

**TITLE 14. Fish and Game Commission
Notice of Proposed Changes in Regulations**

NOTICE IS HEREBY GIVEN that the Fish and Game Commission (Commission), pursuant to the authority vested by sections 240, 1006, 7071, 7652, 7923, 8405.3, 8425, 8587.1, and 8591 of the Fish and Game Code and to implement, interpret or make specific sections 7055, 7056, 7058, 7071, 8587, and 8587.1, of said Code, proposes to add section 105.5 and repeal subsection 195(e), Title 14, California Code of Regulations, relating to Cooperation with State and Federal Fishery Observers.

Informative Digest/Policy Statement Overview

Under existing law, State and federal regulations exist to manage groundfish species including rockfish and lingcod. These regulations include State and federal provisions for the placement of fishery observers aboard commercial fishing vessels. Also under existing regulations, lingcod and at least six species of rockfish (bocaccio, cowcod, canary, yelloweye, darkblotched, and widow rockfishes) have been declared overfished off California, and subject to rebuilding requirements as directed under the Magnuson-Stevens Sustainable Fisheries Act. Also under existing law, nearshore rockfish and associated species that are being subjected to increased fishing by commercial and sport fisheries, are directed to be managed on a sustainable basis, that include the setting of annual harvest limits. On August 30, 2002, the Fish and Game Commission (Commission) adopted emergency regulatory changes to ensure cooperation with at-sea fisheries observers that collect vital fisheries information from which to assess effects of the fishery on important fish stocks.

Annual assessments of the status of shelf and nearshore groundfish stocks depend on the collection of data, including information on fisheries bycatch and discards that is collected by fishery observers from vessels while at sea. Some owners and operators of fishing vessels that are fishing for State-managed species or for which a federal permit is not required are refusing to participate in ongoing observer programs that collect this vital information. To deal with this problem so that blocks of vital fishery data are not lost, and the integrity of dependent fisheries assessments is not compromised, regulatory action is proposed to require that owners and operators of commercial fishing vessels permitted under regulations of the Commission, and commercial passenger fishing vessels licensed pursuant to Fish and Game Code Section 7920, will, as a condition of permit or license issuance, cooperate with Department or Federal fishery observers, or observers collecting data for the Department, when asked to carry and accommodate an observer on fishing trips at no cost to the sponsoring agency. The Department may request revocation of fishing permits or licenses by the Commission for denials for observer access where the denials are deemed uncooperative in nature, after first allowing the owner or operator to meet with the Manager of the Marine Region or his representative, to provide an explanation of the denial. The regulations also include provisions for requiring a vessel owner or operator to provide explanation in writing within 15 days of a written request by the Department where an observer is denied access (coverage) on a trip. The proposed regulations provide that a Department or federal request to place an observer aboard shall not include a requirement that the vessel owner or operator provide an observer with meals or a subsistence allowance, but require that they shall accommodate the observer with regard to reasonable eating and working condition and access to pertinent fishing information and fishery data while aboard the vessel. Failure to provide such reasonable access may lead to revocation of vessel fishing permits or licenses issued under regulations of the Commission. The proposed regulations make it unlawful to assault,

resist, oppose, impede, intimidate, sexually harass, bribe, or interfere with an observer, or otherwise interfere with or bias sampling procedures, tamper with, destroy or discard an observer's collected samples, equipment, or gear, or require the observer to perform duties normally performed by crew members. These proposed regulations follow the recent adoption and approval of emergency regulations to make the regulations permanent and effective during 2003 and beyond.

NOTICE IS GIVEN that any person interested may present statements, orally or in writing, relevant to this action at a hearing to be held in the Monterey Beach Resort Hotel, 2600 Sand Dunes Drive and Highway 1, Monterey, California on Friday, December 6, 2002, at 8:30 a.m., or as soon thereafter as the matter may be heard. It is requested, but not required, that written comments be submitted on or before December 2, 2002 at the address given below, or by fax at (916) 653-5040, or by e-mail to FGC@dfg.ca.gov, but must be received no later than December 6, 2002, at the hearing in Monterey, CA. E-mail comments must include the true name and mailing address of the commenter.

The regulations as proposed in strikeout-underline format, as well as an initial statement of reasons, and all information upon which the proposal is based (rulemaking file), are on file and available for public review from the agency representative, John M. Duffy, Assistant Executive Director, Fish and Game Commission, 1416 Ninth Street, Box 944209, Sacramento, California 94244-2090, phone (916) 653-4899. Please direct inquiries to John M. Duffy or Jon D. Snellstrom at the preceding address or phone number. Don Schulze, Marine Region, Department of Fish and Game, phone (916) 227-5670, has been designated to respond to questions on the substance of the proposed regulations. Copies of the Initial Statement of Reasons, including the regulatory language, may be obtained from the address above. Notice of the proposed action shall be posted on the Fish and Game Commission website at <http://www.dfg.ca.gov>.

Availability of Modified Text

If the regulations adopted by the Commission differ from but are sufficiently related to the action proposed, they will be available to the public for at least 15 days prior to the date of adoption. Circumstances beyond the control of the Commission (e.g., timing of Federal regulation adoption, timing of resource data collection, timelines do not allow, etc.) or changes made to be responsive to public recommendation and comments during the regulatory process may preclude full compliance with the 15-day comment period. Any person interested may obtain a copy of said regulations prior to the date of adoption by contacting the agency representative named herein. If the regulatory proposal is adopted, the final statement of reasons may be obtained from the address above when it has been received from the agency program staff.

Impact of Regulatory Action

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following initial determinations relative to the required statutory categories have been made:

- (a) Significant Statewide Adverse Economic Impact Directly Affecting Business, including the Ability of California Businesses to Compete with Businesses in Other States:

Generally, participants in the commercial sectors of the nearshore fishery are small business operators. The commercial fishery is conducted from a variety of small to large sized vessels that utilize a variety of fishing gear in coastal waters. The proposed regulations that have already been adopted on an emergency basis do not require the vessel operator to or owner to provide an observer with meals or a subsistence allowance on observed fishing tips, but must accommodate the observer with regard to reasonable eating and working condition. These requirements are not expected to result in significant adverse economic impacts to affected businesses.

(b) Impact on the Creation or Elimination of Jobs within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California: None.

(c) Cost Impacts on a Representative Private Person or Business:

The Commission is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

(d) Costs or Savings to State Agencies or Costs/Savings in Federal funding to the State: None.

(e) Nondiscretionary Costs/Savings to Local Agencies: None.

(f) Programs Mandated on Local Agencies or School Districts: None.

(g) Costs Imposed on any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4: None.

(h) Effect on Housing Costs: None.

Effect on Small Business

It has been determined that the adoption of these regulations may affect small business.

Consideration of Alternatives

The Commission must determine that no reasonable alternative considered by the Commission, or that has otherwise been identified and brought to the attention of the Commission, would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

FISH AND GAME COMMISSION

John M. Duffy
Assistant Executive Director

Dated: October 7, 2002

As background, approximately 80 species of groundfish (bottom fish), generally associated with sea-floor habitats, are managed under the federal Pacific Coast Groundfish Fishery Management Plan (Groundfish Plan). The Groundfish Plan was developed by the Pacific Fishery Management Council (Council), and is implemented through regulations adopted by the National Marine Fisheries Service (NMFS), as authorized pursuant to the Magnuson-Stevens Sustainable Fisheries Act (Magnuson-Stevens Act). Under the Sustainable Fisheries Act, when fish stocks have been declared overfished (have declined to less than 20 percent of their unfished biomass) they become subject to Council approved rebuilding plans that are designed to restore them to at least 40 percent of their unfished biomass within a specified time period.

In June 2002, the Council closed fisheries for rockfish and lingcod (and California scorpionfish and ocean whitefish that associate with rockfish and lingcod) in waters 20 fathoms (120 feet) or deeper south of 40 degrees, 10 minutes North Latitude (near Cape Mendocino, Humboldt County) to protect bocaccio rockfish. During September 2002 the Council set catch levels for 2003 groundfish fisheries, including those for overfished rockfish and lingcod, based on the fishery data collected during 2001 and 2002. Fishery species-composition and bycatch information is critical to understanding what quantity of the overfished stocks are being taken incidental to fisheries for other species. Similarly, during September 2003, the Council will be setting catch levels for 2004 based on information collected from the fishery conducted during 2002 and 2003.

The National Marine Fisheries Service has established an at-sea Comprehensive Observer Program to place trained staff aboard commercial fishing vessels to determine the identity and amount of bycatch in the fisheries. Regulations governing groundfish observers for the north Pacific groundfish fishery include provisions that are incorporated in the emergency regulations to ensure that observers are able to complete their data collection duties under reasonable and safe conditions free from harassment and interference (Section 679.7, Title 50, Code of Federal Regulations). As a part of the current program, each year boats that are to have observers aboard are randomly selected to ensure a random sample of boat catches are observed that can be used to reasonably estimate the level of take of overfished stocks in the fisheries. Some fishermen selected for the observer program to start in September of 2002 that fish for State-managed species off California have indicated an unwillingness to participate in the program and legal council for the NMFS and Council indicate that, while they can require vessels with federal limited entry permits to carry observers, they cannot require the same for vessels fishing for State managed species or federal species for which a federal permit is not required. Therefore, this regulatory action is to provide for observer coverage of

vessels permitted or licensed under Commission regulations during the balance of 2002 and beyond the period encompassed by the already adopted emergency regulations.

Information on type and amount of bycatch collected from the observer program involving State-managed species this during this and subsequent years will be critical to assess groundfish stocks and setting harvest levels for 2004 and beyond. Therefore, if this data series is interrupted, it could have serious consequences on stock assessment and rebuilding efforts in coming years.

The Commission adopted similar requirements for commercial passenger fishing vessels (CPFVs) during its consideration and adoption of interim nearshore fishery regulations in December of 2000 due to the reaction (reluctance) of some CPFV operators to the groundfish restrictions that were being placed on this fishery at that time to protect and rebuild rockfish and lingcod stocks. The increasing restrictions on sport and commercial groundfish fisheries has made collection of data more difficult, but are imperative to meet the mandates of State and federal fisheries policies and directives [Magnuson-Steven's Act and California's Marine Life Management Act (Chap. 1052, Stats 1998)].

Part of the proposed action is to repeal a current section which only applies to owners and operators of CPFV vessels and barges subject to Section 195 of Title 14, CCR and to apply the provision for cooperation with State and Federal Fishery observers to all vessel owners and operators that are permitted or licensed under Commission regulations, or are licensed under statutes that give the Commission regulatory authority. The proposed new regulation provides a procedure for the Department to request revocation of permits or licenses when it determines a vessel owner or operator is being uncooperative. It also exempts vessels from having to provide food or a subsistence allowance to fishery observers but does require the vessel to meet certain sampling and information needs of the fishery observers.

Therefore, in summary, regulatory action will help ensure that trained State and federal fisheries observers are provided continued access to commercial fishing vessels operating off California to collect essential fishery information on the level of bycatch (incidental catch) of overfished stocks of shelf rockfish and nearshore rockfishes. The proposed new regulation provides a procedure for the Department to request revocation of permits or licenses when it determines a vessel owner or operator is being uncooperative (refuses to allow observers aboard). It also exempts vessels from having to provide food or a subsistence allowance to fishery observers, but does require the vessel to meet certain sampling and operational needs of the fishery observers.

Costs to the Department:

Costs to the Department associated with adoption and implementation of the proposed regulations are primarily those related to coordination with the Comprehensive Federal Fisheries Observer Program that provides most of the professionally trained staff conducting at-sea monitoring and assessment of commercial fishing operations. Additional cost to the Department resulting from the regulation are expected to be minimal. Existing Marine Region staff are already involved with the Federal Comprehensive Observer Program and will continue to assist with its coordination.

- (b) Authority and Reference Sections from Fish and Game Code for Regulations:

Authority: Sections 240, 1006, 7071, 7652, 7923, 8405.3, 8425, 8587.1, and 8591, Fish and Game Code.

Reference: Sections 7055, 7056, 7058, 7071, 8587, and 8587.1, Fish and Game Code.

- (c) Specific Technology or Equipment Required by Regulatory Change:

None.

- (d) Identification of Reports or Documents Supporting Regulation Change:

- (e) Public Discussions of Proposed Regulations Prior to Notice Publication:

This issue was included as a discussion item on the Commission's August 30, 2002 regularly scheduled meeting agenda where the emergency regulations for requiring observer cooperation was adopted by the Commission. The minutes of that meeting are being summarized and responses to those public comments provided will be responded to in the Pre-adoption Statement of Reasons or the Final Adoption Statement of Reasons.

IV. Description of Reasonable Alternatives to Regulatory Action:

- (a) Alternatives to Regulation Change: Alternatives considered to the regulation change primarily involve efforts to encourage voluntary compliance with at-sea observer programs. This includes emphasizing the importance of the data collected in sustaining viable populations of

fish and the fisheries. However, with the increasing need to adopt management measures to sustain viable fisheries, there is increasing concern by some fishery participants that data collected on their vessels will be used to further curtail fishing, which has occurred in the case of overfished stocks. However, the immediate effects on the fishery of further constraints on fishing are overshadowed by the need to maintain renewable resources that will provide greater cumulative value to the fishery in the long term if maintained at sustainable levels through sound management based on accurate fisheries data collected according to scientific protocols.

- (b) No Change Alternative: This alternative does nothing to address the current need to maintain an appropriate level of at-sea collection of fishery data through full cooperation by fishery participants.
- (c) Consideration of Alternatives: In view of information currently possessed, no reasonable alternative considered would be more effective in carrying out the purposes for which the regulation is proposed or would be as effective and less burdensome to the affected private persons than the proposed regulation.

V. Mitigation Measures Required by Regulatory Action:

The proposed regulatory action will have no negative impact on the environment; therefore, no mitigation measures are needed.

VI. Impact of Regulatory Action:

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following initial determinations relative to the required statutory categories have been made:

- (a) Significant Statewide Adverse Economic Impact Directly Affecting Businesses, Including the Ability of California Businesses to Compete with Businesses in Other States:

Generally, participants in the commercial sectors of the nearshore fishery are small business operators. The commercial fishery is conducted from a variety of small to large sized vessels that utilize a variety of fishing gear in coastal waters. The proposed regulations that have already been adopted on an emergency basis do not require the vessel operator to or owner to provide an observer with meals or a subsistence allowance on observed fishing tips, but must accommodate the observer with regard to reasonable eating and working

condition. These requirements are not expected to result in significant adverse economic impacts to affected businesses.

- (b) Impact on the Creation or Elimination of Jobs Within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California: None.
- (c) Cost Impacts on a Representative Private Person or Business:

The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.
- (d) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State: None
- (e) Nondiscretionary Costs/Savings to Local Agencies: None
- (f) Programs mandated on Local Agencies or School Districts: None
- (g) Costs Imposed on Any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4: None
- (h) Effect on Housing Costs: None

Informative Digest (Plain English Overview)

Under existing law, State and federal regulations exist to manage groundfish species including rockfish and lingcod. These regulations include State and federal provisions for the placement of fishery observers aboard commercial fishing vessels. Also under existing regulations, lingcod and at least six species of rockfish (bocaccio, cowcod, canary, yelloweye, darkblotched, and widow rockfishes) have been declared overfished off California, and subject to rebuilding requirements as directed under the Magnuson-Stevens Sustainable Fisheries Act. Also under existing law, nearshore rockfish and associated species that are being subjected to increased fishing by commercial and sport fisheries, are directed to be managed on a sustainable basis, that include the setting of annual harvest limits. On August 30, 2002, the Fish and Game Commission (Commission) adopted emergency regulatory changes to ensure cooperation with at-sea fisheries observers that collect vital fisheries information from which to assess effects of the fishery on important fish stocks.

Annual assessments of the status of shelf and nearshore groundfish stocks depend on the collection of data, including information on fisheries bycatch and discards that is collected by fishery observers from vessels while at sea. Some owners and operators of fishing vessels that are fishing for State-managed species or for which a federal permit is not required are refusing to participate in ongoing observer programs that collect this vital information. To deal with this problem so that blocks of vital fishery data are not lost, and the integrity of dependent fisheries assessments is not compromised, regulatory action is proposed to require that owners and operators of commercial fishing vessels permitted under regulations of the Commission, and commercial passenger fishing vessels licensed pursuant to Fish and Game Code Section 7920, will, as a condition of permit or license issuance, cooperate with Department or Federal fishery observers, or observers collecting data for the Department, when asked to carry and accommodate an observer on fishing trips at no cost to the sponsoring agency. The Department may request revocation of fishing permits or licenses by the Commission for denials for observer access where the denials are deemed uncooperative in nature, after first allowing the owner or operator to meet with the Manager of the Marine Region of his representative, to provide an explanation of the denial. The regulations also include provisions for requiring a vessel owner or operator to provide explanation in writing within 15 days of a written request by the Department where an observer is denied access (coverage) on a trip. The proposed regulations provide that a Department or federal request to place an observer aboard shall not include a requirement that the vessel owner or operator provide an observer with meals or a subsistence allowance, but require that they shall accommodate the observer with regard to reasonable eating and working condition and access to pertinent fishing information and fishery data while aboard the vessel. Failure to provide such reasonable access may lead to revocation of vessel fishing permits or licenses issued under regulations of the Commission. The proposed

regulations make it unlawful to assault, resist, oppose, impede, intimidate, sexually harass, bribe, or interfere with an observer, or otherwise interfere with or bias sampling procedures, tamper with, destroy or discard an observer's collected samples, equipment, or gear, or require the observer to perform duties normally performed by crew members. These proposed regulations follow the recent adoption and approval of emergency regulations to make the regulations permanent and effective during 2003 and beyond.

Regulatory Language

Repeal Subsection (e) of Section 195, Title 14, CCR, as follows:

~~(e) Owners and operators of vessels and barges subject to these provisions shall carry and cooperate with department and federal fishery observers, and observers collecting data for the department on trips when space is available, at no charge to the sponsoring agency. If observer coverage of a trip is denied by the owner or operator of a vessel, the department may require an explanation in writing by the owner or operator be submitted to the department within 15 days of the department's request for an explanation.~~

NOTE

Authority cited: Sections 7071, 7923 and 8587.1, Fish and Game Code. Reference: Sections 7923 and 8587.1, Fish and Game Code.

Adopt Section 105.5, Title 14, CCR, as follows:

Section 105.5 Cooperation with State and Federal Fishery Observers

(a) Owners or operators of commercial fishing vessels permitted under regulations of the Commission, and commercial passenger fishing vessels licensed pursuant to Fish and Game Code Section 7920, will, as a condition of permit or license issuance, cooperate with Department or Federal fishery observers, or observers collecting data for the Department, when asked to carry and accommodate an observer on fishing trips at no charge to the sponsoring agency.

(b) If observer coverage of a trip is denied by the owner or operator of a vessel, the Department may require an explanation in writing from the owner or operator. This explanation shall be received by the Department within 15 days of written request by the Department for an explanation.

(c) The Department may request revocation of fishing permits or licenses to the Commission for denials that it deems to be uncooperative in nature, after first allowing the owner or operator to meet with the Manager of Marine Region, or his representative, to provide an explanation for the denial.

(d) The Department or Federal agency requesting cooperation under subsection (a) shall not require the vessel operator or owner to provide an observer with meals or a subsistence allowance on observed fishing trips, but shall accommodate the observer with regard to reasonable eating and working conditions and access to pertinent fishing information and fishery data while aboard the vessel.

(e) Failure to provide reasonable eating and working conditions or access to pertinent fishing information or fishery data to observers, or actions taken by a vessel owner or operator against an observer that is prohibited pursuant to subsection (f), on observed fishing trips may lead to revocation of the vessel's fishing permits or licenses issued under regulations of the Commission following the procedure outlined in subsections (b) and (c) above.

(f) To ensure that observer objectives may be reasonably and safely achieved, consistent with federal groundfish observer rules, it is unlawful for any person to do any of the following:

(1) forcibly assault, resist, oppose, impede, intimidate, sexually harass, bribe, or interfere with an observer,

(2) interfere with or bias the sampling procedure employed by an observer, including physical, mechanical, or other sorting or discarding of any catch before sampling.

(3) tamper with, destroy or discard an observer's collected samples, equipment, or personal gear, without the express consent of the observer,

(4) prohibit or bar by command, impediment, threat, coercion, or refusal of reasonable assistance, an observer collecting samples, making observations, or otherwise performing the observers duties,

(5) harass an observer by conduct that has sexual connotations, has the purpose or effect of interfering with the observer's work performance, or otherwise creates an intimidating, hostile or offensive environment,

(6) require, pressure, coerce, or threaten an observer to perform duties normally performed by crew members.

NOTE

Authority cited: Sections 1006, 7071, 7652, 7923, 8405.3, 8587.1, and 8591, Fish and Game Code. Reference: Sections 7055, 7056, 7058, 7071, 7923, 8587, and 8587.1, Fish and Game Code.