

**ACTION:** Correction to final rule preamble.

**SUMMARY:** This document contains a correction to the preamble of the final rule on two-way end-of-train telemetry devices (two-way EOTs) and certain passenger train operations, which was published on Friday, May 1, 1998 (63 FR 24130). The final rule specifically addressed and clarified the applicability of the existing two-way EOT requirements to certain passenger train operations where multiple units of freight-type equipment, material handling cars, or express cars are part of a passenger train's consist.

**FOR FURTHER INFORMATION CONTACT:**

James Wilson, Motive Power and Equipment Division, Office of Safety, RRS-14, FRA, 400 Seventh Street, SW, Stop 25, Washington, DC 20590 (telephone 202-632-3367); or Thomas Herrmann, Trial Attorney, Office of the Chief Counsel, RCC-12, FRA, 400 Seventh Street, S.W., Stop 10, Washington, D.C. 20590 (telephone 202-632-3178).

**SUPPLEMENTARY INFORMATION:**

**Background**

The "Regulatory Impact" portion of the preamble to the final rule addressing Executive Order 12866 and DOT regulatory policies and procedures stated that because the requirements contained in the final rule clarify the applicability of the two-way EOT regulations to a specific segment of the industry and generally reduce the regulatory burden on these operators, FRA concluded that the final rule did not constitute a significant rule under either Executive Order 12866 or DOT's policies and procedures. However, FRA inadvertently omitted a statement that the impact of the rule would be so minimal that any further analysis was not warranted.

**Need for Correction**

As published, the "Regulatory Impact" portion of the preamble failed to inform the public of FRA's determination that the impact of the rule would be so minimal that any further analysis was not warranted. Thus, that portion of the preamble is in need of clarification.

**Correction**

Accordingly, the publication on May 1, 1998 of the final rule on two-way EOTs and certain passenger train operations, which was contained in FR Doc. 98-11408, is corrected as follows:

On page 24134 in the first column, at the end of the paragraph headed "Executive Order 12866 and DOT

Regulatory Policies and Procedures," the following sentence is added:

Furthermore, as the final rule is intended to clarify the applicability of the two-way EOT regulations and affects a very limited number of passenger train operations, FRA has determined that the impact of the rule would be so minimal that any further analysis was not warranted.

Issued in Washington, D.C., on May 12, 1998.

**S. Mark Lindsey,**

*Chief Counsel, Federal Railroad Administration.*

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 600**

[Docket No. 970829214-8090-02; I.D. 082097B]

RIN 0648-AJ76

**Magnuson-Stevens Fishery Conservation and Management Act Provisions; Observer Health and Safety**

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

**ACTION:** Final rule.

**SUMMARY:** NMFS amends the regulations that pertain to fishery observers and the vessels that carry them. This regulatory amendment implements measures to ensure the adequacy and safety of fishing vessels that carry observers. Owners and operators of fishing vessels that carry observers are required to comply with guidelines, regulations, and conditions in order to ensure that their vessels are adequate and safe for the purposes of carrying an observer and allowing normal observer functions.

**DATES:** Effective June 17, 1998.

**ADDRESSES:** Copies of the Regulatory Impact Review prepared for this action may be obtained from NMFS, SF3, 1315 East-West Highway, Silver Spring, MD 20910, Attn: William J. Bellows.

**FOR FURTHER INFORMATION CONTACT:** William J. Bellows, 301-713-2341.

**SUPPLEMENTARY INFORMATION:**

**Background**

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

The Magnuson-Stevens Act 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.

A proposed rule to implement the required measures was published in the **Federal Register** on September 22, 1997 (62 FR 49463), and invited public comment through October 22, 1997. Several comments were received late in the comment period requesting that the comment period be extended. NMFS extended the comment period 30 days (62 FR 55774, October 28, 1997).

Eleven letters of comment were received concerning the proposed rule. Of these 11, eight expressed opposition to the rule or to specific provisions in the rule, and one letter was signed by eight individuals who represented different industry organizations. Two letters expressed strong support for the rule, one of which was from an observer organization with approximately 200 members. One letter expressed neither opposition nor support but listed many problems that observers face on the job.

*Comment 1:* The publication of the rule was inadequately advertised/announced. It was not on any of the following notice mediums: NMFS bulletin boards, NMFS press release, NMFS homepage, or Alaska Region homepage. The commenter requested an extension of the 30-day comment period.

*Response:* The proposed rule was published in the **Federal Register** on September 22, 1997 (62 FR 49463). The comment period was extended for 30 days and was announced by publication in the **Federal Register** on October 28, 1997 (62 FR 55774). In addition to the October 28 publication of the extension of the comment period, both the proposed rule and the extension of the comment period were posted on the NMFS homepage and on the Alaska Region homepage during the extended comment period.

*Comment 2:* The 30-day extension of the comment period is grossly inadequate.

*Response:* NMFS disagrees. By extending the public comment period by an additional 30 days, NMFS doubled the length of the original comment period. NMFS believes that a 60-day public comment period is adequate.

*Comment 3:* Observers are not qualified to make a judgement regarding vessel safety.

*Response:* It is true that observers do not receive the same vessel safety examination training that U.S. Coast Guard (USCG) personnel do. However, NMFS observers are provided training that addresses vessel safety. For example, in the North Pacific observer training, observers are taught to look for obvious areas of non-compliance that may jeopardize their safety. In addition to viewing several safety videos, the observers are shown a set of "safety tour" slides in which they are asked to look for items on a safety check list. Section 600.746(c)(3) has been added to the rule; this section encourages the observer to check major safety items (as identified by the USCG) and to briefly check the vessel's major spaces for especially hazardous conditions. The intent of this rule is not to empower an observer as a USCG enforcement official. Its purpose is to encourage an observer to check the major safety items identified in § 600.746(c)(3); if these items are absent or unserviceable, the rule empowers the observer not to sail with the vessel until those deficiencies are corrected. The observer's pre-trip safety check will be made in accordance with published USCG guidance on some of the most important items that would be required in the event of an at-sea emergency.

*Comment 4:* The rule's evaluation that there will be no significant impact on a substantial number of small entities is wrong. If an observer refuses to board a vessel that is safe in accordance with USCG standards, the vessel could be delayed in departing long enough to miss an important part of a short season,

resulting in significant lost opportunity to fish. The observer's refusal could be the result of poor judgement, lack of expertise or training, or vindictiveness.

*Response:* NMFS has added language to the rule in § 600.746(c)(3) that is intended to minimize, if not eliminate, the possibility of an observer making a decision, for whatever reason, regarding a safe vessel that would delay its beginning legal fishing at the optimum time. The above-mentioned section was added to the regulations in order to give the observer detailed guidance regarding the pre-trip safety check. In addition, this document makes it clear that the observer's safety check is to confirm that the USCG safety decal is current and to spot-check other safety items by conducting a brief walk through the vessel's major spaces to check for obviously hazardous conditions. NMFS believes that the training observers now receive is adequate to enable an observer to conduct the pre-trip safety check as discussed in the response to comment 3.

*Comment 5:* There are no provisions for redress and appeal in the event that a vessel is unnecessarily detained or impacted.

*Response:* There are no specific procedures for redress or appeal in these regulations. It would be redundant to include those legal procedures here because they are available to anyone who considers that he or she has experienced wrongful negative impact of any regulations. As is suggested in the response to comment 17, when a vessel operator disputes the observer's decision and is unable to reach a resolution, the vessel operator should call the USCG and request reexamination of the issue in dispute.

*Comment 6:* If the regulations were approved in the absence of USCG regulations, they would be inadequate.

*Response:* They are not being approved in the absence of USCG regulations. The intent of this rule is to build upon the USCG and other safety regulations. The regulations intend to insure the safety of observers at sea without duplicating USCG regulations, which are designed to insure the safety of all persons on board fishing vessels.

*Comment 7:* All vessels carrying observers are required to have a current safety decal; consequently, there is no basis for an observer refusing to board a vessel.

*Response:* If the decal is valid (current) and if no safety equipment has been lost, damaged, or is otherwise unserviceable, there should be no safety-related reasons for an observer to refuse boarding. If, on the other hand, the decal is current, but safety

equipment is missing or unserviceable, the observer is authorized not to board the vessel.

*Comment 8:* The style of referring to other sections of the CFR is difficult to read and understand. Furthermore, some of the sections cited have not been written.

*Response:* This rule cites other sections of the CFR rather than duplicating those sections in order to make the regulations published in the **Federal Register** as concise as possible. NMFS wants the regulations to refer to the most recent versions of the regulations cited. If other agencies' regulations were repeated in NMFS' regulations, it would be nearly impossible for NMFS to keep the regulations current. By citing the other agencies' regulations, the reference is always to the most recently amended regulation. All cited sections have been written and published before they are incorporated into the CFR except for citations to the rule being enacted through this action. The regulatory text for this rule follows after this preamble. Some changes may have been too recent to appear in the CFR dated October 1996, which was the last-published CFR at the time that the proposed rule was published.

*Comment 9:* USCG no longer performs no-cost inspections of processor vessels.

*Response:* The commenter is correct. Processing vessels examined by private organizations comprise the only category of fishing vessels that pays to have inspections done. These for-fee inspections are in lieu of USCG dock-side examinations but do not preclude at-sea examinations by USCG. The inspections of processing vessels are required whether observer safety rules are in effect or not.

*Comment 10:* This rulemaking is premature; "neither the industry nor NMFS is ready at this time to begin discussions on such rules. Before that discussion can begin, NMFS first needs to develop appropriate rules regarding onboard observers in all the other fisheries in which they have been deemed necessary."

*Response:* This rule is required by the Magnuson-Stevens Act.

*Comment 11:* It is unrealistically generous to require that accommodations be equivalent to those of the vessel's officers. Observers do not warrant treatment as officers.

*Response:* This rule requires nothing specific regarding accommodations for observers. It merely refers to regulations already in place.

*Comment 12:* Under the regulations that would be put in place by this rule, if all vessels were required to carry

observers, all vessels would have to undergo safety inspections. This would mean the end of uninspected fishing vessels.

*Response:* Under the assumptions made by the commenter, it is true that if all vessels were required to carry observers, all of them would have to be examined. At the present time, however, not all vessels are required to carry observers. NMFS wants fishing vessels carrying observers to fish safely, and undergoing USCG safety examinations promotes safety.

*Comment 13:* What is the authority under which regional requirements governing observer accommodations might be developed? It is possible that these regional requirements could have unintended effects. For example, if the regional requirement deals with an issue that is judged subjectively, such as the adequacy of accommodations or food, the observer in applying that subjective judgement could keep a safe vessel from fishing.

*Response:* The authorities under which regional requirements are developed are the Magnuson-Stevens Act, the Marine Mammal Protection Act, and the ESA. The addition of § 600.746(c)(3) to the rule should eliminate the problem of subjective judgement in conducting the vessel's pre-trip safety check. It is not the intent of this rule to develop regional requirements.

*Comment 14:* If a vessel has a valid USCG safety decal, there should be no question concerning the vessel's safety. To then have an observer, who has the authority to refuse to board the vessel because of a safety deficiency, is double jeopardy.

*Response:* If a vessel has passed a USCG dock-side safety examination, the regulations indicate that such vessel would be considered safe with respect to the USCG regulations. However, it is possible that some requirements with which the vessel was in compliance at the time of the USCG safety examination may not be met at the time of boarding by an observer for a specific trip. NMFS has added language at § 600.746(c)(3) that encourages the observer to examine some of the most important items that would be required in the case of an emergency at sea. This approach is consistent with that applied by USCG in recognizing that changes in vessel safety may occur between the time when a USCG safety decal is issued and the beginning of subsequent fishing. NMFS notes that this rule gives an observer authority not to board an unsafe or inadequate vessel. If such a vessel is operating in a fishery with mandatory observer coverage, the result of the

observer's refusing to board might be that the vessel would not be authorized to conduct fishing.

*Comment 15:* This rule cites other regulations already in place, which suggests that regulations to effect safety are already in place. That being the case, this rule will not change anything.

*Response:* This rule applies safety standards to all fisheries, including those for which no other observer regulations are in place. In fisheries with mandatory observer programs in place now, and for those in which mandatory programs may be established, this rule makes it a violation to fish without an observer aboard. This rule also requires vessels to submit to an otherwise voluntary inspection program to provide evidence of compliance with safety standards.

*Comment 16:* This rule is an attempt to exceed the authority conveyed by the Magnuson-Stevens Act in that it goes beyond USCG regulations by authorizing an observer to refuse to board an unsafe vessel, thereby keeping the vessel from fishing legally. It goes beyond what is necessary to provide a safe environment for an observer, and it gives an observer authority that Congress gave to USCG.

*Response:* NMFS believes that the rule does not go beyond what is required to provide a safe environment for observers and for other persons aboard fishing vessels. The intent of the rule is not to empower an observer with USCG enforcement official status; its intent is to provide a safe vessel for an assigned observer. The NMFS rule does not encroach on USCG authority to terminate a voyage. Rather, it conditions a vessel's ability to fish safely by requiring compliance with existing regulations enforced by the USCG. The authority to regulate fishing activities properly rests with NMFS.

*Comment 17:* If NMFS wants to require more than vessel-provided personal flotation devices (PFDs) and safety briefings, it should specifically identify the requirements that relate to observer safety rather than to such other safety concerns as the environment. NMFS should also consider which safety requirements warrant giving observers "the extraordinary authority to prevent a vessel from undertaking a fishing trip."

*Response:* NMFS is not giving greater significance to some USCG regulations than to others. NMFS is encouraging observers to check for compliance with existing regulations. A safety decal is considered to be evidence of compliance, but if there is other obvious non-compliance, the observer has the option of not boarding the vessel. If the

vessel operator disputes the observer's decision, which should be based upon published USCG guidance on some of the most important items that would be required in the event of an at-sea emergency, and no resolution is reached, the vessel operator should call the USCG to request reexamination of the issue in dispute. The addition of § 600.746(c)(3) clarifies which items the observer should check at the time of boarding. The observer's pre-trip safety check will be made in accordance with published Coast Guard Guidance on some of the most important items that would be required in the event of an at-sea emergency. NMFS recognizes that, in some circumstances, an observer may raise a safety question that requires a vessel to wait for a USCG boarding before fishing. It is true that this could result in a loss of fishing days. In structuring the rule this way, NMFS had to weigh the impacts of this approach versus the impacts of alternative approaches. Just as there is a potential for a vindictive observer declining to board and thereby delaying a vessel's departure, other approaches would have raised the possibility of an observer being coerced into boarding a vessel that he or she believes is unsafe. Given the safety risks at issue and the probability that most safety violations will be easily remedied, e.g., replacing PFDs, NMFS determined that placing the presumptions in the selected manner was preferable.

Whenever possible, vessel owners/operators are encouraged to arrange for the observer to make the pre-trip safety check in advance of the beginning of the planned fishing trip. In that way, there would be time to correct problems without delaying the trip's departure time.

*Comment 18:* There are alternatives that would accomplish NMFS' objectives that were not considered by NMFS. One alternative is to provide an automatic waiver 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 inspection either at sea or in port. Alternative two would be to require that the safety determination be made by a NMFS enforcement agent who had completed the USCG training program for vessel safety inspections. Alternative three would be to determine which classes of vessels have consistently failed to provide safe working conditions for observers. Only those classes of vessels would be required to comply with the rule. Vessels with proven safety records would be exempt from the provisions of this rule.

*Response:* Alternative one 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. Furthermore, it could provide an opportunity for vessel operators to avoid taking observers by incurring safety violations, such as no PFD for the observer. By authorizing an observer to refuse to board an unsafe vessel and by making it illegal to fish without an observer in a mandatory observer fishery, there is a strong incentive for the vessel to meet all USCG safety regulations. Alternative two was considered and rejected. It is equally possible that a NMFS enforcement agent, like an observer, would discover a safety violation that would delay a vessel's fishing trip. This option would also create the risk of an observer having to board a vessel that he or she believes is unsafe. In addition, from a practical standpoint, the current work load for NMFS enforcement agents makes it impossible for them to undertake this responsibility and continue to perform other enforcement functions/duties. Alternative three is not feasible because vessel safety is an individual vessel issue not one that can be addressed by classes of vessels.

*Comment 19:* The rule does not analyze measures taken by regions.

*Response:* It is not the intent of this rule to analyze measures taken by regions. That analysis is done at the time those measures are developed and proposed in the rulemaking process.

*Comment 20:* One commenter believes that, should an observer refuse to board a vessel because of safety deficiencies, there could be legal implications beyond the simple issue of the USCG safety requirement and the vessel's fishing. "After an observer has determined a vessel to be unsafe, a crew member injures himself [sic] in the factory. Considering the Jones Act, the lawyers would have a field day."

*Response:* NMFS believes this comment refers to the possible use of an observer's safety determinations as evidence in a law suit. As stated in the responses to comments 3 and 16, this rule is not intended to give observers the authority to make actual determinations as to a vessel's compliance with USCG regulations. Rather, it simply requires that a vessel, if its safety has been called into question, rectify the shortcoming or submit to a new USCG safety examination or inspection. If anything, this rule is likely to reduce the number of negligence claims because vessels with questionable safety issues will correct them or be reexamined by USCG before fishing.

*Comment 21:* The USCG should be consulted.

*Response:* The USCG was involved at every stage of development of this rule.

*Comment 22:* One commenter raised specific issues about an observer who was terminated and who subsequently filed suit.

*Response:* Because the case is before the court, it would be inappropriate for NMFS to respond at this time.

#### **Changes From the Proposed Rule**

Four changes were made from the proposed rule. One was made in response to comments: A provision was added at § 600.746(c)(3) to provide guidance on the scope of the observer's pre-trip safety check.

Another change was made to clarify that USCG performs either an inspection or an examination: The words "examination or inspection" replaced "inspection" in §§ 600.725(p), 600.746(c)(1), and 600.746(d)(1) so that it is clear that either an examination or an inspection can be performed.

The word "Examination" was inserted in § 600.746(c)(1) in order to more clearly identify the Commercial Fishing Vessel Safety Examination decal.

The word "examine" replaced "inspect" in § 600.746(c)(2) in order to avoid confusion with USCG inspection.

The observer's pre-trip safety check of a vessel that displays a current Commercial Fishing Vessel Safety Examination decal will normally consist of no more than a spot check of the equipment identified in § 600.746(c)(3), i.e., PFDs/immersion suits; ring buoys; distress signals; fire extinguishing equipment; emergency position indicating radio beacon, when required; survival craft, when required; and a walk through major spaces. This walk-through is not intended to broaden the scope of the safety check. The safety check should be done expeditiously because the decal indicates that the vessel has already undergone an extensive dockside inspection.

#### **Classification**

At the proposed rule stage, NMFS certified to the Assistant General Counsel for Legislation and Regulation, Department of Commerce and to the Chief Counsel for Advocacy, Small Business Administration that this action would not result in a significant economic impact on a substantial number of small entities. Comments received on the proposed rule suggested that small entities might experience a significant economic impact as a result of the rule. Based on this new information, NMFS decided to prepare

a Final Regulatory Flexibility Analysis (FRFA). The FRFA concludes that the rule's authorization for an observer to refuse to board a vessel that the observer believes to be unsafe and the rule's requirement that a vessel required to carry an observer cannot legally fish without the observer make it possible that implementation of this rule could delay a vessel's departure for a fishing trip. Because of variations in the structures of different fisheries' mandatory observer programs and in the structures of the different fishery management regimes, the fact that an observer refused to board would not necessarily mean that the vessel would lose fishing time as might be the case in those fisheries where vessels are allowed a limited number of days fishing per year. It is not possible to estimate accurately how many, if any, vessels would lose days at sea as a result of this rule. Therefore, there is at least a theoretical possibility that 20 percent of the affected small entities could experience a significant economic impact.

In addition to the preferred alternative, which is the alternative that is implemented by this rule, NMFS considered several other alternatives. One of them would have been to take no action. Under this approach, vessels that carry observers would be required to comply with the same safety standards that would be applicable under the preferred alternative, but there would be no guidance to interested parties as to how to conduct a pre-trip safety check nor would there be any means by which an observer could quickly ascertain whether the vessel was in compliance with applicable USCG regulations. If the agency were to adopt the no-action alternative, the Congressional mandate in the Magnuson-Stevens Act would not be effected. In addition, there would be continued risk of unsafe conditions on board vessels to which observers were assigned.

Another alternative would have prescribed new national 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 as is the case in the first alternative. In addition to those basic USCG standards, this alternative would result in new regulations addressing a wide range of accommodation issues, such as quality of food, which, if not met, would authorize an observer not to board a fishing vessel. The observer would be authorized to make the pre-trip safety check to determine whether or not he/

she would board the vessel. In mandatory observer programs, a fishing vessel would not be permitted to fish legally without an observer. This alternative is not the preferred alternative because of the degree to which an observer would be authorized to make subjective, qualitative determinations. Furthermore, 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 that of the preferred alternative.

The last alternative that NMFS considered would have prescribed basic standards for determining safety and adequacy as described in the preferred alternative, but either the National Marine Fisheries Service or an authorized observer contractor would have been authorized to make the pre-trip safety check to determine whether or not the observer would board the vessel. In mandatory observer programs, a fishing vessel would not be permitted to fish legally without an observer. This alternative would have used the same evaluation criteria (USCG dockside safety examination, pre-trip safety check, presence of a current Commercial Fishing Vessel Safety Decal, etc.) as the preferred alternative but would give NMFS and/or an authorized observer contractor the authority 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 despite 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. The benefit of having NMFS or an authorized observer contractor make the safety and adequacy decision is that it would avoid putting the additional pressure on an observer of potentially having to tell a captain and crew with whom he/she would be spending time at sea that a fishing trip would be delayed. However, this alternative would also have the potential to delay a fishing voyage pending safety resolution. It is just as possible that a NMFS employee or observer contractor 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 contractor believes the vessel to be safe. There would also be costs to NMFS and/

or the observer contractor in the form of having a representative on site each time an observer boarded a vessel. NMFS and/or the observer contractor would also experience the cost of training 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 of forcing an observer aboard an unsafe vessel.

In addition to these alternatives, one commenter suggested two additional alternatives: The first would have provided an automatic waiver 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 inspection either at sea or in port. This alternative would have voided 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. Furthermore, it could provide an opportunity for vessel operators to avoid taking observers by incurring safety violations, such as no PFD for the observer. The other suggested alternative would be to determine which classes of vessels have consistently failed to provide safe working conditions for observers. Only those classes of vessels would be required to comply with the rule. Vessels with proven safety records would be exempt from the provisions of this rule. This approach is not feasible because vessel safety is an individual vessel issue not one that can be addressed by classes of vessels.

NMFS tried to mitigate the potential impact of the rule by using objective standards for the observer's pre-trip safety check in the form of the published USCG guidance about the most important items that would be required in the event of an at-sea emergency. This particular alternative was chosen because it seemed to be an appropriate balance between the objectives of increasing observer safety and minimizing the risk of negative economic impact on vessels.

This action has been determined to be not significant for purposes of E.O. 12866.

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

Administrative practice and procedure, Confidential business information, Fisheries, Fishing, Fishing vessels, Foreign relations, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Statistics.

Dated: May 12, 1998.

**David L. Evans,**

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

For the reasons set forth in the preamble, 50 CFR part 600 is amended as follows:

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

1. The authority citation for 50 CFR part 600 continues to read as follows:

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

2. Section 600.725 is amended by redesignating paragraph (p) as paragraph (t), adding paragraphs (p), (q), (r), (s), and (u), and revising newly redesignated paragraph (t) to read as follows:

#### § 600.725 General prohibitions.

\* \* \* \* \*

(p) Fail to submit to a USCG safety examination when required by NMFS pursuant to § 600.746.

(q) Fail to display a Commercial Fishing Vessel Safety Examination decal or a valid certificate of compliance or inspection pursuant to § 600.746.

(r) Fail to provide to an observer, a NMFS employee, or a designated observer provider information that has been requested pursuant to § 600.746, or fail to allow an observer, a NMFS employee, or a designated observer provider to inspect any item described at § 600.746.

(s) Fish without an observer when the vessel is required to carry an observer.

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

(u) Prohibit or bar by command, impediment, threat, coercion, or refusal of reasonable assistance, an observer from conducting his or her duties aboard a vessel.

3. In subpart H, § 600.746 is added to read as follows:

#### § 600.746 Observers.

(a) *Applicability.* This section applies to any fishing vessel required to carry an observer as part of a mandatory observer program or carrying an observer as part of a voluntary observer program under the Magnuson-Stevens Act, MMPA (16 U.S.C. 1361 *et seq.*), the ATCA (16 U.S.C. 971 *et seq.*), the South Pacific Tuna Act of 1988 (16 U.S.C. 973 *et seq.*), or any other U.S. law.

(b) *Observer requirement.* An observer is not required to board, or stay aboard, a vessel that is unsafe or inadequate as described in paragraph (c) of this section.

(c) *Inadequate or unsafe vessels.* (1) A vessel is inadequate or unsafe for

purposes of carrying an observer and allowing operation of normal observer functions if it does not comply with the applicable regulations regarding observer accommodations (see 50 CFR parts 229, 285, 300, 600, 622, 648, 660, 678, and 679) or if it has not passed a USCG safety examination or inspection. A vessel that has passed a USCG safety examination or inspection must display one of the following:

(i) A current Commercial Fishing Vessel Safety Examination decal, issued within the last 2 years, that certifies compliance with regulations found in 33 CFR, chapter I and 46 CFR, chapter I;

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

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

(2) Upon request by an observer, a NMFS employee, or a designated observer provider, a vessel owner/operator must provide correct information concerning any item relating to any safety or accommodation

requirement prescribed by law or regulation. A vessel owner or operator must also allow an observer, a NMFS employee, or a designated observer provider to visually examine any such item.

(3) *Pre-trip safety check.* Prior to each observed trip, the observer is encouraged to briefly walk through the vessel's major spaces to ensure that no obviously hazardous conditions exist. In addition, the observer is encouraged to spot check the following major items for compliance with applicable USCG regulations:

(i) Personal flotation devices/immersion suits;

(ii) Ring buoys;

(iii) Distress signals;

(iv) Fire extinguishing equipment;

(v) Emergency position indicating radio beacon (EPIRB), when required; and

(vi) Survival craft, when required.

(d) *Corrective measures.* If a vessel is inadequate or unsafe for purposes of carrying an observer and allowing operation of normal observer functions,

NMFS may require the vessel owner or operator either to:

(1) Submit to and pass a USCG safety examination or inspection; or

(2) Correct the deficiency that is rendering the vessel inadequate or unsafe (e.g., if the vessel is missing one personal flotation device, the owner or operator could be required to obtain an additional one), before the vessel is boarded by the observer.

(e) *Timing.* The requirements of this section apply both at the time of the observer's boarding, at all times the observer is aboard, and at the time the observer is disembarking from the vessel.

(f) *Effect of inadequate or unsafe status.* A vessel that would otherwise be required to carry an observer, but is inadequate or unsafe for purposes of carrying an observer and for allowing operation of normal observer functions, is prohibited from fishing without observer coverage.

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