

November 2, 2004

MEMORANDUM FOR: AIS Observers

FROM: David Potter  
Branch Chief, FSB

SUBJECT: Observer Program Regulatory Compliance

The Northeast Fisheries Observer Program is providing observer coverage of Category I and II fisheries under the authority of the Marine Mammal Protection Act (MMPA) of 1972 and various other fisheries under the 1996 Magnuson-Stevens Fishery Conservation and Management Act (MSA) amendments. The following information is to provide you with information on what is required under these Acts and how to report a potential compliance issue. The topics addressed in this memo include:

- Trip Refusals
- Observer Requirements
- Safety Requirements
- Observer Procedures During a Coast Guard Boarding
- Observer Guidelines for Preparing an Affidavit

Attachments and enclosures passed out during training (also available on <http://www.nefsc.noaa.gov/femad/fsb/>) include:

- Trip Refusal Report (Attachment 1)
- Vessel Safety Checklist (Handed out during safety training)
- *2004 List of Fisheries\** (In the Training Manual)
- Regulations, 50 CFR 229.7 (In the Training Manual)
- Regulations, 50 CFR 648.11 (In the Training Manual)
- Regulations, 50 CFR 600 (In the Training Manual)
- Regulations, 50 CFR 600.725, 600.746 (In the Training Manual)
- US Coast Guard pamphlet on Federal Safety Requirements for Commercial Fishing Industry Vessels (Handed out during safety training)
- Contact Information for USCG Safety Examiners (In the Training Manual)
- Contact Information for NOAA Fisheries Enforcement (In the Training Manual)

*\* Recently updated regulation - all other regs remain the same.*

## **Trip Refusals**

If asked, a fisherman must take an observer, for fisheries listed under the MMPA as a Category I and II and fisheries listed under the MSA. A refusal occurs when an observer informs a fisherman that they have been selected for observer coverage and the fisherman refuses to cooperate with the observer. The reasons for refusing an observer must be clearly reported and will be evaluated on a case by case basis. A refusal based on principle (a fixed or predetermined policy or mode of action) or lack of insurance are not legally legitimate reasons to not comply with observer requirements. Deliberate behavior to avoid the observer or deceive them by providing incorrect information regarding the vessel's fishing activities is considered a refusal.

When requesting a trip, be clear, firm and polite. The observer must clearly communicate that the permit or vessel has been selected for coverage. If refused, confirm that the skipper is denying the observer coverage by asking "Are you refusing to take me?". Politely inform the operator that you are required to document all refusals.

The observer must note all dialogue that occurred between the parties, including dates and times, weather conditions, fishing conditions, trip logistics, and safety issues. The notes must be complete and factual and may be used to write an affidavit if warranted. Notes about trip refusals may initially be documented in observer field diaries. The observer should then complete a Refusal Report (Attachment 1) and immediately report to the area coordinator. The area coordinator will submit the report to the program manager, from there to the NMFS contracting officer technical representative and area leads. If the refusal warrants enforcement action, NMFS area leads will work with NOAA Enforcement to obtain the appropriate level of response.

Any harassment, intimidation, or assault of an observer, interference with their work, or tampering with their equipment is strictly prohibited and should be immediately reported as the observer finds appropriate and necessary for the situation. The observer may contact NOAA Enforcement directly under these extreme circumstances if time is of the essence, and then follow the chain of command listed above.

## **Observer Requirements**

Vessel owners and operators selected for observer coverage are responsible for complying with regulations set forth by the Marine Mammal Protection Act (50 CFR § 229.7) and the Magnuson-Stevens Act (50 CFR § 600.746), which state the following:

The observer requirements for participants in Category I and II fisheries are [50 CFR § 229.7(c)]:

- If requested by NMFS or by a designated contractor providing observer services to NMFS, a vessel owner/operator must take aboard an observer to accompany the vessel on fishing trips.
- After being notified by NMFS, or by a designated contractor providing observer services to NMFS, that the vessel is required to carry an observer, the vessel owner/operator must comply with the notification by providing information requested within the specified time on scheduled or anticipated fishing trips.
- NMFS, or a designated contractor providing observer services to NMFS, may waive the observer requirement based on a finding that the facilities for housing the 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. The MSA Health and Safety Regulations hold the vessel out of compliance if they continue to fish without an observer due to safety inadequacies that have not been fixed [50 CFR § 600.746(d)(2)].
- The vessel owner/operator and crew must cooperate with the observer in the performance of the observer's duties including:
  - Providing, at no cost to the observer, the United States government, or the designated observer provider, food, toilet, bathing, sleeping accommodations, and other amenities that are equivalent to those provided to the crew, unless other arrangements are approved in advance by the Regional Administrator;
  - Allowing for the embarking and debarking of the observer as specified by NMFS personnel or designated contractors. The operator of a vessel must ensure that transfers of observers at sea are accomplished in a safe manner, via small boat or raft, during daylight hours if feasible, as weather and sea conditions allow, and with the agreement of the observer involved;
  - Allowing the observer access to all areas of the vessel necessary to conduct observer duties;
  - Allowing the observer access to communications equipment and navigation equipment, when available on the vessel, as necessary to perform observer duties;
  - Providing true vessel locations by latitude and longitude, accurate to the minute, or by loran coordinates, upon request by the observer;
  - Sampling, retaining, and storing of marine mammal specimens, other protected species specimens, or target or non-target catch specimens, upon request by NMFS personnel, designated contractors, or the observer, if adequate facilities are available and if feasible;

- Notifying the observer in a timely fashion of when all commercial fishing operations are to begin and end;
- Not impairing or in any way interfering with the research or observations being carried out; and
- Complying with other guidelines or regulations that NMFS may develop to ensure the effective deployment and use of observers.

It is unlawful to fail to take an assigned observer on a fishing trip [50 CFR § 229.7(c)(1)]. It is unlawful for any person to assault, harm, harass (including sexual harassment), oppose, impede, intimidate, impair, or in any way influence or interfere with an observer, or to attempt the same. This includes any action which has the purpose or effect of interfering with the observer's responsibilities, or which creates an intimidating, hostile, or offensive environment [50 CFR § 229.3(b)].

The general prohibitions listed under the Magnuson-Stevens Act (50 CFR § 600.746) (MSA) are applicable to any fishing vessel required to carry an observer under any U.S. law and include, but are not limited to:

- Fail to submit to a USCG safety examination when required by NMFS pursuant to Sec. 600.746.
- Fish without an observer when the vessel is required to carry an observer.
- Assault, oppose, impede, intimidate, or interfere with a NMFS-approved observer aboard a vessel.
- Prohibit or bar by command, impediment, threat, coercion, or refusal of reasonable assistance, an observer from conducting his or her duties aboard a vessel.

Violations of the MMPA may result in sanctions on Authorization Certificates, civil penalties of up to \$12,000 and criminal penalties. A complete list of MMPA prohibitions can be found at 50 CFR § 229.3. Violations of the MSA may result in sanctions on Federal fisheries/operator permits, civil penalties up to \$120,000 per violation, civil forfeiture of catch/vessel, and/or criminal penalties.

## **Safety Requirements**

On May 18, 1998, NMFS published regulations under the Magnuson Stevens Act that address the health and safety of observers stationed aboard commercial fishing vessels. Under these regulations, observers **may** not depart on a fishing trip aboard a vessel which does not comply with United States Coast Guard (USCG) safety requirements or that does not display a current Commercial Fishing Vessel Safety Examination decal [50 CFR § 600.746(c)(1)] **or does not meet the safety checklist.**

Fishermen can schedule a free dockside examination to obtain a current safety decal by contacting the nearest U.S. Coast Guard Marine Safety Office Dockside Examiner.

All vessels required to carry an observer must meet USCG safety requirements and display a current safety decal (issued within the previous two years). Vessels that do not meet these requirements are deemed unsafe for purposes of carrying an observer and must correct noted deficiencies prior to departing port [50 CFR § 600.746(d)(2)]. Failure to meet safety requirements which result in failure of a vessel to take an observer once selected for that trip will constitute a "refusal" and may result in enforcement action against the individual and vessel.

The vessel owner/operator must allow an observer, NMFS, or NMFS-appointed-contractor to visually inspect any safety or accommodation requirement if requested [50 CFR § 600.746(c)(2)]. Observers are required to complete a pre-trip safety check of the emergency equipment (Attachment 2) and are encouraged to review emergency instructions with the operator prior to the vessel departing port.

### **Observer Procedures During a Coast Guard Boarding**

The USCG makes periodic boardings of fishing vessels to inspect them for fisheries and safety violations. NOAA enforcement personnel may also be present. If the USCG boards the vessel you are on, introduce yourself. After that, remain in the background and let the boarding party know where you can be found. Do not join in any discussions between boarding party members and vessel personnel. The USCG or NOAA enforcement personnel have certain objectives to accomplish in every boarding.

If the boarding party has questions or requests your assistance, be cooperative. Most Coast Guard officers are not biologists and you may be of assistance in identifying species of fish and invertebrates on deck or in freezer holds.

Make sure your diary and paperwork are in order in case the boarding party wishes to inspect them. If possible, avoid giving anyone your original logs or your diary. However, they may insist on retaining your paperwork as evidence. An observer can not refuse to provide the data or logs if they are likely to contain evidence of a violation of the MSA or MMPA. The USCG and NOAA enforcement personnel have the authority to seize evidence under both acts. Do not resist the enforcement efforts on scene. If possible, make copies before turning the originals over. If the vessel you are on has no copy machine ask if copies can be

made on board the Coast Guard vessel. You may request that copies be obtained at the dock when you land. If this is not a possibility, at least make handwritten copies or summarized notes if there too many logs to transcribe. Generally, the USCG and NOAA enforcement will get copies back to the program once back on shore. If they need to contact the National Marine Fisheries Service, have them call the Fisheries Sampling Branch Chief, David Potter, at 508-495-2262 or 508-495-2000.

If you have information on suspected or actual violations, or other problems, you may or may not wish to relay them to the boarding party. Use your judgement to decide if a potential violation would best be reported to the boarding party or saved for debriefing. The observer's role is not one to report violations, it is to collect non-biased scientific data. The USCG is aware that observers may or may not choose to advise them of witnessed violations dependent on the situation.

If you have no information for the boarding party but someone in the boarding party wishes to question you, find a private location for your conversation. On occasion, an uninformed boarding party member may ask you questions in front of vessel personnel. Should this happen, defer the questions until you can speak in private if this would be better. If that doesn't work, ask if they will accept a written statement from you. If you are questioned in private, answer all questions completely and honestly. Your testimony is one part of the whole investigation. Your role in a Coast Guard boarding is as a source of objective information for the boarding party. The boarding party will conduct their own inspections and investigation, and they may or may not require your assistance. You should cooperate fully, and not hamper the investigation. Observers should contact their area coordinators as soon as possible after the boarding or enforcement questioning and document the event fully.

### **Observer Guidelines for Preparing an Affidavit**

An affidavit is a written declaration made under oath before an official, as a notary public. If violations are to be pursued, the observer must be prepared to write an affidavit. An affidavit should be a detailed, non-inflammatory, concise, and factual description of the events that led up to and including the violation(s).

Use the following guidelines when writing an affidavit:

- Define crucial information (names, dates, times, locations).
- Outline the issues with your area coordinator.
- Detail events in chronological order as they occur.
- Do not summarize or minimize events.
- Identify each time an event occurred.

- Maintain objectivity, do not use personal opinions.
- Use complete sentences in a narrative, not outline form.
- Write in the first person, active tense.
- Should be written on plain paper and may be handwritten or typed.

The first paragraph should be an introduction of yourself; your name, who you work for, what position you hold, how much experience you have, your education, and any other pertinent background information that would support your credibility.

*Example: I, (First/Last name), was employed by (Contractor) to serve as an observer for the National Marine Fisheries Service (NMFS). I have served as a NMFS fisheries observer on (number of) trips, and on this trip served aboard the (vessel name and vessel number) fishing in the (fishery name) with permit (permit number) from (embark to disembark date), where I witnessed an (or several) incident(s) of (state suspected violation). I received a (highest schooling degree) from the (school name) in (year of graduation). I have successfully completed certifications in C.P.R., vessel safety, and NMFS fisheries observer training.*

Referring to your diary and logs, detail the event addressing the following questions:

<i>Who</i> committed the violation?	<i>What</i> was the violation?
<i>When</i> did it occur?	<i>Where</i> did it occur?
<i>Why</i> did it occur?	<i>How</i> did it occur?

You should close the affidavit with the following and *sign* and *date*:

*I certify that, to the best of my knowledge, the above statement is true.*

If you have any questions regarding the requirements listed under the Marine Mammal Protection Act or the Magnuson-Stevens Fishery Conservation and Management Act, or relating to refusals or affidavits, please contact Amy Van Atten at 508-495-2266 or [Amy.Van.Atten@noaa.gov](mailto:Amy.Van.Atten@noaa.gov).

Attachment: Attachment 1, Refusal Report

