

Explaining why this violation of the Paperwork Reduction Act took place (April 16, 2009)

**Instructions:** 3 f., of the 83I Form, Check "Existing collection" if the collection has been in use without ever having received OMB approval. If you check this block, your request should be accompanied by a memo explaining why this violation of the Paperwork Reduction Act took place.

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NMFS observer programs provide the only reliable or most effective method for obtaining information that is critical for meeting NMFS' responsibilities for the conservation and management of living marine resources. The Magnuson-Stevens Fishery Conservation and Management Act (MSA), the Endangered Species Act (ESA), and the Marine Mammal Protection Act (MMPA) authorize NMFS to place observers on fishing vessels.

Most of the information collected by the observer programs is obtained through "direct observation by an employee or agent of the sponsoring agency or through nonstandardized oral communication in connection with such direct observations". Under the Paperwork Reduction Act regulations at 5 C.F.R. 1320.3(h)(3), such information is not subject to the PRA. There was confusion on NMFS' part as to whether all observer program operations were essentially exempt from the requirements of the PRA. The confusion was in part due to the understanding that, because observers could not complete their observations safely, effectively, and efficiently without asking pre-deployment logistical questions, gear and safety questions, and observer performance questions, such questions were also exempt. As recently as 2005, an exchange between NOAA/NMFS and OMB during the reauthorization of the Magnuson-Stevens Act (MSA) contributed to NMFS' long standing confusion on this issue. Ambiguity concerning what information is obtained through "nonstandardized oral communication in connection with such direct observations" also contributed to that confusion.

However, after a recent review of this issue, NOAA and DOC General Counsels agreed to the following (1) certain questions that NOAA/NMFS was asking are covered by the PRA and should have gone through the OMB review and approval process; (2) only "facts or opinions obtained through direct observation by an employee or agent of the sponsoring agency or through nonstandardized oral communication in connection with such direct observations" are not subject to the PRA; (3) NOAA MSA observers who are employed by vessel operators are agents of NOAA for the purposes of the PRA; and (4) NOAA is pursuing a prudent course of action in seeking OMB approval as quickly as possible.