5	985	344.75
Other vessels	16	485	169.75	11	886	310.10
All vessels	355	27,684	9,689.40	365	31,836	11,142.60
Shore plants	20	3,166	1,108.10	27	4,522	1,582.70
Grand totals	375	30,850	10,797.50	392	36,358	12,725.30

Table A.1 Continued.

Vessels that operated exclusively in the BSAI

	1999			2000		
	Count	Obs. Days	Cost	Count	Obs. Days	Cost
Catcher vessels						
Pot						
60-124	21	283	99.05	16	312	109.20
>124	18	234	81.90	14	169	59.15
Pot total	39	517	180.95	30	481	168.35
Trawl						
60-124	25	825	288.75	44	1,950	682.50
>124	6	641	224.35	28	4,073	1,425.55
Trawl total	31	1,466	513.10	72	6,023	2,108.05
Catcher-vessel total	70	1,983	694.05	102	6,504	2,276.40
Catcher/processors						
Hook and line						
>124	10	1,931	675.85	19	4,393	1,537.55
H&L total	10	1,931	675.85	19	4,393	1,537.55
Pot						
>60	-	-	-	6	295	103.25
Pot total	-	-	-	6	295	103.25
Fillet trawler						
>124	4	1,154	403.90	4	1,195	418.25
H&G trawler						
60-124	3	180	63.00	4	326	114.10
>124	4	1,093	382.55	-	-	-
Surimi trawler						
>124	11	3,495	1,223.25	11	3,996	1,398.60
Trawl total	22	5,922	2,072.70	19	5,517	1,930.95
Catcher/processors r total	32	7,853	2,748.55	44	10,205	3,571.75
Motherships	3	490	171.50	4	905	316.75
All vessels	105	10,326	3,614.10	150	17,614	6,164.90

Table A.1 Continued.

Vessels that operated exclusively in the GOA

	1999			2000		
	Count	Obs. Days	Cost	Count	Obs. Days	Cost
Catcher vessels						
Hook and line						
60-124	27	426	149.10	24	369	129.15
H&L total	27	426	149.10	24	369	129.15
Pot						
60-124	11	118	41.30	19	240	84.00
>124	-	-	-	3	36	12.60
Pot total	11	118	41.30	22	276	96.60
Trawl						
60-124	22	559	195.65	32	860	301.00
Trawl total	22	559	195.65	32	860	301.00
Catcher-vessel total	60	1,103	386.05	78	1,505	526.75
All vessels	60	1,103	386.05	78	1,505	526.75

Note: The cost estimates are based on an estimated average cost per day of \$350. This includes the payment to observer providers and the cost of transportation and board.

Source: NMFS Observer Program, CFEC fish tickets, weekly production reports, Alaska state and Federal vessel-registration files. National Marine Fisheries Service, P.O. Box 15700, Seattle, WA 98115-0070.

Table A.2 Number of vessels that caught or caught and processed more than \$3.5 million ex-vessel value or product value of groundfish by area, catcher type and gear, 1996-2000.

	Gulf of Alaska			Bering Sea and Aleutian			All Alaska		
	Catcher Vessels	Catcher process	Total	Catcher Vessels	Catcher process	Total	Catcher Vessels	Catcher process	Total
1996									
All gear	1	33	34	2	62	64	2	62	64
H & L	0	4	4	0	9	9	0	9	9
Trawl	1	29	30	2	53	55	2	53	55
1997									
All gear	1	21	22	1	56	57	1	56	57
H & L	0	4	4	0	8	8	0	8	8
Pot	0	0	0	0	1	1	0	1	1
Trawl	1	17	18	1	48	49	1	48	49
1998									
All gear	0	25	25	0	59	59	0	59	59
H & L	0	5	5	0	14	14	0	14	14
Trawl	0	20	20	0	44	44	0	44	44
Oth. & unk.	0	0	0	0	2	2	0	2	2
1999									
All gear	0	28	28	0	57	57	0	57	57
H & L	0	13	13	0	21	21	0	21	21
Pot	0	1	1	0	3	3	0	3	3
Trawl	0	14	14	0	36	36	0	36	36
Oth. & unk.	0	0	0	0	1	1	0	1	1
2000									
All gear	0	26	26	1	57	58	1	57	58
H & L	0	12	12	0	25	25	0	25	25
Pot	0	0	0	0	1	1	0	1	1
Trawl	0	14	14	1	33	34	1	33	34

Note: Includes only vessels that fished part of Federal TACs.

Source: Fishtickets, weekly processor reports, NMFS permits, commercial operators annual reports. National Marine Fisheries Service, P.O. Box 15700, Seattle, WA 98115-0070.

APPENDIX 2: PROPOSED REGULATORY LANGUAGE

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

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

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

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

2. In §679.50, paragraph (i)(2)(vi)B is revised to read as follows:

§ 679.50 Groundfish Observer Program.

* * * * *

(i) * * *

(2) * * *

(vi) * * *

(B) Except as provided in paragraphs (i)(2)(vi)(C) and (i)(2)(vi)(D) of this section, each observer deployed to a shoreside processing facility or stationary floating processor, and each observer between vessel, stationary floating processor or shoreside assignments while still under contract with a permitted observer provider, shall be provided with accommodations at a licensed hotel, motel, bed and breakfast, stationary floating processor, or other shoreside accommodations for the duration of each shoreside assignment or period between vessel or shoreside assignments. Such accommodations must include an assigned bed for each observer and no other person may be assigned that bed for the duration of that observer’s stay. Additionally, no more than four beds may be in any individual room housing observers at accommodations meeting the requirements of this section.

(C) An observer may be housed on a vessel he or she will be, or currently are, assigned to for a period not to exceed:

(1) The time period prior to the vessel’s departure from port necessary to coordinate the vessel observer’s deployment logistics and vessel departure plans;

(2) Twenty-four hours following the completion of an offload where the observer has duties and is scheduled to disembark; or

(3) Twenty-four hours following the vessel’s arrival in port when the observer is scheduled to disembark.

* * * * *