



BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

50 CFR Parts 648, 660, and 679

National Oceanic and Atmospheric Administration

RIN 0648-XG338

Request for Information on National Reform of Regional Observer Program Insurance Requirements

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

ACTION: Notification; Request for Information (RFI).

SUMMARY: NMFS requests information from the public to support a national initiative to reform and streamline observer program insurance requirements. The goals of this reform effort are to: ease the regulatory burden and reduce costs for private companies that provide observer staffing to NMFS observer programs through more efficient, nationally applicable insurance requirements; eliminate outdated and/or inappropriate regulatory requirements; reduce observer deployment risks for vessel owners and shore side processors; and identify insurance that could improve observer safety and facilitate full compensation for observer occupational injuries. To proceed with this effort, NMFS seeks technical information on the types of insurance and minimum coverage amounts (in dollars) that would minimize observer deployment risks to the extent practicable considering costs and other factors. Additionally, NMFS seeks public comment on Federal Employees Compensation Act (FECA) claims and benefits processing for observer occupational injuries and whether observer companies should carry private insurance to supplement FECA benefits for observers.

DATES: Interested persons are invited to submit comments on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit written comments by any of the following methods:

- *Email:* NMFS-HQ-ST.Insurance-Reform@NOAA.GOV. Please include the subject heading of “Comments on Regional Observer Program RFI”. Attachments to electronic comments will be accepted in Microsoft Word or Excel, or Adobe PDF formats only.
- *Mail:* Dennis Hansford, 1315 East West Highway, Room 12506, Silver Spring, MD 20910.

Instructions: Comments containing references, studies, research, and other empirical data that are not widely published should include copies or electronic links of the referenced materials. All submissions, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Sensitive personal information, such as account numbers or Social Security numbers, or names of individuals, should not be included. Submissions will not be edited to remove any identifying or contact information. Do not submit confidential business information, or otherwise sensitive or protected information. Comments that contain profanity, vulgarity, threats, or other inappropriate language will not be considered.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Dennis Hansford, 301-427-8136 or *dennis.hansford@noaa.gov*.

SUPPLEMENTARY INFORMATION:

Overview

The Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. 1801 *et seq.*, establishes a national program for conservation and management of fishery resources within the United States Exclusive Economic Zone (EEZ). *See id.* 1801(a)(6),

1811(a). NMFS, acting under authority delegated from the Secretary of Commerce, is responsible for managing fisheries under the MSA, in conjunction with eight regional fishery management councils (Councils) established under the Act. *See id.* 1852(a). Each Council has authority to develop fishery management plans (FMPs) for fisheries in a specific geographical area and to deem proposed regulations that are necessary for plan implementation. *See id.* 1852(a), (c).

Collection of information on fishing and fish processing, such as type and quantity of fishing gear used, catch in numbers of fish or weight thereof, fishing locations, and biological information, are critical to effective fishery management. *See id.* 1853(a)(5). To obtain this information, the MSA authorizes, among other things, that an FMP may “[r]equire that one or more observers be carried on board a vessel of the United States engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery . . .”. *See id.* 1853(b)(8).

In 2016, 53 fisheries subject to management under an FMP or international authority were monitored by observer programs. To carry out required observer coverage, NMFS administers 14 observer programs that operate in the agency’s five regions. These programs train and deploy observers, establish information collection protocols, debrief observers following deployment to provide quality control on information that observers collect, and oversee private companies that provide program support. At present, all NMFS observer programs staff their at-sea and shore side observer deployments through private companies, commonly referred to as observer providers. Observer providers service NMFS regional observer programs under two distinct models: 1) direct service, where the NMFS observer program contracts with an observer provider; and 2) industry-funded, where the observer

provider contracts with industry to fulfill observer coverage requirements. Further information about NMFS' regional observer programs is available at <https://www.fisheries.noaa.gov/topic/fishery-observers>.

While observers most frequently are deployed under the MSA to collect information on fishing vessels, observers also are deployed on motherships, and shore side processing facilities. Additionally, NMFS' regional observer programs deploy at-sea monitors, who collect only vessel catch information under "catch share programs," which allocate a portion of a fishery total allowable catch to permit holders or sectors. For purposes of this RFI, the term "observer" refers to a person deployed in any of these roles.

Observer Deployment Risks

The Bureau of Labor Statistics, Census of Fatal Occupational Injuries ranks commercial fishing as one of the most dangerous occupations. Because most observers are deployed to fishing vessels, observer risk of occupational injury is on par with that of commercial fishermen. Observer programs also entail risks for observer employers – private companies – and the fishing vessels and shore side processors that are subject to observer coverage. The risks for the three parties include: —

1. Observers – risk of occupational injury.
2. Vessel owners and shore side processors – observer claims for compensation for incidents arising out of deployment, e.g., occupational injury.
3. Private companies – observer claims for compensation for incidents arising out of deployment, e.g., occupational injury, and vessel/shore side processor owner claims for damages resulting from observer negligence.

Insurance and statutory compensation programs are the traditional mechanisms to address the risks that private companies entail. However, the nuances of maritime law combined with the unique nature of the fishery observer occupation have complicated efforts to address observer risks, whether through insurance or statutory program. Since 1994, Councils and NMFS have taken various efforts to resolve insurance issues for observer programs. These efforts have resulted in regulatory – or contract based – insurance requirements that differ across regions. At present, the types of insurance policies that observer providers are required to have, either by regulation or by contract, include the following:

- Maritime liability to cover “seamen’s claims” under the Merchant Marine Act (Jones Act) and General Maritime Law
- U.S. Longshore and Harbor Worker’s Compensation Act
- State Worker’s Compensation
- Contractual General Liability
- Marine General Liability
- Commercial General Liability
- Marine Employers Liability

Regulatory based observer provider insurance requirements are codified at 50 CFR 679.52(b)(11)(vi) (North Pacific Groundfish Observer Program), 50 CFR 660.17(e)(vii) (West Coast Groundfish Observer Program), and 50 CFR 648.11(h)(3) (Northeast Observer Program).

In addition, Congress addressed compensation for observer occupational risks through the 1996 Sustainable Fisheries Act (SFA). Pub. L. 104-297 (Oct. 11, 1996). Through that statute, Congress amended the MSA to deem observers to be federal employees for purposes of FECA while deployed on a vessel under the Act or the Marine Mammal Protection Act. 16

U.S.C. 1881b(c). The extension of FECA coverage to observers deployed at-sea filled a gap in coverage for observer occupational injuries that occur at-sea, but this extension is not applicable to shore side observers.

NMFS Reevaluation of Observer Program Insurance Requirements

Beginning in 2014, NMFS initiated a reevaluation of regional observer program insurance requirements. This effort included an Observer Provider Insurance Workshop in 2016 during which observer providers, insurance experts, and observers joined NMFS and representatives from other federal agencies to discuss the efficiency of observer provider insurance requirements and compensation for observer occupational injuries. Subsequent to the Insurance Workshop, NMFS published an Observer Provider Insurance Workshop Technical Report (Tech Report), available at <http://spo.nmfs.noaa.gov/tech-memos>, which summarized the Workshop's proceedings and identified actions that NMFS could take to reform observer program insurance requirements and facilitate compensation for observer occupational injuries. As detailed in the Tech Report, some of the insurance policies that observer providers are required to have are inapplicable to observers or have limited applicability depending on whether the claim concerns an injury sustained at-sea or on shore. Furthermore, prior to the publication of the Tech Report, it was noted that other forms of insurance generally not required, such as a Marine General Liability policy, may better address certain observer company risks.

In addition, NMFS has learned that, while FECA does provide coverage for observer at-sea injuries, the compensation formula under that Act does not provide for overtime pay. Because observers typically work 12-16 hour shifts to correspond with fishing vessel crew shifts, they often do not receive full wage compensation for occupational injury claims under FECA.

To address these issues, the Tech Report recommended that NMFS explore replacing regional insurance requirements with nationally applicable minimum insurance requirements. The goal of that action would be to streamline and improve the efficiency of regional observer provider insurance requirements, thereby resulting in reduced regulatory burden, cost savings, and a suite of insurance that better addresses observer deployment risks. Considering the highly technical nature of maritime insurance and insurance markets in general, the Tech Report recommended that NMFS first gather more information on the types of insurance and minimum dollar coverage amounts for the risks that observer deployments present. NMFS issues this RFI to gather that information through the questions below.

In addition, NMFS seeks public comment on the related issue of FECA compensation for observer occupational injuries and whether some form of private insurance could supplement FECA benefits. National inconsistencies with observer compensation for occupational injuries were noted not only in the Tech Report, but also in the Observer Program Safety Review (OPSR) Final Report, available at <https://www.fisheries.noaa.gov/resource/document/observer-safety-program-review-report>. The OPSR recommended that NMFS initiate action to improve the insurance scheme for compensation of observer occupational injuries. Through this notification, NMFS seeks information to respond to that recommendation and ways that insurance can improve observer safety.

Request for Information

To reform and streamline observer provider insurance requirements, and facilitate observer compensation for at-sea occupational injuries under FECA, NMFS seeks public comment on the issues raised in this RFI and, in particular, on the following questions. See **ADDRESSES** for information on how to submit comments.

1. What insurance policies and coverage amounts (in dollars) are appropriate to address observer deployment risks for: (a) observers, (b) observer providers, and (c) owners of vessel and shore side processors and other observing platforms?
2. If observer providers have different insurance requirements to cover the different contexts in which observers are deployed – at-sea and shore side, what would be the most feasible and efficient insurance package and associated dollar amounts for covering all of the various contexts?
3. As an alternative to national minimum insurance requirements, would it be feasible, and more efficient, for observer providers to self-organize and self-insure?
4. If an insurance policy for a Jones Act or General Maritime Law claim is required, acknowledging that courts in some jurisdictions have held that those claims are inapplicable to observers, might it be beneficial to continue the requirement?
5. What gaps, if any, are there in FECA coverage for observer occupational injuries? For observers, what, if any, problems have you experienced with regard to claims and benefits for occupational injuries, whether under FECA, state worker’s compensation, or private insurance?
6. If there are gaps in FECA coverage, is there a type of private insurance that could supplement FECA compensation for observer occupational injuries?
7. What types of insurance could advance NMFS’ efforts to improve the safety of observer programs and reduce the occurrence of observer occupational injuries?
8. To maximize efficiency of observer insurance requirements, should NMFS address the requirements regionally, through regional regulatory or contractual insurance

requirements, or through nationally applicable minimum insurance standards? If a, what regional or national policies and dollar amounts of coverage would be appropriate?

Dated: July 10, 2018.

Edward C. Cyr,

Director, Office of Science and Technology,

National Marine Fisheries Service.

[FR Doc. 2018-15057 Filed: 7/13/2018 8:45 am; Publication Date: 7/16/2018]