seq. may be used to prosecute the owner or operator of that vessel in a subsequent civil or criminal enforcement proceeding.

Most observer programs are mandatory in nature. For example, under the Magnuson Act, domestic vessels participating in the groundfish fishery of the Gulf of Alaska are required to carry an observer if ordered to do so. (See 50 CFR 672.27). Under the MMPA, U.S. commercial vessels in the eastern tropical Pacific yellowfin tuna purse seine fishery must carry an observer, (See 16 U.S.C. 1374(h)(2)(B)(viii)), as must any vessel selected by NMFS while operating pursuant to a special exemption permit in a Category I fishery. (See 16 U.S.C. 1383a(b)(3)(B)). Under the ESA, NMFS occasionally requires observers as a condition of a section 7 incidental take statement. (See 16 U.S.C. 1536(b)).

Pursuant to all three acts, however, voluntary observer programs also have been utilized. For example, under the MMPA's interim exemption program for commercial fisheries, NMFS may, with the consent of a vessel owner, station an observer aboard a vessel that is not fishing in a Category I fishery. (See 16 U.S.C. 1383a(e)(3)). Under this and other programs, fishermen who are under no legal obligation to do so, may voluntarily agree to carry observers selected by NMFS. Although most observer programs implemented by NMFS are mandatory in nature, voluntary programs are widely used to gather scientific information along the northeastern and southeastern coasts of the United States.

Concerns have arisen within the fishing industry and NMFS as to whether information collected by voluntary observers should be used in subsequent enforcement proceedings. Many fear that fishermen will be reluctant to carry voluntary observers if the information collected by the observer can be used to prosecute them. Without the cooperation of the fishing industry, the voluntary observer program might deteriorate, depriving NMFS of information that is essential to living marine resource management and protection. Conversely, others worry that unduly restricting the use of such information will undermine the ability to effectively prosecute violations of each statute.

In response to these concerns, Congress enacted 16 U.S.C. 1853(f) of the Magnuson Act. This amendment, codified at section 303(f) of the Magnuson Act, requires the issuance of regulations that restrict, in civil and criminal enforcement proceedings conducted under the Magnuson Act, MMPA, and ESA, the use of information collected by VFDCs while aboard a vessel for conservation and management purposes.

These proposed regulations have been prepared to satisfy this statutory directive. They do so in a manner that balances the competing concerns associated with the use of information collected by voluntary observers. Specifically, the regulations would encourage industry participation in voluntary observer programs by limiting the risk of civil or criminal prosecution under the Magnuson Act, MMPA, and ESA, based upon information collected by a VFDC. At the same time, the regulations would protect essential enforcement activities by permitting the use of such information in limited circumstances.

## Scope

These proposed regulations would add a new part to title 15 of the Code of Federal Regulations, and would apply to the use of information collected by VFDCs. Section 905.5 would define a VFDC as an observer or sea sampler whose presence aboard a vessel is not required pursuant to any provision of the Magnuson Act, MMPA, ESA or supporting regulations. By definition, these proposed regulations would only apply when an observer is aboard a vessel at the sole discretion of the owner or operator.

These regulations would not categorically prohibit the use of information collected by VFDCs in enforcement proceedings. Rather, the regulations would restrict the use of such information. Restricting the use of information collected by a VFDC is consistent with the plain language of the statute, and strikes a balance between separate and sometimes conflicting goals of the Magnuson Act, MMPA, and ESA: the management and protection of species through the acquisition of scientific information and through the effective prosecution of prohibited conduct.

These regulations would apply to any enforcement proceeding initiated pursuant to the Magnuson Act, MMPA, or ESA. The term "enforcement proceeding" is broadly defined to encompass any judicial or administrative action that is initiated for the purpose of imposing any civil or criminal penalty that is authorized by the Magnuson Act, MMPA, or ESA.

These regulations would apply even if the information collected relates to the violation of a statute subject to this proposed rule that is different from the one giving rise to the VFDC's presence onboard a vessel. For example, assume that a VFDC is stationed aboard a fishing vessel pursuant to a voluntary program authorized by the Magnuson Act. These regulations would restrict the use of information collected by the VFDC in an enforcement proceeding arising from a violation of the Magnuson Act. The regulations, however, also would restrict the use of information collected by this same VFDC in an enforcement proceeding arising from a violation of the MMPA or ESA.

## Information

Part 905 would restrict the use of information collected by a VFDC in enforcement proceedings conducted under the Magnuson Act, MMPA, and ESA. The term "information" would be defined in § 905.2 to include all observations, data, statistics, photographs, film, or recordings collected by a VFDC. Under this broad definition, information may take the form of recorded data or activities seen or heard by the observer. This definition is intended to encompass any type of information, regardless of form.

The restrictions, however, would not apply to independent evidence that is derived from information collected by a VFDC. In practice, evidence initially collected by enforcement personnel frequently leads to the discovery of additional evidence. These regulations would not restrict the use of additional evidence acquired in this manner. Absent this exception, prosecutors might be denied use of relevant evidence, wholly unrelated to the purposes of part 905, simply because it was acquired through information collected by a VFDC.

For example, assume a VFDC observed a fishing vessel land fish in excess of the vessel's authorized limit. Under these proposed regulations, the government could not rely upon the VFDC's observations in any subsequent prosecution. Aware of these observations, however, enforcement personnel could obtain additional evidence, such as landing slips, that independently establish the violation. These proposed regulations would not restrict the use of the landing slips in any subsequent prosecution.

## Access to Information

Part 905 would restrict the use of information collected by a VFDC in an enforcement proceeding conducted pursuant to the Magnuson Act, MMPA or ESA. It would not restrict access to this same information by any party to an enforcement proceeding. Instead, access to such information remains subject to existing Federal statutes and rules. For example, access to information collected