

MEMORANDUM

TO: Council, SSC and AP Members

FROM: Chris Oliver *CO*  
Executive Director

DATE: April 2, 2002

SUBJECT: Observer Program

ESTIMATED TIME 3 HOURS
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**ACTION REQUIRED**

- (a) Regulatory amendments and program extension: Final action
- (b) Discuss next OAC meeting.

**BACKGROUND**

- (a) Regulatory amendments and program extension: Final action

The regulations that authorize and implement the North Pacific Groundfish Observer Program (Observer Program) expire December 31, 2002. This regulatory analysis package (EA/RIR/IRFA) addresses alternatives to extend and improve the Observer Program beyond 2002. The three primary alternatives are as follows: (1) allow the regulations and the Observer Program to expire (no action alternative); (2) extend the regulations indefinitely with the expectation that they would be amended periodically to maintain or increase the effectiveness and efficiency of the Observer Program; and (3) extend the regulations through December 31, 2007.

In addition to the alternatives above, two complementary options for improving the existing regulations are proposed. The options would: (1) increase NMFS' management controls over observer providers and observers by strengthening the regulations governing the relationship between NMFS and the observer providers and observers; and (2) increase the ability of NMFS to interact effectively with observers, fishermen, and processing plant employees by granting NMFS the authority to place NMFS staff and other qualified persons aboard groundfish and halibut vessels and at groundfish plants.

The regulatory actions under consideration were developed in response to the agency's need to analyze methods of strengthening the regulations governing the relationship between NMFS and the observer providers to ensure sufficient management controls. NMFS has long recognized a need to change the service delivery model under which the Observer Program operates. The difficulty of replacing the current service delivery model has been demonstrated, with the major obstacle to any such change being perceived or actual increases in the total cost of the program and changes in the distribution of that cost. This proposed rulemaking represents a first step in revising the overall program in order to meet the needs that have been identified by the agency, the Council, and the Observer Advisory Committee (OAC).

The Observer Program developed the alternatives and options under consideration in consultation with the OAC. The OAC reviewed the draft analysis in January and made recommendations on additions to the analysis. That report was presented to the Council in February. The Council approved the draft analysis for public review in February 2002, with specific modifications and additions to the current suite of options. The

Council's motion from February is attached as Item C-1(a)(1). Two of the Council's recommendations regarding insurance and annual observer safety training are addressed separately in an attached letter (Item C-1(a)(2)) and will be discussed during the staff presentation. Final action is scheduled for this meeting. The draft analysis was sent to the Council on March 15, 2002.

(b) Discuss next OAC meeting

At the February meeting, the Council requested that NMFS and Council staff coordinate to schedule an OAC meeting to discuss long-term program changes to the North Pacific Groundfish Observer Program. This meeting has been scheduled for July 18-19 at the Alaska Fisheries Science Center in Seattle. The Council also requested that the OAC review prior program efforts to restructure the NPGOP and take those into consideration when developing alternatives. We have available Chris Oliver's 1998 discussion paper outlining the options to fund the observer program, as well as the committee's concerns noted in the March 2000 OAC report. Given that those concerns and options are still pertinent, and in order to facilitate the committee process, staff will develop a short discussion paper which addresses re-developing these options and the issues associated with restructuring the program. This paper will be sent to the committee for review prior to the meeting. The Council may want to consider receiving the OAC report resulting from that meeting at the October Council meeting.

**Council motion on the North Pacific Groundfish Observer Program  
(February 8, 2002)**

The Council recommends releasing the draft EA/RIR/IRFA to the public with modifications and expansion of discussion on the following:

1. NPGOP proposed drug and alcohol policy and requirements for the observers and observer providers
2. The observer "fit for duty" requirements
3. The observer providers responsibility in data transmission
4. Observers in-person mid-deployment data reviews
5. Insurance requirements for placing NMFS staff on vessels
6. Observers duties during offload before the observer is released from duty and the vessel can return to fishing
7. Guidelines which will be used in determining placement of NMFS staff on vessels <60' in length. Examples could include:
  - A. Availability of safety equipment to accommodate an observer
  - B. Availability of berthing space
  - C. Availability of a workstation for sampling activities
  - D. Advance notice requirements
  - E. Expected length of deployment
  - F. USCG safety decal requirements
8. Clarity that the intent and purpose of the program is to fulfill data needs and solve sampling problems
9. Develop and analyze a range which would represent an annual cap on the number of NMFS staff deployment days
10. Identify regulatory changes that represent legal issues
11. Add an option to require annual safety training for observers

The Council also noted that NMFS and Council staff will coordinate to schedule an Observer Advisory Committee (OAC) meeting in May 2002 or over the summer to discuss long-term program changes to the North Pacific Groundfish Observer Program. The Council expects that the OAC will review prior program efforts to restructure the NPGOP and take those into consideration when considering restructuring alternatives.



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
National Marine Fisheries Service  
P.O. Box 21668  
Juneau, Alaska 99802-1668

April 3, 2002

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APR - 3 2002

N.P.F.M.C

Mr. David Benton, Chairman  
North Pacific Fishery Management Council  
605 West 4<sup>th</sup> Avenue, Suite 306  
Anchorage, Alaska 99501-2252

Dear Dave:

Contained within the Council motion on "Extending and Improving the North Pacific Groundfish Observer Program Beyond 2002" two topics exist that we did not address in our March 13, 2002, revision of the Draft Environmental Assessment, Regulatory Impact Review and Initial Regulatory Flexibility Act Analysis. Specifically, we did not address: (1) insurance requirements for placing NMFS and other staff on vessels or at shoreside plants, and (2) addition of an option that would require annual safety training for observers. This letter addresses these two topics.

Insurance Requirements

The Federal Employees' Compensation Act (FECA) provides workers' compensation to NMFS staff in the event of employment-related injuries. This would include injuries at shoreside plants and on commercial fishing vessels where staff are assigned to perform sampling or research duties. Benefits under FECA include: wage replacement, payment for medical care, and rehabilitation assistance. If a party other than the injured employee is responsible for an injury, the government may require the employee to seek damages from that party or the government may pursue a claim on the injured party's behalf. While regulations do not require vessels and plants to insure themselves in the event of such claims, it may be in their best interest to do so.

Staff spoke with numerous fishing industry representatives and all parties indicated they insure themselves against claims from observers. If staff are deployed in lieu of observers, these same representatives indicated they would insure themselves against claims from staff or the government. Industry should not realize additional costs or savings when staff are deployed in lieu of observers. Deployments when NMFS staff do not replace an observer may cost industry



additional monies if they choose to insure themselves against claims. We are attempting to quantify these costs for inclusion in our presentation at the April 2002 Council meeting.

Non-NMFS staff that NMFS may deploy (e.g., University of Alaska staff and contracted parties), will be insured with State of Alaska workers' compensation either through their employer or their employer's insurance company. This will provide coverage in the event of an accident or injury. Similar to FECA, if a party other than the injured employee is responsible for an injury, the injured employee may seek compensation or the injured employee's insurer may seek compensation from the responsible party.

We are unaware of any mandated insurance requirements that protect vessels and plants against third party claims. However, some organizations (e.g., University of Washington) require vessels to carry protection and indemnity (P & I) insurance with a minimum limit of ~~one million dollars~~ before they will deploy staff on a vessel. We understand certain small entities may not be able to obtain this amount of coverage. The Council should note that NMFS may not be able to deploy certain parties to vessels that cannot or chose not to carry P & I insurance. Staff are continuing to explore this issue.

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The focus for improvements to and support of the Groundfish Observer Program will be on those vessels and plants already required to carry some level of observer coverage. These vessels already have appropriate insurance. They likely would need only to carry an insurance rider on existing coverage for the duration of a trip when staff are deployed in addition to observers. However, small vessels may experience a cost increase if NMFS staff are placed on them. The Council and industry groups are the most likely entities that would request NMFS staff on small vessels. Additional insurance costs due to P & I coverage need to be considered should such requests be made.

We recommend that the Council move forward with providing the regulatory framework necessary to take full advantage of placing NMFS staff on any fishing vessel or at groundfish plants in the North Pacific groundfish and halibut fisheries.

### Annual Observer Safety Training

The Council requested that NMFS examine the inclusion of annual observer safety training as part of this regulatory action. Safety training currently is part of the annual recertification process required for all experienced groundfish observers. The safety components reviewed each year account for about one half day of the 4-day briefing, and include the following topics:

1. Immersion suit practice;
2. Review of personal floatation devices;
3. Methods for lifting;
4. Effects of seasickness;
5. Effects of sleep deprivation;
6. Vessel and gear hazards and cautions;
7. Hydrostatic release mechanisms;
8. The seven steps to survival; and
9. Coast Guard review of vessel safety equipment and operations.

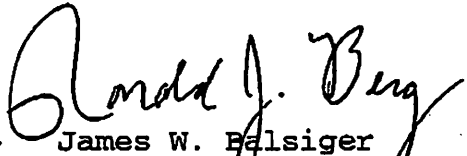
Observer and vessel safety are important concerns of NMFS. We currently have a great deal of flexibility in how this training is conducted. The Observer Program also cooperates closely with the U.S. Coast Guard Marine Safety Offices in the 17<sup>th</sup> and 13<sup>th</sup> Districts, which offer a session at each annual 4-day briefing.

Observer Program staff receive safety-related suggestions and comments from individual observers, the Association of Professional Observers, the union representing observers, observer providers, and industry. These suggestions and comments are taken into account in staff efforts to offer the best possible safety training. In fact, the annual immersion suit practice was implemented in December 2000, after several vessel skippers had identified this need to staff who were participating in the seabird deterrence experiments. This is another good example of the importance of sending program staff to sea.

We will continue to offer observer safety training in both the initial 3-week observer training sessions and in the annual re-certification process. Observer providers have been keen to ensure observer safety is a high priority, and desire ongoing cooperation in these efforts. Limited training time during the annual 4-day briefing has prompted Observer Program

staff to look into additional options for more extensive periodic reviews. Any such changes will be closely coordinated with the observer providers. At this time no regulatory changes are needed to support further improvements to observer safety training.

Sincerely,

  
For James W. Balsiger  
Administrator, Alaska Region



3 April 2002

David Benton, Chairman  
North Pacific Fishery Management Council  
605 West 4<sup>th</sup> Avenue, Suite 306  
Anchorage, AK 99501-2252

Re: Comments on the Draft Environmental Assessment, Regulatory Impact Review and Initial Regulatory Flexibility Act Analysis (EA/RIR/IRFAA) Extending and Improving the North Pacific Groundfish Observer Program Beyond 2002

Dear Mr. Chairman,

To begin, we support Alternative 3, outlined in section 2.3, which would extend the observer program through 2007. This alternative, unlike Alternative 2, creates at least a psychological deadline for putting together a restructured observer program. And if that effort fails, then Alternative 3 guarantees the public an opportunity five years from now to comment on rulemaking that will presumably extend the observer program once again. We don't want to go through the process of commenting every year any more than NMFS wants to go through the process of rulemaking every year—but we believe that to let everyone off the hook permanently, as option 2 would do, would be a mistake.

We also believe complimentary option 2 (which will pave the way for NMFS Staff to provide observer coverage aboard vessels and at plants) will in fact provide NMFS a genuine opportunity to improve its working relationships with observers, address difficult sampling situations, and improve its working relationship with the fishing community. We do object to NMFS' plan to provide industry at least 2 weeks notice prior to assigning a qualified person. Two weeks is insufficient. We need to plan 60 days in advance to allow our prior observers opportunity to work and to allow us to recruit any trainees we may need to hire. We will need the same notice from NMFS or we will risk having to rescind or shorten observer contracts to make room for NMFS staff in the field. Provided this issue of advance notice can be addressed, we look forward to working with Observer Program staff to implement this option in ways that produce minimal disruptions to observer employments and no disruptions to vessel coverage.

We find it more difficult to support the complementary option 1 that represents what NMFS apparently sees as a first step in restructuring its working relationship with observer providers. We are disappointed to find little here in the way of approaches that will improve the working relationships between our companies and NMFS. What we would like to see in future is improved coordination and communication between NMFS units and between NMFS and observer providers, but we can expect to see the reverse effect if complementary option 1 is implemented as written.

Option 1 would modify existing contractor responsibilities to state that contractors are to provide observers "as agreed to in signed and valid contracts." The Draft EA/RIR suggests that this would have the effect of protecting contractors in some way, but it is just as likely to have the opposite effect.

As things work now, contractors do what they can to meet vessel coverage needs no matter the situation. If a vessel drops out of the opilio fishery ten days early and wants to begin pollock fishing, the contractor tries to provide an observer ten days early—even if the vessel provides only two days' notice. But if we fail, have we failed to perform on our contract? As things work now, the boat might wait an extra day. With this responsibility re-defined, another path is available to the vessel: inform NMFS Enforcement that the contractor has failed to perform on its contract. Vessels might do this in hopes of getting relief from NMFS



in the form of an exemption, but in any case they could be sure that by informing Enforcement they were bringing more pressure to bear on their contractor.

That the prospect of being fined for failing to provide coverage would give us pause shouldn't be a surprise if one considers a few examples of actual observer coverage problems and their causes. For instance, at the start of A season 30% pollock boats are reluctant to take observers because they have yet to identify where the best roe fish are. This is because if the roe fish turn up in the crab savings area, by NMFS regulation 30% vessels need 100% coverage to fish there. A skipper who knows his vessel might turn into a 100% vessel in (for instance) mid-February isn't going to take coverage in late January. Of course, if roe fish turn up in the crab savings area January 22, then every 30% boat clamors for an observer on January 23. If we can't come up with six or eight or ten observers on January 23 for all the boats we have "signed and valid contracts" with, are we going to be subject to Enforcement action?

Or consider the effect of the way NMFS manages vessels fishing cod as part of an inshore cooperative. Bycatch rates for a coop can be established in a current season by carrying an observer. As a result, 30% vessels are reluctant to take an observer until they see how their bycatch is. When bycatch is low they all want observers—and we mean right now—to help them "establish a bycatch rate." When we can't produce half a dozen observers to vessels with whom we have "signed and valid contracts" with, are we going to be subject to Enforcement action?

Or consider that at the start of 2002 NMFS issued an emergency regulation requiring 2 observers on vessels fishing Atka Mackerel. By the time this regulation fell into place, we had no way to hire any more observers—trainings and briefings were already in process or had been completed. So observer providers shifted observers they had intended to devote to 30% coverage over to Mackerel boats. But this inevitably comprises our ability to satisfy coverage requests from 30% vessels (see above examples).

Or consider the situation that developed in 2000 when ADF&G delayed the Opilio fishery by several months. Crab vessels moved over to the groundfish fishery en masse, and while all the contractors did their best to try and meet the sudden demand for observers, some vessels went uncovered. Should observer providers be subject to Enforcement action in a situation like this?

The prospect of getting fined for failing to provide coverage will have several consequences that go unmentioned here. First, providers may grow reluctant to enter into contracts with 30% coverage vessels, instead preferring to say, in effect, "We'll let you know if we can cover you when the time comes." Secondly, contractors are going to have to put a price on this regulatory change. After all, no one can forecast the length of an opilio fishery or the number of observers who might come down with the ear infections in Dutch Harbor in January or countless other unforeseeable developments that can compromise a provider's ability to have an observer in ready when and where a given vessel wants him. Fines will be viewed as a cost of doing business; this will get factored into daily rates; observers will cost more. How much more is hard to say, but the increase will be unnecessary. The vast majority of coverage comes off without incident, and we don't need any further incentives to accomplish our jobs. NMFS does not need to develop a regulatory response to address every outlying event, but that's what's happening in this case.

It should also be pointed out that the language about "signed and valid contracts" will not solve any real coverage issues, one of which is that 30% coverage is (as NMFS and the Council have agreed) not random. The quarterly approach to coverage requirements for 30% boats has remained unchanged since 1990 in a fishery that has seen myriad management and regulatory changes—a fact that seems negligent at best. We think the problems of lack of observer availability faced by 30% vessels (for this is where the problem really exists) should be addressed after NMFS completes a comprehensive review of coverage needs for all fisheries that takes into account all scientific, management, and compliance needs.

We're also concerned about the language in option 1 that changes the observer certification process to make it APA compliant. It is not clear when the applications of potential observers would be reviewed. This

concerns us because this review would need to happen in a timely fashion. We often need to deploy observers the day after training, but the regulation is written in a way that indicates it is possible that a trainee could pass training and then see his application for certification rejected. Delays in deployment and an increased failure rate of trainees both have costs which will, again, be passed on to industry—and again, we don't see what will be gained in exchange for these costs. If currently certified observers are no grandfathered into the program, but instead are subject to the same certification process as new recruits, then the potential for delays and last-minute decisions only grows, since 400 plus observers will need to be considered for certification. The current system of considering observer performance and certification on a deployment by deployment basis seems much more sensible to us than the proposed changes being considered here.

Option 1 also addresses standards of observer behavior. One change will prohibit observers from having sex with employees of the vessel or plant where they are assigned, which is a change from the current language prohibiting emotional and physical involvement. After this change is in place, exactly nothing about the current situation will have changed. We already know observers are not permitted to have sex with employees of the vessels and plants where they are assigned, and it is already extremely difficult to identify whether they are doing so, and with whom, and whether it would be making a difference in their work if it were true. Vessels already make lurid allegations about observers they want to see replaced; they will continue to do so; and these allegations will continue to be difficult to address. What do we suggest? We suggest that NMFS continue to handle these matters on a case-by-case basis, being careful to credit only credible evidence, and most often disappointing the accusers. It distresses us to see time and energy being spent on fiddling with the wording of this regulation as if it will somehow make any difference.

Option 1 will also modify provider responsibilities by stating that only observers "fit for duty at time of embarkation" can be assigned to vessels. NMFS has two sub-options with define "fit for duty" differently, but both definitions would preclude the deployment of an observer who was suffering from the stomach flu, an ear-infection, and perhaps even sinus infections, since any of these conditions can interfere with an observer's ability to work, if only for a period of several days. We suspect that fishing companies, whose vessels are equipped with antibiotics and who maintain contracts with on-shore physicians services (and who make these resources available to sick observers), don't disembark everyone with a sinus infection before heading to sea. Also, while NMFS acknowledges that this regulatory change will bring with it some increased costs to industry, it fails to acknowledge that it will result in a loss of work for some observers. If we have to scramble to get someone into the field to replace an observer who is down with a sinus infection for five days, no one should assume we'll have work for that observer five days later. If we have extra people in the field, someone has to come out of the field.

Option 1 also requires in-person mid-deployment data reviews. NMFS should consider how difficult insuring an in-person mid-deployment data review will often be. Here's a not untypical example: A vessel might be expected in Dutch Harbor on a Friday—until Wednesday morning, when a vessel manager lucks into an opportunity to do a partial offload in Adak on Wednesday evening. The boat goes into Adak and is ready to leave again by Thursday mid-day. If the observer on the boat was required to have an in-person data review, then we would have to fly him from Adak to Anchorage on Thursday. Assuming we could get a replacement freed up in Dutch Harbor (a big if, since until Wednesday morning we wouldn't have had any idea that we had to replace the observer), that person would have to fly to Anchorage on Thursday and on to Adak on Friday. If all the flights came off on schedule (which happens in Adak once in a while), the boat would only be held up about twenty-four hours.

Option 1 also continues to make contractors responsible for data transmission. We want to point out that this regulation, in whatever version, has never functioned very well. Our experience has repeatedly been the following: First, NMFS staff are inclined to presume that if they didn't get a message, it was not sent. We then contact the observer, asking them to re-send the message. Observer assures us it has been re-sent. NMFS staff report back that said message still has not been received. We then contact observer . . . and so on. This circular activity sometimes continues until the observer leaves the field and heads to

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debriefing. NMFS has direct communication with many observers via Atlas and sees many observers at NMFS field offices, and has made clear that we are not to be handling data. The reality is that NMFS has moved away from relying on the contractor to get messages in over the last several years. This is the right way to go—because we have no way of verifying directly that a message has been sent, making us responsible for message transmission is not the best approach to the problem.

Option 1 also contains language requiring us to monitor observer performance of duties. Since we have no access to observer data, much of our response to this language will be to monitor how well NMFS is monitoring observer performance of duties, since to NMFS we must turn to find out how someone is doing in the field. What will be gained by this redundancy? Apparently further opportunities to levy fines upon us.

Option 1 would put NMFS Enforcement and not the Observer Program in charge of monitoring observer provider responsibilities (see number 9 of section 2.4.3), and we think this is the wrong way to go. Monitoring contractor performance is a difficult task, but that's no reason for the Observer Program to pass it off to Enforcement. In the past, observer providers and the Observer Program have at times been guilty of viewing one another with suspicion and resentment. We believe what we see here will put more distance between us, and observers will be the losers should that happen. As the observer program is restructured, we want the focus to be on improving the working relationship between NMFS and observer providers.

Sincerely,

ALASKAN OBSERVERS, INC.



Michael Lake  
President

**RECEIVED**

APR - 3 2002

**N.P.F.M.C**

Chris Oliver - Director  
NPFMC  
605 West 4th Ave., Suite 306  
Anchorage, AK 99501-2252

April 3, 2002

Dear Chris,

As the Council is currently exploring changes to the North Pacific Observer Program, I'd like to take this opportunity to bring to light some very disturbing things with regard to insuring Observers.

In the event of an injury/illness, Observers are eligible for one of five different jurisdictions of insurance (please see Memorandum provided for explanation). There are obviously redundancies here which down the road could cause some significant cost increases (current insurance cost estimate - \$450,000.00 annually) to any funding mechanism chosen by the Council as well as the potential of losing the one underwriter that insures five of the six currently certified Observer providers.

One of the remedies available to Observers is the Federal Employees Compensation Act (FECA). While this remedy may have application in other regions of the country, I have been told by our underwriter that they have significant problems with the language in the FECA act itself. There is a clause that could cause a subrogation action against either us as Providers and/or against a vessel owner/operator (please refer to the letter generated by Attorney Paul Anderson).

Due to the Council's very busy agenda, I am formally requesting that the Insurance Technical Committee(ITC) be reconvened to address the current state of insuring Observers.

I will be asking for some time at the upcoming Council meeting to testify on this issue.

Thank you for your consideration in this matter.

Sincerely,

Alaskan Observers, Inc

  
Michael Lake  
President

cc: Bill Stewart, Alaska National Insurance  
Vicki Cornish, National Observer Program  
Irene Dorang, Assoc. Professional Observers  
Bruce Thiffault, FIS Insurance Services

## MEMORANDUM

If you are injured or become ill during the course of your employment there are several options which may be available to you for benefits. Not each of these options is available to every employee in every circumstance and this information is provided only to allow you to consider what benefits might be available.

### 1. Federal Maritime Law

Employees who are injured or become ill during service to the vessel are entitled to have medical benefits paid and receive a daily stipend (maintenance) until they reach a point of maximum medical improvement. They are also entitled to the wages they would have earned had they been able to complete their contract. We typically provide these benefits to observers through private insurance carried by the company. Absent a specific request we usually process claims under Federal Maritime Law.

### 2. State Workers' Compensation Benefits

Some employees may be entitled to benefits under the Workers' Compensation Act of one or more states. Each state has its own particular statute which describes when benefits may be paid and the amount of such benefits. Some of these benefits are insured through private insurance and some are provided by state agencies.

### 3. FECA

Some observers may be covered by the Federal Employees Compensation Act. This is an act which is administered by the Federal Government fully apart from any insurance provided by Alaskan Observers. This program is administered by the United States Department of Labor.

### 4. USL&H

Some, but not most, employees may be entitled to benefits under the United States Longshoreman and Harbor Workers' Compensation Act. This is a Federal Workers' Compensation Act with benefits provided by Alaskan Observers' private insurance.

LAW OFFICE OF

PAUL L. ANDERSON

P.L.L.C.

February 5, 2002

Michael Lake  
Alaskan Observers, Inc.  
130 Nickerson, Suite 206  
Seattle, WA 98109

Re: Alaskan Observers - General  
Our File No. 22-1806

Dear Michael:

You asked us to research the implications of an observer pursuing a Federal Employees Compensation Act (FECA) claim and whether the pursuit of the claim might impose liability upon Alaskan Observers. More specifically, you are concerned that, because of the effect of FECA, your liability insurer may continue to maintain reserves on your account after the completion of personal injury claims.

Congress provided for the management of fisheries off the coasts of the United States when it adopted the Fisheries Conservation and Management Act. In this congressional enactment, Congress directed the Secretary of Commerce to institute an observer program. Subsection (c) of 16 § 1881b states that an observer under contract to carry out the responsibilities imposed by the Fisheries Conservation Act as well as those imposed by the Marine Mammal Protection Act shall be deemed to be a federal employee for the purpose of compensation under the Federal Employee Compensation Act (5 USC 8101, *et seq.*). Congress further provided in the Marine Mammal Protection Act that an observer operating pursuant to the auspices of the Marine Mammal Protection Act cannot bring a civil action for injury against the vessel on which the observer was engaged or against the vessel owner. The courts have not made it clear whether the Fisheries Conservation Act prohibits an observer from claiming against the vessel on which he or she was engaged.

Chapter 81 of Title 5 of the U.S. Code describes the compensation payable pursuant to FECA and Section 8131 allows for subrogation by the United States. "If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability on a person other than the United States to pay damages, the Secretary of Labor may require the beneficiary to":

1001 FOURTH AVENUE, SUITE 2800 SEATTLE, WA 98154  
PHONE 206.467.0237 FAX 206.467.0351  
P.ANDERSON@BOAT-LAW.COM

Alaskan Observers, Inc.  
February 5, 2002  
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1. assign to the United States any right of action he may have to enforce the liability; or
2. prosecute the action in his own name.

In other words, if the United States pays the injured observer, the United States "steps into the shoes of the observer" and retains the right to attempt to recover part or all of the FECA payment from the person or entity who was legally liable for the observer's damages.

Section 8132 applies to the circumstances where a claimant receives funds from a responsible third party. In this circumstance, the government does not maintain a right of subrogation. However, a portion of the funds received from the third party is applied as a credit against the claimant's FECA entitlement.

The ability of the United States to subrogate against the at-fault party poses some liability upon Alaskan Observers. Apparently, observers have the ability to pursue injury claims under alternative theories. An injured observer has the option, pursuant to Alaska workers' compensation laws, to file a claim with the workers' compensation insurer of Alaskan Observers. Such a claim is not based upon fault but based upon the statutory, no-fault compensation scheme. Such a claim also pursues "compensation" rather than "damages." However, it appears as though observers have another option which is to pursue claims for damages pursuant to the Jones Act.

Even if an employer is not the owner of the vessel on which its employee was injured, if the employee is a seaman, the employer owes the employee the protections of the Jones Act. *Tullos v. Resource Drilling, Inc.*, 750 F.2d 380 (5<sup>th</sup> Cir., 1985). A Jones Act claim is based upon proof of negligence on the part of the employer. Consequently, if an observer can present a cognizable allegation that his or her injuries were caused by the negligence of Alaskan Observers, Alaskan Observers faces Jones Act liability. The Alaska superior court in *Schaller v. Arctic Alaska Fisheries Corp.*, 1996 AMC 438, found that a fisheries observer was a seaman for purposes of maritime law and that the facts justified a claim against Saltwater, Inc., the observer's employer. The observer was burned when boiling water from a crab cooker spilled onto her legs. The observer contended that Saltwater was negligent in failing to properly train the observer for working around a crab cooker and the court allowed the observer to pursue the claim. The decision is an example of how an observer company can be exposed to Jones Act claims by its observer employees.

If one of your observers files a FECA claim and the facts of the incident lead to an allegation of negligence on the part of Alaskan Observers, the government has the right to attempt to collect from Alaskan Observers the amount the government paid to the observer. Because of the potential of legal liability imposed upon Alaskan Observers by the Jones Act, this could give the United States sufficient grounds to pursue a subrogation action against Alaskan Observers.

Alaskan Observers, Inc.  
February 5, 2002  
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However, if the observer employee elected to pursue a claim under the Alaska workers' compensation program, it is my opinion that it is doubtful that the United States could pursue a subrogation action against Alaskan Observers. The Alaska workers' comp system is a no-fault program. Regardless of the possible fault of Alaskan Observers, an injured observer is entitled to scheduled compensation benefits. If an observer elected to pursue a workers' comp claim, it is my opinion that, if the government "stepped into the shoes" of the observer, the government would not have the opportunity to claim that Alaskan Observers was legally liable for the observer's damages inasmuch as the observer is entitled to certain benefits, not damages, without regard to fault.

There exists the possibility that an observer might negate the ability of the government to pursue a subrogation claim. If the observer releases Alaskan Observers from unresolved claims, the government would likely be barred from pursuing reimbursement. Subsection (b) of 5 USC § 8131 provides: "A beneficiary who refuses to assign or prosecute an action in his own name when required by the Secretary is not entitled to compensation under this subchapter." This seems to state that, if an observer blocks the ability of the government to pursue a subrogation action, the observer would not be able to receive FECA compensation.

You asked the question of whether your insurer Alaska National could be reimbursed for compensation that it paid prior to the observer's receipt of the FECA funds. A thought would be that Alaskan Observers and Alaska National could reach an agreement with the observer for the reimbursement of the monies paid on behalf of Alaskan Observers for either maintenance-and-cure benefits or workers' comp benefits. However, Section 8130 of Title 5 prevents an employee from assigning a claim for compensation. Specifically, the section states that an assignment of a claim for compensation is void. Therefore, the quoted provision of the statute would render any such reimbursement agreement invalid.

In conclusion, if Alaska National wishes to maintain a reserve on a claim subsequent to the final payment to the observer by Alaska National, maintaining a reserve is appropriate under some but not all circumstances.

1. If the claimant has submitted a Jones Act claim against Alaskan Observers and the claim has been fully settled and paid by Alaska National, Alaska National should not continue to maintain a reserve. If the observer, subsequent to resolution of the Jones Act claim, submits a FECA claim, the government would apply a credit against the observer's FECA claim in the amount received in settlement of the Jones Act claim. In that circumstance, it is my opinion that the government does not have the right to subrogate against Alaskan Observers.
2. If a claim by an observer is concluded under the Alaska workers' comp mechanism, it is my opinion that Alaska National should not be able to



Alaskan Observers, Inc.  
February 5, 2002  
Page 4

maintain a reserve subsequent to final resolution of the claim. In that circumstance, the claimant has essentially waived any claim of liability for damages against Alaskan Observers because of the no-fault provision of the Alaska workers' comp program. Because of the waiver of the fault and damages, the government should not be able to subrogate. As with a resolved Jones Act claim, if an employee submits a FECA claim, any amount received under the Alaska workers' comp provisions would apply as a credit to the FECA award.

3. The analysis applied in a fully resolved Alaska workers' comp claim should apply to a workers' comp claim that has not been resolved prior to the filing of a FECA claim. Because of the waiver of the "fault" claim, the government should not be able to subrogate against Alaskan Observers. However, circumstances may arise where a claimant may be able to elect to pursue a Jones Act claim after initiating a workers' comp claim. In that circumstance, the government could bring a subrogation action if a FECA claim is brought prior to the resolution of the Jones Act claim. In that situation, it might be appropriate for Alaska National to maintain a reserve.
4. The last circumstance involves a claimant who files a FECA claim for injuries sustained that could bring about Jones Act liability. The provisions of FECA would allow the government to pursue a subrogation action against Alaskan Observers. Therefore, it might be appropriate for Alaska National to maintain a reserve.

The status of observers as seaman vs. workers' comp employees continues to evolve. A court decision, especially from a court of more precedential value, could alter the current understanding of the status of fisheries observers. Such a ruling could alter the scope of liability facing Alaskan Observers. I hope you will find the information in this letter useful in your discussions with Alaska National. Thank you for your consideration.

Very truly yours,

LAW OFFICE OF PAUL L. ANDERSON P.L.L.C.



Paul L. Anderson

PLA/jkj

Re: Comments on the Draft Environmental Assessment, Regulatory Impact Review and Initial Regulatory Flexibility Act Analysis (EA/RIR/IRFAA) Extending and Improving the North Pacific Groundfish Observer Program Beyond 2002

Dear Mr. Chairman,

April 4, 2002

To begin, we support continuing the observer program beyond December 31, 2002. Alternative 3 appears to provide a psychological deadline for putting together a restructured observer program. We don't want to go through the process of commenting every year any more than NMFS wants to go through the process of rule making every year so if Alternative 3 provides a clear date when we will return to this issue (whether to restructure or extend the existing program) we support it.

We also support the general idea of NMFS staff providing observer coverage (Option 2 with the sub-option) aboard vessels and at plants, provided it does not disrupt existing observer employments and coverage. At the OAC meeting and the February 2002 Council meeting many questions were left unanswered by NMFS: Would NMFS staff time count as observer coverage? Would vessels pay for it? How would NMFS determine which vessels it would cover? Would NMFS take into account the effect on contractors in assessing how to assign observers? Why would NMFS prioritize the pollock fishery? NMFS needs to provide a clear plan in advance about how this would be done. Another option would be to have NMFS staff available 24/7 as a resource to everyone rather than to one vessel at a time. In addition, contractors need 60 days notice to ensure our prior observers opportunity to work and allow us to recruit any trainees we may need to hire. It would be unfair to contractors and observers to ask us to rescind existing contracts to make room for NMFS staff in the field. Therefore, we would be unable to support Option 2 without the sub-option which limits the number of days NMF's staff would be deployed.

We find it more difficult to support Option 1 which represents what NMFS apparently sees as a first step in restructuring its working relationship with observer providers. We are disappointed to find little here that would improve working relationships, coordination, or communication between observer providers and NMFS. We believe the approach outlined in Option 1

represents a shift from the attitude of "we're all in this together trying to make a difficult program work" to something quite different, where providers would be managed by NMFS Enforcement. Observer costs would increase as a result, and NMFS Enforcement would find itself sorting out disputes in an effort to enforce regulations that, no matter how well written, would always run the risk of holding providers responsible for events over which they have no control. The remainder of this letter focuses on this last point.

#### Observer Certification Process

Saltwater Inc. supports the proposal of making the observer application process APA-compliant. However, we have great concerns if the sub-option to grandfather current observers is not also adopted. If current observers are not grandfathered into the program, the observers would be faced with the uncertainty of work. We could lose good observers from the program to other work they know will be available and the observer program could be faced with a reduced or very inexperienced work force with not much time to fix the problem. A reduced work force would mean vessels could potentially be left uncovered. We are uncertain of how many observers would lose their certification if they weren't grandfathered in to the program since the analysis didn't provide any information. NMFS did mention in the analysis that if the observers were grandfathered in that they would lose the ability to weed out those observers "on shaky ground." NMFS already has procedures in place to suspend and/or decertify those observers who do not meet the program's expectations. We believe that NMFS should be able to finalize their decertifications by January 1, 2003 and not penalize the entire work force by not completing a full decertification.

#### Standards of Observer Behavior

We support the establishment of a drug and alcohol policy for the observer program. However, we would request that the observer program involves observer providers add observers in establishing these policies. We would also suggest adding "while under contract" to the Standards of Behavior.

#### Observer Provider Certification

It would be redundant for currently certified observer providers to submit new permit applications as we have all already completed applications and the

application criteria would not be changed. Saltwater whole heartedly supports sub-option 1 to grandfather currently certified observer providers.

#### Monitoring Observer Providers

Proposed regulations would put NMFS Enforcement and not the Observer Program in charge of monitoring observer provider responsibilities, and we think this is the wrong way to go. Monitoring contractor performance is a difficult task, but that's no reason for the Observer Program to pass it off to Enforcement. In the past, observer providers and the Observer Program have at times been guilty of viewing one another with suspicion and resentment. We believe what we see here will put more distance between us, and observers will be the losers should that happen. As the observer program is restructured, we would prefer that the focus to be on improving the working relationship between NMFS and observer providers.

#### Observer Fit for Duty

We are concerned that NMFS will monitor if the right decisions are being made when observers and observer providers determine if an observer is "fit for duty." First, how will NMFS monitor this after the fact. Also, if NMFS determines the observer providers made the wrong choice with the observer, then they will be subject to NMFS Enforcement.

We are unable to support sub-option 2, that "fit for duty" will be determined by a licensed health care professional before deployment, because of limited availability of personnel in ports throughout Alaska where observers will be deployed 24/7.

#### Signed Vessel Contracts

We are in support of the proposed changes regarding vessel contracts. However, there are larger issues at stake that are not addressed in the proposed word changes such as; early season closures that prevent vessels from getting all of their coverage, new regulations requiring additional observers (ex. Atka Mackerel 2002) vessels changing fishing areas requiring a jump from 30% to 100% observer coverage.

#### Observer Data Transmission

Proposed regulations also continue to make contractors responsible for data

transmission. We want to point out that this regulation, in whatever version, has never functioned well. Our experience has repeatedly been the following: First, NMFS staff are inclined to presume that if they didn't get a message, it was not sent. We then contact the observer, asking them to re-send the message. Observer assures us it has been re-sent. NMFS staff report back that said message still has not been received. We then contact observer . . . and so on. This circular activity sometimes continues until the observer leaves the field and heads to debriefing. NMFS has direct communication with many observers via Atlas and sees many observers at NMFS field offices, and has made clear that we are not to be handling data. The reality is that NMFS has moved away from relying on the contractor to get messages in over the last several years. This is the right way to go because we have no way of verifying directly that a message has been sent, so making us responsible for message transmission is not the best approach to the problem.

#### In-person Mid-deployment Data Reviews

NMFS should consider how difficult it would be to ensure an in-person mid-deployment data review. We deploy observers out of King Cove, Akutan, Sand Point, Seward, Cordova, Yakutat, St. Paul, Chignik, Adak, Homer, and Juneau where no NMFS field staff are based. If we have to pull observers out of these ports for an in-person mid-deployment data review it will not only be a tremendous cost to the industry but could potentially put observers out of work.

For example, a very real problem a contractor could be faced with is having 30% vessels operating out of King Cove and only having an observer available that is required to mid-cruise. Not covering the vessels is not an option, so the vessels operating out of King Cove would be faced with additional costs and the time of rotating observers so the first observer could return to Anchorage for an in-person mid-deployment review. Not only would vessels encounter additional costs of rotating observers and potentially lost fishing time due to flights being canceled for weather but for observers it would result in reduced work if no assignments were available after their check-in.

We urge the Council to request specific information from NMFS on the difference of data quality between those observers that perform in-person checks versus the phone/fax method currently being used.

### Monitor Observer Performance

Requiring observer providers to monitor observer performance is an outdated regulation from when observer providers performed preliminary debriefing duties and were permitted to help observers with sampling questions. Since we have no access to observer data, much of our response to this language will be to monitor how well NMFS is monitoring observer performance of duties, since we must turn to NMFS to find out how someone is doing in the field. What will be gained by this redundancy? Apparently further opportunities to levy fines upon us. We are opposed to leaving this regulation in place either in its current form or with the proposed changes.

### Reporting Observer Problems

We are concerned about the vague language in the proposed regulations that contractors would have to report observer illness and injury, observer performance, standards of behavior, and conflict of interest problems. It is unreasonable to assume that contractors are notified about every incident that arises while observers are on contract. Furthermore, since observers often need or want to talk to someone in confidence i.e. observer provider staff, this requirement degrades communication rather than improving it. Additionally, observers have expressed concern over the confidentiality of what is being reported to NMFS and both the release of that information to program staff and whether that personal information even needs to be reported to NMFS.

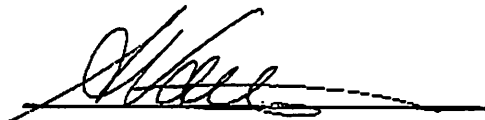
### Interviewing Observer Applicants

NMFS requires the contractors to recruit, evaluate and hire observer candidates. With the high cost of training new observers and the potential logistical problems, it is in the contractors best interest to hire the best possible candidates for the observer positions. All candidates are currently approved by NMFS and meet the minimum qualifications for observer training. As with any industry each company has its own corporate culture and observer contractors are no exception. Therefore, it's only logical that each contractor has developed their own interview process to meet the needs of their applicants, the observer program, and the contractors themselves. We do not agree with the proposed additional regulation that would require contractors to have the same interview and standard information packet for applicants.

If NMFS finds a deficiency in one of the observer providers' ability to recruit, evaluate and hire observer candidates they should notify that observer provider directly.

Although we are not opposed to changing the current regulations, we do not feel that the proposed regulatory changes in their current form are written in a way that addresses the concerns and long term goals of the observer program. We believe that with more collaboration between the NPGOP and contractors we can find solutions to satisfy all parties.

Sincerely,



Saltwater Inc.

Re: Comments on the Draft Environmental Assessment, Regulatory Impact Review and Initial Regulatory Flexibility Act Analysis (EA/RIR/IRFAA) Extending and Improving the North Pacific Groundfish Observer Program Beyond 2002

Dear Mr. Chairman,

February 4, 2002

This letter is a joint effort of Saltwater Inc. and Alaskan Observers Inc., two observer contractors which jointly have provided about 70% of the observer coverage in the North Pacific over the past five years.

To begin, we support continuing the observer program beyond December 31, 2002. Alternative 3 appears to provide a psychological deadline for putting together a restructured observer program. We don't want to go through the process of commenting every year any more than NMFS wants to go through the process of rule making every year so if Alternative 3 provides a clear date when we will return to this issue (whether to restructure or extend the existing program) we support it.

We also support the general idea of NMFS staff providing observer coverage (Option 2) aboard vessels and at plants provided it does not disrupt existing observer employments and coverage. At the OAC meeting many questions were left unanswered by NMFS: would NMFS staff time count as observer coverage? would vessels pay for it? how would NMFS determine which vessels it would cover? would NMFS take into account the affect on contractors in assessing how to assign observers? why would NMFS prioritize the pollock fishery? NMFS needs to provide a clear plan in advance about how this would be done. Another option would be to have NMFS staff available 24/7 as a resource to everyone rather than to one vessel at a time. In addition, contractors need 60 days notice to ensure our prior observers opportunity to work and allow us to recruit any trainees we may need to hire. It would be unfair to contractors and observers to ask us to rescind existing contracts to make room for NMFS staff in the field.

We find it more difficult to support Option 1 which represents what NMFS apparently sees as a first step in restructuring its working relationship with observer providers. We are disappointed to find little here that will improve working relationships, coordination, or communication between observer providers and NMFS. We believe the approach outlined in Option 1 represents a shift from the attitude of "we're all in this together trying to make a difficult program work" to something quite different, where providers will be managed by NMFS Enforcement. Observer costs will increase as a result, and NMFS Enforcement will find itself sorting out disputes in an effort to enforce regulations that, no matter how well written, will always run the risk of holding providers responsible for events over which they have no control.

The remainder of this letter focuses on this last point. We've put an asterik next to the items that we feel are particulary crucial.



### Observer Certification Process

We're concerned about the language in Option 1 that changes the observer certification process to make it APA compliant. It is not clear when the applications of potential observers would be reviewed. This concerns us because this review would need to happen in a timely fashion. We often need to deploy observers the day after training, but the regulation is written in a way that indicates it is possible that a trainee could pass training and then see his application for certification rejected. Delays in deployment and an increased failure rate of trainees both have costs which will, again, be passed on to industry-and again, we don't see what will be gained in exchange for these costs.

### Standards of Observer Behavior

Option 1 also addresses standards of observer behavior. One change will prohibit observers from having sex with employees of the vessel or plant where they are assigned, which is a change from the current language prohibiting emotional and physical involvement. After this change is in place, exactly nothing about the current situation will have changed. We already know observers are not permitted to have sex with employees of the vessels and plants where they are assigned, and it is already extremely difficult to identify whether they are doing so, and with whom, and whether it would be making a difference in their work if it were true. Vessels already make lurid allegations about observers they want to see replaced; they will continue to do so; and these allegations will continue to be difficult to address. What do we suggest? We suggest that NMFS continue to handle these matters on a case-by-case basis, being careful to credit only credible evidence, and most often disappointing the accusers. It distresses us to see time and energy being spent on fiddling with the wording of this regulation as if it will somehow make any difference.

### \* Observer Fit for Duty

Option 1 will also modify provider responsibilities by stating that only observers "fit for duty at time of embarkation" can be assigned to vessels. NMFS has not defined what "fit for duty" means, but in section 3.4.4 they include flu, sinus problems, and ear infections as illnesses that would prevent an observer from going to sea. We suspect that fishing companies, whose vessels are equipped with antibiotics and who maintain contracts with on-shore physicians services (and who make these resources available to sick observers), don't disembark everyone with a sinus infection before heading to sea. Also, while NMFS acknowledges that this regulatory change will bring with it some increased costs to industry, it fails to acknowledge that it will result in a loss of work for some observers. If we have to scramble to get someone into the field to replace an observer who is down with a sinus infection for five days, no one should assume we'll have work for that observer five days later. If we have extra people in the field, someone has to come out of the field.

### Signed Vessel Contracts

As things work now, contractors do what they can to meet vessel coverage needs no matter the situation. If a vessel drops out of the opilio fishery ten days early and wants to begin pollock fishing, the contractor tries to provide an observer ten days early-even if the vessel provides only two days' notice. But if we fail, have we failed to perform on our contract? As things work now, the boat might wait an extra day. With this responsibility re-defined, another path is available to the vessel: inform NMFS Enforcement that the contractor has failed to perform on its contract. Vessels might do this in hopes of getting relief from NMFS in the form of an exemption, but in any case they could be sure that by informing Enforcement they were bringing more pressure to bear on their contractor.

That the prospect of being fined for failing to provide coverage would give us pause shouldn't be a surprise if one considers a few examples of actual observer coverage problems and their causes. For instance, at the start of A season 30% pollock boats are reluctant to take observers because they have yet to identify where the best roe fish are located. This is because if the roe fish turn up in the crab savings area, by NMFS regulation 30% vessels need 100% coverage to fish there. A skipper who knows his vessel might turn into a 100% vessel in (for instance) mid-February isn't going to take coverage in late January. Of course, if roe fish turn up in the crab savings area January 22, then every 30% boat clamors for an observer on January 23. If we can't come up with six or eight or ten observers on January 23 for all the boats we have "signed and valid contracts" with, are we going to be subject to Enforcement action?

Or consider the effect of the way NMFS manages vessels fishing cod as part of an inshore cooperative. Bycatch rates for a coop can be established in a current season by carrying an observer. As a result, 30% vessels are reluctant to take an observer until they see how their bycatch is. When bycatch is low they all want observers--and we mean right now--to help them "establish a bycatch rate." When we can't produce half a dozen observers to vessels with whom we have "signed and valid contracts" with, are we going to be subject to Enforcement action?

Or consider that at the start of 2002 NMFS issued an emergency regulation requiring 2 observers on vessels fishing Atka Mackerel. By the time this regulation fell into place, we had no way to hire any more observers--trainings and briefings were already in process or had been completed. So observer providers shifted observers they had intended to devote to 30% coverage over to Mackerel boats. But this inevitably compromises our ability to satisfy coverage requests from 30% vessels (see above examples).

Or consider the situation that developed in 2000 when ADF&G delayed the Opilio fishery by several months. Crab vessels moved over to the groundfish fishery en masse, and while all the contractors did their best to try and meet the sudden demand for observers, some vessels went uncovered. Should observer providers be subject to Enforcement action in a situation like this?

The prospect of getting fined for failing to provide coverage will have several consequences that go unmentioned here. First, providers may grow reluctant to enter into contracts with 30% coverage vessels, instead preferring to say, in effect, "We'll let you know if we can cover you when the time comes." Secondly, contractors are going to have to put a price on this regulatory change. After all, no one can forecast the length of an opilio fishery or the number of observers who might come down with the ear infections in Dutch Harbor in January or countless other unforeseeable developments that can compromise a provider's ability to have an observer in ready when and where a given vessel wants him. Fines will be viewed as a cost of doing business; this will get factored into daily rates; observers will cost more. How much more is hard to say, but the increase will be unnecessary. The vast majority of coverage comes off without incident, and we don't need any further incentives to accomplish our jobs. NMFS does not need to develop a regulatory response to address every outlying event, but that's what's happening in this case.

It should also be pointed out that the language about "signed and valid contracts" will not solve any real coverage issues, one of which is that 30% coverage is (as NMFS and the Council have agreed) not random. The quarterly approach to coverage requirements for 30% boats has remained unchanged since 1990 in a fishery that has seen myriad management and regulatory changes-a act that seems negligent at best. We think the problems of lack of observer availability faced by 30% vessels (for this is where the problem really exists) should be addressed after NMFS completes a comprehensive review of coverage needs for all fisheries that takes into account all scientific, management, and compliance needs.

\* Observer Data Transmission

Option 1 also continues to make contractors responsible for data transmission. We want to point out that this regulation, in whatever version, has never functioned very well. Our experience has repeatedly been the following: First, NMFS staff are inclined to presume that if they didn't get a message, it was not sent. We then contact the observer, asking them to re-send the message. Observer assures us it has been re-sent. NMFS staff report back that said message still has not been received. We then contact observer . . . and so on. This circular activity sometimes continues until the observer leaves the field and heads to debriefing. NMFS has direct communication with many observers via Atlas and sees many observers at NMFS field offices, and has made clear that we are not to be handling data. The reality is that NMFS has moved away from relying on the contractor to get messages in over the last several years. This is the right way to go-because we have no way of verifying directly that a message has been sent, making us responsible for message transmission is not the best approach to the problem.

\* In-person Mid-deployment Data Reviews

Option 1 also requires in-person mid-deployment data reviews. NMFS should consider how difficult insuring an in-person mid-deployment data review will often be. Here's a not-untypical example: A vessel might be expected in Dutch

Harbor on a Friday when on Wednesday morning, a vessel manager lucks into an opportunity to do a partial offload in Adak on Wednesday evening. The boat goes into Adak and is ready to leave again by Thursday mid-day. If the observer on the boat was required to have an in-person data review, then we would have to fly him from Adak to Anchorage on Thursday. Assuming we could get a replacement freed up in Dutch Harbor (a big if, since until Wednesday morning we wouldn't have had any idea that we had to replace the observer), that person would have to fly to Anchorage on Thursday and on to Adak on Friday. If all the flights came off on schedule (which happens in Adak once in a while), the boat would only have been held up about twenty-four hours and incurred a tremendous airfare bill.

We also deploy observers out of King Cove, Akutan, Sand Point, Seward, Cordova, Yakutat, St. Paul, Chignik, Adak, Homer, and Juneau where no NMFS field staff are based. If we have to pull observers out of these ports for an in-person, mid-deployment data review it will not only increase costs but potentially put observers out of work.

#### Monitor Observer Performance

Option 1 also contains language requiring us to monitor observer performance of duties. Since we have no access to observer data, much of our response to this language will be to monitor how well NMFS is monitoring observer performance of duties, since to NMFS we must turn to find out how someone is doing in the field. What will be gained by this redundancy? Apparently further opportunities to levy fines upon us.

#### \* Reporting Observer Problems

We are concerned about the vague language in the proposed regulations that contractors would have to report observer illness and injury, and observer performance, standards of behavior, and conflict of interest problems. It is unreasonable to assume that contractors are notified about every incident that arises while observers are on contract. We also believe with these increased reporting requirements that the observers will tell the contractors less about their problems and will degrade the relationship between the observers and their contractors.

#### Interviewing Observer Applicants

NMFS requires the contractors to recruit, evaluate and hire observer candidates. With the high cost of training new observers and the potential logistical problems, it is in the contractors best interest to hire the best possible candidates for the observer positions. All candidates are currently approved by NMFS and meet the minimum qualifications for observer training. As with any industry each company has its own corporate culture and observer contractors are no exception. Therefore, it's only logical that each contractor has developed their own interview process to meet the needs of their applicants, the observer program, and the contractors themselves. We do not agree with the proposed additional regulation that would require contractors to have the same interview and standard information packet for applicants.

Safety Decals

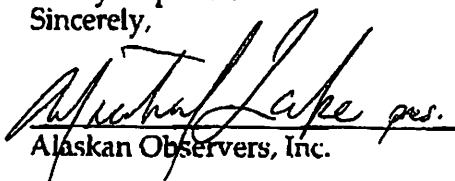
We support the intention of NMFS to increase observer safety, but we don't believe making a contractor responsible for verifying the safety condition of a vessel that may be several hundreds or thousands of miles away from the contractor is reasonable. We also fear that some observers may be lulled into a false sense of security and neglect to complete their own safety evaluation of the vessel if the contractor tells the observer a vessel has a current Coast Guard safety decal.

\* Monitoring Observer Providers

Option 1 would put NMFS Enforcement and not the Observer Program in charge of monitoring observer provider responsibilities (see number 9 of section 2.4.3), and we think this is the wrong way to go. Monitoring contractor performance is a difficult task, but that's no reason for the Observer Program to pass it off to Enforcement. In the past, observer providers and the Observer Program have at times been guilty of viewing one another with suspicion and resentment. We believe what we see here will put more distance between us, and observers will be the losers should that happen. As the observer program is restructured, we want the focus to be on improving the working relationship between NMFS and observer providers.

While we are not opposed to changing the current regulations, we do not feel that the proposed regulatory changes in their current form are written in a way that addresses the concerns of the observer program. We believe with more collaboration between the NPGOP and contractors that we can find solutions to satisfy all parties.

Sincerely,

  
Alaskan Observers, Inc.

\_\_\_\_\_  
Saltwater Inc.

**Data  
Contractors  
Incorporated**

**RECEIVED**



APR - 3 2002

April 1, 2002

**N.P.F.M.C**

David Benton  
Chairman  
North Pacific Fishery Management Council  
(907) 271-2817

**COMMENTS & CONCERNS REGARDING  
OBSERVER PROGRAM REGULATORY ADMENDMENTS**

The following letter addresses the EA/RIR/IRFAA presented by NMFS concerning the North Pacific Groundfish Observer Program regulation changes. Data Contractors Inc. (DCI) has participated, since early November 2001, in the process of creating the current version of the regulation. DCI has requested additional information be provided on a number of issues. The NPFMC Advisory Panel has requested that NMFS explain and expand many of the same issues to provide clarification. The following issues still have not been clarified to DCI's satisfaction.

**Alternatives to Extend the Program**

As we begin the third year of the new millennium, an old issue returns to the Council. The regulations that authorize and implement the Observer Program in the North Pacific will expire on December 31, 2002. It is clear that the Observer Program is a vital part of the successful management of the North Pacific fisheries. Expiration of the program is not a viable alternative to maintain the goals of the fishery. NMFS has identified two other alternatives: extend the expiration date through December 31, 2007, or, extend the program indefinitely. DCI supports the extension of the expiration date.

DCI cannot support the indefinite extension of the program. DCI is concerned about the direction (or lack of direction) guiding NMFS North Pacific Observer Program. DCI agrees the program's current service delivery model has some problems. Cost to industry continues to increase. Communication between NMFS and interested parties is poor at best, adversarial at worst. Some improvements have been made. The Anchorage and Dutch Harbor Observer Program field offices have improved information flow and support of observers. Bob Maier strives to resolve contractor issues in a timely manner. Debriefings have become more timely and complete, resulting in improved data quality.

NMFS has stated that the proposed regulatory changes are the beginning, not the solution, to a revised observer program. However, NMFS has not clearly defined the long-term objectives of the program. This lack of definition makes it difficult to evaluate the proposed regulatory changes.

DCI questions whether the proposed regulatory changes will have the effect NMFS desires.

**Change in Observer Provider Certification Process**

NMFS views the NMFS/observer provider relationship as a client/vendor relationship. Observer data is the product. However, NMFS does not pay the observer providers for the product, industry does. NMFS argues that in this relationship they do not have a mechanism to penalize the providers for poor performance. NMFS's solution is to change the current certification process for observer providers to a permit process similar to a fishing permit. With this change, NMFS argues, they will be able to correct contractor performance problems quickly via NMFS enforcement.



4606 Garfield Street  
Anchorage, Alaska 99503  
(907) 561-2210 Phone (907) 563-7817 Fax

DCI would argue that the perceived problems are correctable without this relationship change. The existing program can be much improved by the honest exchange of information when problems are encountered. The permitting process creates an adversarial relationship between the providers and NMFS rather than one that encourages communication. DCI is concerned that observer providers may be financially penalized in the future for something that is a result of NMFS's lack of direction and focus. If the observer providers are to accept some of the responsibilities currently carried by NMFS, then NMFS must provide the proper level of management and direction to allow the observer providers to comply. This requires regulations that are not ambiguous, and that realistically reflect NMFS Observer Program Policy and the expectations to be upheld.

#### **Ensuring Catch Message Transmission**

NMFS proposes to remove the words "In cooperation with vessel or processing facility owners" from the regulation. NMFS would place the responsibility of ensuring the catch message transmission solely on the observer provider. DCI argues that this regulation has never functioned well. NMFS has made it clear that observer providers are not to handle data. DCI does not have a way to verify directly if a message has been sent. Making the observer provider responsible for message transmission is not a valid solution to the problem.

NMFS has direct communication with most observers through Atlas or via field office staff. The majority of late transmissions are a result of communication device malfunctions. DCI is concerned that the proposed regulation places an unrealistic expectation on the observer provider. NMFS needs to define more clearly the Agency's role in the transmission and receipt of data. NMFS is the only party that can directly determine if a transmission has been received. DCI feels it is NMFS' responsibility to provide management protocols that ensure catch messages are submitted in a timely manner. As an observer provider, DCI will gladly do everything in its power to ensure that messages are re-sent when notified by NMFS of missing data. However, observer providers should not be held solely responsible by NMFS, when usually the problem is caused by equipment which is not under their control.

#### **In-Person Mid-Cruise Data Reviews**

NMFS proposes to add in phrases "in-person" and "as required, unless specifically exempted by the Observer Program" to the regulation regarding mid-deployment data reviews. DCI is concerned about the logistical implications of this regulation change. A majority of DCI's observers are deployed to ports such as Seward, Yakutat, King Cove, Akutan, and Adak, which do not have Observer Program field offices. Staff members are few in Kodiak and Dutch Harbor field offices. The cost required to ensure that observers are available for in-person mid-cruise data checks will be substantial. This change may cause vessels to be delayed, observer contract length to shorten, and increase the number of observers required to cover the same number of boats. This will increase costs to vessels, especially to those vessels not working in ports with a NMFS field office.

Currently observers are required to perform a mid-season data review with Observer Program staff. These are in-person when possible (Dutch Harbor and Kodiak). In other cases, the observer faxes the data to a field office and calls the appointed program staff member at a scheduled time to complete the data review. Experienced, prior observers with a history of good data collection are exempted by NMFS from mid-cruise interview requirements at debriefing. The observer provider has access to this information on the observer's final debriefing evaluation. DCI estimates that 35% of our deployed observers were exempt from mid-cruise data checks in 2001.

The proposed regulation change will further complicate a very difficult logistical situation. Observers will need to disembark vessels in mid-season, travel to field office locations, and then be redeployed if possible. Replacement observers will be required in many situations. This will increase transportation



4606 Garfield Street  
Anchorage, Alaska 99503  
(907) 561-2210 Phone (907) 563-7817 Fax



costs to industry. Vessels may be forced to wait for new observers if flights are delayed by weather. The average length of observer contracts will be reduced. Even though the same amount of work will be available, observer providers will need to use more observers to fill the same need.

NMFS has indicated that the phone interview method is not sufficient. NMFS believes that data quality issues can be more completely addressed 'in-person.' DCI proposes that NMFS strengthen their interview process. NMFS needs to re-evaluate the questions asked during data reviews, train staff to recognize common sampling problems more readily, and increase the time and energy spent during data reviews to ensure that all problems have been addressed. DCI can cite numerous examples of observers who have completed in-person mid-cruise data checks in which the sampling problems were not fully identified. In these cases where these problems were not identified in the mid-cruise data check, but later identified in the final debriefing, much of the affected data was not usable. This indicates serious problems in NMFS's mid-cruise and debriefing protocols.

DCI believes the negative effects of this regulation change outweigh the benefits. DCI proposes NMFS strengthen the protocols for the mid-cruise data reviews. NMFS should make program staff available in remote ports to encourage in-person data reviews. NMFS should explore ways to identify sampling problems prior to data reviews, via in-season ATLAS advisors and cadre staff. If NMFS identifies an observer with suspect data, DCI would strive to make that observer available for an in-person mid-cruise interview. DCI feels strongly that it is NMFS's management responsibility to identify and maintain a list of observers required to have a mid-cruise data review and provide the staff to facilitate timely completion of the data reviews. DCI proposes the revised regulation read "Ensuring that observers complete mid-deployment data reviews, in-person if requested, unless specifically exempted by the Observer Program."

#### Observer Illness, Injury, and Code of Conduct

NMFS proposes adding "observer illness and injury" and "code of conduct" problems to the list of performance issues to be reported to NMFS within 24 hours. DCI is concerned about the intent and enforcement of this change. NMFS must define "observer illness and injury." NMFS has proposed that observers that report illness or injury would require medical approval before embarking on a vessel. DCI does not send observers to sea that are unable to work due to injury or illness. However, DCI may send an observer to sea that has an injury or illness that will not hinder the observer's duty. NMFS must elaborate on what will be considered a reportable injury. NMFS should set guidelines that are clear and unambiguous concerning what constitutes medical approval. Physicians may not be available in some ports or at sea.

This proposed regulation causes another reason for concern. Observers may decide not to inform observer providers of injury or code of conduct issues for fear of NMFS' involvement. For example, an observer develops a cold a few days prior to embarking on a vessel for A-season. The observer does not report the cold to the observer provider knowing that the provider must inform NMFS. The observer fears that they will be withheld from work by NMFS until the cold gets better. The fear of loss of work causes the problem to escalate. The same problems will occur with code of conduct issues, for the fear is greater--decertification and permanent loss of work could be the consequences.

DCI perceives that this regulation change will decrease the level of trust between observer providers and observers. Observer providers already find that observers are less likely to inform providers of potential problems for fear of NMFS involvement. DCI sees this particularly with minor harassment and potential sexual harassment issues. Observers often do not want NMFS enforcement involved in these issues. Enforcement often exacerbates the problem.

If an observer provider does receive a report from the observer, we currently must notify NMFS. This is not a problem. The problem is that the issue is then out of the observer's hands, and they are left





completely out of the information loop from that point forward. Although it is the observer who may bring a problem to NMFS, it is rare that they get any follow up information, and are left wondering what came of their report. This is poor consideration for observers' role in these situations, and exacerbates the distrustful ambience that surrounds NMFS. NMFS is not expected to be a covert agency, and they need to understand and support that the free exchange of information is necessary for the success of this program.

As a final note, DCI feels that off-duty observers should not be held to higher standards of conduct than those to which NMFS holds their own staff. Problems that arise in company bunkhouses should be handled by the company involved. The observer position is a high stress job. Conflict and isolation are everyday issues for observers at sea. NMFS is naive if they expect observers to perform day in and day out without the ability to release this stress.

#### NMFS-Regulated Hiring

DCI does not feel that the government should regulate our hiring practices. In the Rationale for Change for regulation 679.50(i)(2)(i), NMFS states that "NMFS does not give guidance on how to recruit or evaluate potential observer candidates". seems in contradiction to this proposal. It is in our best interest to hire the best candidates available for the observer position. If a candidate can meet NMFS qualifications, pass the three-week certification course, and still not perform the job to NMFS specifications, perhaps the standards NMFS has set should be examined. If NMFS is concerned about the information provided to candidates, DCI will be glad to distribute and post on our website any additional information that NMFS would like to provide on this subject.

#### NMFS Drug and Alcohol Policy

Substance abuse is a difficult and problematic issue. DCI maintains a drug-free workplace policy, and fully supports NMFS' stance that drugs and alcohol have no place in this program. DCI is concerned, however, that NMFS may set standards regarding this issue that are unattainable or unrealistic. NMFS and the contractors must work together to develop a practical program. If NMFS becomes aware of a drug or alcohol conduct issue (or any other conduct issue), it should be required that the observer provider be informed within the same 24-hour time frame (bi-directionality of information is key to the success of this program) that NMFS requires if the situation is reversed. Additionally, NMFS should train debriefing and cadre staff to recognize signs of abuse and need for counseling. The observer lifestyle can contribute to a wide range of problems from substance abuse to depression to dealing with sexual assault. NMFS should have at least several staff members available with the skills to counsel these problems.

#### Vessel Safety Decal

DCI believes that verifying a vessel safety decal prior to sending an observer to a vessel is not an effective solution to the problem at hand. Often the observer provider cannot inspect the vessel. Observer providers can include USCG safety decal requirements as part of the contractual agreement between the provider and vessel. DCI can inform its employees to verify the sticker is current. However, it is ultimately the observer's responsibility to check the safety of the vessel. A safety decal does not ensure the vessel is currently safe. Decals are valid for two years! The regulations should be strengthened on the backside of the issue: What steps does the contractor take if an observer reports an unsafe vessel? DCI's policy has always been to support the observer should he or she decide not to board a vessel due to safety concerns.

NMFS should focus on improving the communication between NMFS, observer providers, USCG, and vessels, to create a database of safety issues. NMFS must notify contractors if observers or NMFS's staff raise safety concerns about a vessel. NMFS should develop training protocols to ensure observers can verify vessel safety or provide qualified, neutral inspectors to verify safety on vessels on which safety is disputed. As stated, this regulation change does not improve the issue and will be difficult to enforce.



### Shore-side Pollock Observers

DCI agrees with the intent of this regulation. DCI would request that the phrase "unless exempted by the Observer Program" to this regulation. This would allow for some latitude when dealing with extreme logistical problems.


### Summary of Concerns

DCI believes with the current level of interaction between NMFS and the observer providers, the proposed changes may result in numerous and expensive disputes with NMFS enforcement. Issues arise hourly, 24 hours a day, seven days a week. NMFS staff is currently available on an extremely limited basis outside of the federal work schedule. DCI understands that the average response time for an in-season advisor is over a week. In order to positively address the concerns NMFS has raised in the discussion above, NMFS must communicate in real time. Relying on NMFS enforcement to prosecute and uphold the new regulations could be problematic. Currently NMFS enforcement often charges individuals or vessels well over a year after their alleged offense occurs. If NMFS' goal is to improve their ability to control provider performance, a timelier manner of enforcement will be required.

DCI's major concern is that NMFS will implement unrealistic expectations of providers and enforcement of these unrealistic regulations will increase. Second, DCI is concerned that the increased information provided to NMFS will not be utilized. DCI does not oppose additional reporting and compliance with new regulations. However, if this data is not being used in a timely manner what benefit is gained? Finally, in order to improve relations with observer providers, NMFS must be willing to devote time and resources to improving the lines of communication. Some ideas include designing an interactive website that contractors can access to gain real time data about previous safety or harassment issues on a vessel, a contractor liaison that is available 24 hours a day, and increased utilization of the observer cadre to support observers in the field and resolve conflicts.

If you would like additional information or clarification, please contact Bryan Belay at (907) 561-2210.

Thank you,

  
Bryan Belay  
Operations Manager



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4606 Garfield Street  
Anchorage, Alaska 99503  
(907) 561-2210 Phone (907) 563-7817 Fax

# PUBLIC TESTIMONY SIGN-UP SHEET FOR

## AGENDA ITEM C-1 Observer Program

PLEASE SIGN ON THE NEXT BLANK LINE.  
LINES LEFT BLANK WILL BE DELETED.

	NAME	AFFILIATION
1/	BRYAN BELAY	OBSERVER CONTRACTORS
2/	Kathy Robinson + Anne Vanderhoeven	Saltwater Inc.
3/	John Bruce & Al Burch	Whitefish Fisheries
4/	Christa Colway	Observer
5/	Tracey Maynew	Observer
6/	Beth Stewart	AEB
7/	LORI SWANSON	GROUND FISH FORUM
8/	MIKE Todd	APO - Association of Prof. Obs
9.	Michael Lake	AOI
10.	Joe Childers	<del>WFOAF</del> FV NIGHTWATCH
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C-1

April 7, 2002

David Benton, Chairman  
North Pacific Fishery Management Council  
605 West 4<sup>th</sup> Ave., Suite 306  
Anchorage, AK 99501

Dear Chairman Benton:

The Association for Professional Observers (APO) would like to thank NMFS and Council staff for the efforts that have gone into the Draft EA/RIR/IRFAA concerning proposed changes to the North Pacific Groundfish Observer Program (NPGOP). We feel that many of the proposals will have a positive effect on observers and the quality of their data. Below you will find our comments on some of the revised proposed alternatives.

The APO approves of **Alternative 3**, which would extend the current Groundfish Observer Program until December 31, 2007. We believe it will be necessary to set a sunset date in order to ensure that the program is reviewed in a timely manner. If **Alternative 2** is approved we would like the Observer Program to be slated for review by a specific date.

**Regarding Option 1 for Alternatives 2 and 3**, we have the following comments:

- **Criminal Record:** The APO is in favor of making observers who have been convicted of a felony ineligible for certification (sub-option [i]).
- **Standards of Behavior:** The term "on duty" regarding the alcohol policy needs to be very clearly defined, and we would like observers to be able to take part in doing so. There are many different types of observer assignments, and it may be difficult to come up with a good definition. If this ends up being the case it may be simpler to instead require that observers not work or return to work if they would not meet the state's legal requirements for driving.
- **Grandfathering Provisions:** The changes to observer requirements are relatively minor, and the APO supports giving currently certified observers grandfather rights (sub-option [i]). Observer providers will be subject to more far-reaching changes and it is the APO's opinion that grandfather rights need not apply to them.
- **Fit for Duty:** The APO approves of the following definition of fit for duty: "Fully capable of performing all assigned duties, and, if the observer is sick or injured at the time of embarkation and there is access to a licensed health professional, having received clearance to work from a licensed health professional before deployment."
- **Observer Provider Reporting Requirements:** Regarding the issues that observer providers are required to report within 24 hours (i.e. harassment, standard of behavior problems), the APO would like to be able to review the expanded list of included situations that is to be provided by NMFS.
- **Applicant Interviews:** The APO approves of requiring observer providers to meet certain standards in the interview process and to furnish a NMFS-produced pamphlet to observer candidates (sub-option [iii]). We would like to see observers and observer providers should be included in the drafting process for the pamphlet.

The APO is strongly in favor of **Option 2 for Alternatives 2 and 3**, which would grant NMFS the authority to place staff and other qualified persons on fishing vessels and at processing plants.

**Safety Considerations:**

Certain areas of the observer safety-training curriculum are in need of improvement. Observer trainees take a thorough safety course during their first-time certification classes, but follow-up training for priors is far less than what is required of other divisions of NMFS such as Resource Assessment Conservation Engineering (RACE) and organizations such as the International Pacific Halibut Commission (IPHC).

For example:

The IPHC requires employees who work at sea to complete the NPVOA "Safety Equipment and Survival Procedures" class (8 hours) every two years. Course content includes in-water exercises with survival suits and life rafts, and hands-on training with signaling devices.

The RACE division of NMFS requires sea-going employees to complete the following:

- Remote Duty First Aid (12 hours) – every two years.
- First Aid Refresher (4 hours) – every two years.
- Oxygen Therapy (3 hours) – every five years.
- Survival at Sea (6 hours) – every five years.

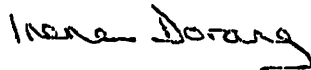
The Pacific Drift Gillnet Program requires prior observers to take annual training that includes in-water survival suit practice.

In contrast, the NPGOP training for prior observers consists of a few hours of lecture time and the donning of survival suits in a classroom once a year. This disparity is especially striking considering the amount of time that observers typically spend at sea.

The NPGOP could, and should, upgrade its safety training for prior observers. This could be done cost-effectively, since there are staff members at both the Seattle and Anchorage training centers who are qualified to teach courses that have the content of AMSEA classes. By requiring a full safety-training day once every two years the Observer Program would bring its curriculum up to the standards of the IPHC. Until this happens, the NPGOP safety training for priors will continue to lag behind that of other programs.

We would greatly appreciate the Council's assistance in improving this situation.

Sincerely,



Irene Dorang  
Executive Director

Cc: Dan Ito, Program Leader, Groundfish Observer Program  
Jim Balsiger, Regional Administrator, Alaska Region  
Doug DeMaster, Science and Research Director



C-1

## Introduction

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We at JFI would like to take this opportunity to express our appreciation to be able to offer some comments on the observer program. We believe extending the program for **ANY** period of time beyond the expiration date of December 31, 2002 would just prolong the **CURRENT** inefficiencies, ineffectiveness, and burdens on industry. The only option that makes sense is to allow the program to expire and start over with a redesigned program.

The purpose of the observer program was supposed to help NMFS manage the fishery using scientifically sound methods of observing, sampling and data collection. Originally supported by the fishing industry, the observer program was supposed to help ensure the health of the fish stocks as well as the fishing industry dependant upon the fishery. What we **ACTUALLY** have is a program that has, in part, morphed into a typical government bureaucracy using scientifically flawed methods, masquerading as science, dependant upon the fisherman for its existence.

Observers have become something other than gatherers of scientific data to be used for management of a natural resource. They are now also garbage police, living quarters police, vessel safety inspectors, speech police, and thought police. Observers, under the current bureaucracy, have been elevated to "**Special Status**". This is very similar to the old Soviet KGB men assigned to fishing and processing vessels that some of us remember seeing in Dutch Harbor twenty years ago. Originally conceived as a **partnering** for better management, the system has become **adversarial**.

Under the current program the primary ones to benefit are the observers themselves and the bureaucracy that supports them. Industry, the fishermen, is the one footing the bill. Industry, the fishermen, is the **ONLY** one held to any standard of

accountability. This accountability is accomplished through a system of monetary penalties. The threat of monetary punishment for honest mistakes is always present. But when the observer program screws things up, be it either the observer or the bureaucracy, they are **NOT** held accountable. **Ironically, the cost in dollars to industry from observer and bureaucracy screw-ups has far exceeded any cost to fish stocks from industry screw-ups.**

There are many incidents of fishermen being abused by the observer program. In the interest of time we will tell you of only three that we have experienced.

In Nov 1999 one of our vessels was fishing in the Bering Sea. The cook was emptying a garbage bag of galley waste overboard. Legal activity. During this exercise he cut his hand on some of the contents and the bag slipped from his grasp into the sea. One of the two observers we were carrying made a report ~~to the Coast Guard~~ and we were subsequently fined \$1000. The issue as we understand it was not that we had **ACCIDENTLY** dropped a bag over, but that we didn't stop hauling our longline gear and go chasing after a black plastic garbage bag a 1130 PM at night in the middle of winter in the Bering Sea.

According to the observer's statement ~~to the Coast Guard~~ he was just waiting for an opportunity to report us for polluting the Bering Sea. And, of course, the ~~Coast Guard~~ officer investigating the incident believed the observer rather than the fisherman.

Another incident occurred when we were fishing in the Bering Sea for CDQ cod ~~with another of our longliners~~. We normally are 30% coverage boats but during CDQ we are required to carry two observers. One observer was sharing the skipper's stateroom that had two bunks and the other observer had to bunk with the crew.

He made an official complaint that **his** quarters were not comparable to ship's officers quarters. He evidently assumed that we would displace the master of the vessel for **him** because of **his** "Special Status". That complaint has since been dismissed.

Industry is **expected** to provide a safe and comfortable environment to **higher** standards for observers than it typically affords its own workers. On most vessels generally, and all our vessels specifically, the working conditions **are** perfectly acceptable to our crews.

Both of these incidents highlight the issue of observer self-importance. It **seems** that those overseeing the observer program think that observers are somehow worthier than fishermen are. And evidently the program has given the observers themselves that very same idea. The idea that observers should be considered better, more **honest**, or more **trustworthy** than the fisherman, or processor, quite frankly, is an affront to me and everyone engaged in this industry. It is the fisherman that makes the observers' existence possible. No fisherman, no observer! No fisherman, no program!

Some time ago, we at JFI obtained copies of observer report data through the Freedom of Information Act. Our eyes were indeed opened to the fact that these "observers" were keeping track of much more ~~than~~ scientific data. We found notes that mentioned politically incorrect statements made by the crew, notes regarding the racial and sexual makeup of the crew, notes regarding the personal hygiene of crewmen, etc.

Recently we were assigned a female observer that was sick from the moment she set foot on our vessel. She was sick for the first few days and did no sampling. She had a screaming episode in her bunk that motivated the skipper to call the CG. Both the CG and the skipper figured she was just seasick and wasn't coping with it



very well. She appeared OK for the next ten days, but then got sick again and returned to her bunk. The skipper called the CG again and it was determined that they needed to return to port, which they did. Our vessel lost considerable time (10 hours each way) running in and out of port, and time that the crew spent assisting the observer with her personal needs. Once in port the crew literally handed her over to the observer company representative. We were later informed by the observer company that she was medevac'd out and underwent surgery for bleeding ulcers.

The point is that this observer **never** was fit for service aboard **any** vessel. Furthermore, if there are eventually **any allegations** of misconduct on the part of the crew relative to this observer and this incident, need I tell you what the bureaucracy's stance will be?

According to the observer program, the observers are considered to be **authorities** regarding the seaworthiness of **our** vessels and they even have the power to keep the vessel from sailing until **their** worries are calmed. How is this possible? What qualifies them to be **experts** on any of the issues that we have pointed out? Does sitting through a few hours of lectures and classroom experiences qualify them as safety experts, sanitation experts? This is absurd!

When incidents such as what we have illustrated happen, what do we as industry, as fishermen, do? What recourse do we have for lost fishing time, for fuel and other costs. Industry **absolutely** needs to be indemnified for losses caused by observer incompetence.

In its present form, the observer program does not take responsibility to ensure that **all** observers placed on fishing vessels are **qualified** and "seaworthy". Industry has made huge concessions to accommodate these observers and this program and what do we have to show for it? We can attribute the success of

*& Councils*

the fishery more to NMFS's conservative approach than to anything the current observer program has contributed!

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It seems that the fishing industry, fishermen in particular, ~~is~~ always at the mercy of and accountable to bureaucrats who either are unwilling or unable, usually unwilling, to go against the tide of programs run amuck.

We recommend that the NPFMC allow the observer program in its current form to sunset on schedule, and then direct it to be redesigned from the ground up in a **cooperative** effort between industry and NMFS. Currently the program is an out of control bureaucracy that needs to be reigned in and redesigned into a balanced, equitable, and productive form. Most times when a program goes astray from its intended purpose, we simply suffer indefinitely. The management council now has the opportunity, and indeed the obligation, to make things right. ~~We hope that it does.~~

ROSS SLEEPNESS  
PRES. JFB

LAW OFFICE OF  
PAUL L. ANDERSON  
P.L.L.C.

February 5, 2002

Michael Lake  
Alaskan Observers, Inc.  
130 Nickerson, Suite 206  
Seattle, WA 98109

Re: Alaskan Observers - General  
Our File No. 22-1806

Dear Michael:

You asked for our comment on the strategy for working through the insurance and compensation issues. We will reiterate what I discussed in our previous letter about the status of the various laws.

Congress provided for the management of fisheries off the coasts of the United States when it adopted the Fisheries Conservation and Management Act. In this congressional enactment, Congress directed the Secretary of Commerce to institute an observer program. Subsection (c) of 16 § 1881b states that an observer under contract to carry out the responsibilities imposed by the Fisheries Conservation Act as well as those imposed by the Marine Mammal Protection Act shall be deemed to be a federal employee for the purpose of compensation under the Federal Employee Compensation Act (5 USC 8101, *et seq.*). Congress further provided in the Marine Mammal Protection Act that an observer operating pursuant to the auspices of the Marine Mammal Protection Act cannot bring a civil action for injury against the vessel on which the observer was engaged or against the vessel owner. The courts have not made it clear whether the Fisheries Conservation Act prohibits an observer from claiming against the vessel on which he or she was engaged.

Chapter 81 of Title 5 of the U.S. Code describes the compensation payable pursuant to FECA and Section 8131 allows for subrogation by the United States. "If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability on a person other than the United States to pay damages, the Secretary of Labor may require the beneficiary to":

1. assign to the United States any right of action he may have to enforce the liability; or

1001 FOURTH AVENUE, SUITE 2800 SEATTLE, WA 98154  
PHONE 206.467.0237 FAX 206.467.0351  
P.ANDERSON@BOAT-LAW.COM

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April 5, 2002  
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2. prosecute the action in his own name.

In other words, if the United States pays the injured observer, the United States "steps into the shoes of the observer" and retains the right to attempt to recover part or all of the FECA payment from the person or entity who was legally liable for the observer's damages.

Section 8132 applies to the circumstances where a claimant receives funds from a responsible third party. In this circumstance, the government does not maintain a right of subrogation. However, a portion of the funds received from the third party is applied as a credit against the claimant's FECA entitlement.

The ability of the United States to subrogate against the at-fault party poses some liability upon Alaskan Observers. Apparently, observers have the ability to pursue injury claims under alternative theories. An injured observer has the option, pursuant to Alaska workers' compensation laws, to file a claim with the workers' compensation insurer of Alaskan Observers. Such a claim is not based upon fault but based upon the statutory, no-fault compensation scheme. Such a claim also pursues "compensation" rather than "damages." However, it appears as though observers have another option which is to pursue claims for damages pursuant to the Jones Act.

Even if an employer is not the owner of the vessel on which its employee was injured, if the employee is a seaman, the employer owes the employee the protections of the Jones Act. *Tullos v. Resource Drilling, Inc.*, 750 F.2d 380 (5<sup>th</sup> Cir., 1985). A Jones Act claim is based upon proof of negligence on the part of the employer. Consequently, if an observer can present a cognizable allegation that his or her injuries were caused by the negligence of Alaskan Observers, Alaskan Observers faces Jones Act liability. The Alaska superior court in *Schaller v. Arctic Alaska Fisheries Corp.*, 1996 AMC 438, found that a fisheries observer was a seaman for purposes of maritime law and that the facts justified a claim against Saltwater, Inc., the observer's employer. The observer was burned when boiling water from a crab cooker spilled onto her legs. The observer contended that Saltwater was negligent in failing to properly train the observer for working around a crab cooker and the court allowed the observer to pursue the claim. The decision is an example of how an observer company can be exposed to Jones Act claims by its observer employees.

If one of your observers files a FECA claim and the facts of the incident lead to an allegation of negligence on the part of Alaskan Observers, the government has the right to attempt to collect from Alaskan Observers the amount the government paid to the observer. Because of the potential of legal liability imposed upon Alaskan Observers by the Jones Act, this could give the United States sufficient grounds to pursue a subrogation action against Alaskan Observers.

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However, if the observer employee elected to pursue a claim under the Alaska workers' compensation program, it is my opinion that it is doubtful that the United States could pursue a subrogation action against Alaskan Observers. The Alaska workers' comp system is a no-fault program. Regardless of the possible fault of Alaskan Observers, an injured observer is entitled to scheduled compensation benefits. If an observer elected to pursue a workers' comp claim, it is my opinion that, if the government "stepped into the shoes" of the observer, the government would not have the opportunity to claim that Alaskan Observers was legally liable for the observer's damages inasmuch as the observer is entitled to certain benefits, not damages, without regard to fault. Regardless, during the course of presenting a workers' compensation claim, the employee can elect to pursue maritime remedies. Consequently, if an injured employee initially pursues a workers' compensation claim, there is no guarantee that the employee won't pursue a Jones Act claim.

As we have discussed, the observers in other areas of the country are federal employees, not employees of private companies like Alaskan Observers. It is likely for the reason of the federal employment that Congress provided that fisheries observers can pursue FECA claims. The difficult you are facing is that the broad brush of Congress applied the FECA remedy to observer companies as well as the federal government.

A federal employee observer who becomes injured has only limited remedies; FECA remedies as well as remedies against non-employer, at-fault third parties. Because of the FECA application to private observer companies, along with the status of private observer companies as non-vessel-owning Jones Act employers, injured observers hired by private companies have all of the remedies outlined above which creates very burdensome insurance requirements. The appropriate solution appears to be to allow the privately-hired observers to have the same types of remedies that are available to federally-hired observers. This could be accomplished in two manners.

One method would be for Congress to prohibit privately-employed observers from filing FECA claims and prohibiting these employees from pursuing Jones Act claims. An injured observer would pursue claims either pursuant to state workers' compensation laws or to USL&H. As regards any claim against the observer company, the observer's claim would be limited to these compensation programs. The observer would retain the right to pursue claims against negligent third parties identical to the rights available to FECA claimants. For example, if an observer was working aboard a vessel and the vessel collided with another vessel due in any small part to the negligence of the operator of the other vessel, the observer would have the right to pursue a negligence claim against the other vessel.

The other method would be for Congress to continue to permit privately-employed observers to file FECA claims but 1) prohibit the filing of state workers' compensation and USL&H claims, and 2) prohibit claims against the private-company employer, either directly or by subrogation. As with the previous method, the observer would retain the right to pursue claims against negligent third parties (other than the employer).

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Both of these remedies would require Congressional action. While Congress is addressing the issue, Congress may wish to decide whether an observer can bring a claim against the vessel if the observer is operating pursuant to the Fisheries Conservation Act. Either of these remedies would continue to provide observers suitable and adequate remedies in the event of injury. However, either of these remedies would reduce the multitudes of insurance exposures facing the private observer companies. Please contact the undersigned should you have any questions.

Very truly yours,

LAW OFFICE OF PAUL L. ANDERSON P.L.L.C.



Paul L. Anderson

PLA/jkj

C-1

NORTH PACIFIC FISHERIES MANAGEMENT COUNCIL. CHAIRMAN OF THE COUNCIL.

I am a commercial fisherman involved in the groundfish industry and would like to comment on the federal observer program.

the observer program is ready for some changes. A portion of the fleet is being observed to death and taking all of the burden of expense, while the rest of the fleet has absolutely no data collected from it.

If the purpose of the program is to see how groundfish are harvested then it is not serving its purpose. Boats under 60 feet have no coverage, yet there are large fleets of these boats. Most of the western gulf fleet, and almost all of the central gulf longline fleet are not covered, but take a significant portion of the catch. Are the findings from larger vessels extrapolated to the smaller vessels that fish inshore? That is a mistake, as different grounds are fished, with differences in the gear.

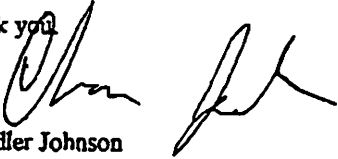
meanwhile, most of the pollock fleet is under 30 or 100% coverage. most pollock tows are very uniform, with little, if any bycatch. Yet the fleet is faced with rising observer costs (which have become a major expense) to monitor these tows. I question how all of this redundant data is used. An industry has been created out of this program, and supporting it seems to be the reason for all of this coverage.

I would suggest lowering the percentage of coverage overall, and having NMFS determine where data is lacking. Send observers to those areas and have the WHOLE FLEET pay for the program. Boats should be charged based on the percentage of the quota that they take. this way some smaller boats are not prevented from fishing by observer costs.

The observer program should take an example from the IPHC and have an annual report to the fleet to justify how our money is being spent and what conclusions are being drawn from all of the collected data. Maybe they could change some opinions that this is a monumental waste of money.

Thank you

Chandler Johnson  
F/V Walter N.



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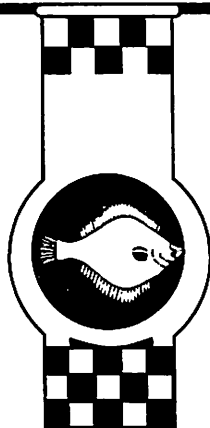
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F/V HAZEL LORRAINE

202 Center Street  
Suite 315-274  
Kodiak, AK 99615

Tel: 907-486-7599

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Mr. David Benton  
Chairman, NPFMC  
605 West 4<sup>th</sup> Avenue, Suite 306  
Anchorage, Alaska 99501-2252  
FAX 907.271.2817

April 1, 2002

Re: Extending and Improving the North Pacific Groundfish Observer Program Beyond 2002

Dear Mr. Benton,

The main thrust for extending and improving the North Pacific Groundfish Observer Program is saving time for the council/ staff if alternative 2 as proposed in the draft is selected for implementation. Allowing the council more time to address pressing issues such as the rationalization in the Gulf of Alaska. Great, do it, but...

Looking at the draft EA/RIR/IRFAA, and the make up of the agencies and individuals (Inc.'s and Associates) consulted for the long view into the future, there was a complete absence of representatives from the harvesting sector. The stool in this case has three legs and the harvesting sector carries the heaviest portion of the load financially, regulatory, logistically, and environmentally. In the last decade for example my vessel has spent more than \$200,000 for observer services; endured scheduling problems (that make you sweat when the season is in full race), additional Coast Guard inspections in port for the safety stickers, and the tracking of billing problems for the number of days observed (there is no audited shared tracking of observer "days" provided).

The "Draft" goes right to the heart of the problem when discussing "equitable fees" for **benefits gained** by each vessel; the current model is a **failure** unless you own or work on a vessel less than 60 foot. When vessels in different classes, pay under the current delivery model, disproportionate percentages of their gross earnings (and share to crew wages) to support this management regime fall heaviest on the smaller vessels. I noted four times in the draft where "higher observer coverage costs and lost fishing time and income" would result if these measures were adopted. The "Observer Providers" want valid agreements in place before the season begins to discourage "last minute shopping" among companies and eliminating competition! Fishermen take a beating at every turn...and the government is working hand in hand with the observer companies to lock us in even tighter.

LATE COMMENT



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Re: Extending and **Improving** the North Pacific Groundfish Observer Program Beyond 2002

Example: The vessels in both inshore and offshore fisheries vary in size and earning potential and you know that the observer costs are not shared equally throughout the fleet. A 60-foot vessel will have to pay the same costs for 30% coverage as a 120-foot vessel.

Observer's fees are a form of **tax** and **one size fee does not fit all**. The observer fee is a very large burden that is not shared by all vessels in the groundfish fishery that are managed in part by the data that is paid for by others (i.e., vessels under 60-foot). The Research Plan was thrown out because the burden would have continued to penalize high producing vessels in both the inshore and offshore fleets particularly the factory ship fleets.

I believe the only way to fairly pay for the observer program is to revive the Research Plan, but **with a ceiling** on the amount each class of vessel is required to pay into the plan with a defined number of classes. This would bring those vessels under 60 feet into sharing the burden at a rate that they can afford with a sliding ceiling for all vessels as protection against shouldering an unfair financial burden. The ceiling will protect vessels from paying more than their fair share of the cost to observe the groundfish fishery. **And** a cap placed on the amount of money the industry (vessels and processors) provides annually (reviewed every 5 years), for NMFS to assign observers where need the most; if used wisely this could achieve more bang for the buck.

The cost of the observer program is pegged at \$13 million per year, with a cost to the industry averaging \$350 per day...**up more than 30% in a decade**. NMFS is seeking authority to place staff and other qualified persons at plants and aboard any vessels targeting groundfish or halibut, determining which tasks, trips, deployment length and whether these "agents" time on board will count as observed time. This appears to be a follow on to the amended Federal Groundfish Permits that were required by emergency rule January 8, 2002 identifying **all vessels of any size** targeting groundfish/halibut IFQ's in federal waters to be prepared for VMS prior to fishing June 10<sup>th</sup> 2002. Observed by satellite or by contracted agents for the government this clearly defines the harvesting sector that benefits from the data gathered on vessels greater than sixty feet that have saddle the full financial weight for the entire span of the program. The price of everything has continued to trend up, fuel, insurance, food and observer coverage while the price of fish has remained the same or trended down. We need relief in the form of clean sheet thinking and a clean sheet approach to managing by-catch...some are on the books but underutilized

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...blending BSAI Amendment 50 "Halibut Donation Program" and BSAI Amendment 26 "Salmon Retention for Food Banks" to lower mortality and make it possible to develop other fisheries and lower economic discards (ask).

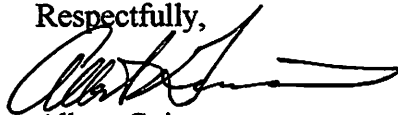
**Alternative 4: (from the field)**

Lowering cost and burden in the catcher vessel harvesting sector:

1. Lower the observer coverage percentage in the pollock fishery for vessels less than 125ft to 10%, for vessels greater than 125 foot, lower to 25% coverage.
2. Lower observer coverage in the cod and sole fisheries to 25% for vessels less than 125 foot to better coordinate the four boats per 90-day observer contract commitment. Lower observer coverage on vessels greater than 125 foot to 50% and allow two vessels to share one observer.
3. Require the "Observer Providers" to identify the "four" boats that are "sharing a single observer and to provide the owners of the vessels with a "excel spread sheet report" of the shared observer days and expenses each month as part of the billing (they have records).
4. Require the "Observer Providers" to provide a daily log to NMFS enforcement of the deployment of all their contracted observers; with quarterly audited reports to match days charged to the vessels to the number of days observed on board the vessels.

The pollock fishery is over observed now with all of the by-catch counted at the plants at offload. Lowering of coverage from 30% to 25% in all other groundfish fisheries is not inconsistent with the model changes in the annual survey's made by NMFS in the GOA/BSAI where the tow times at each station have been shortened by half and the math in the model is adjusted.

Respectfully,



Albert Geiser  
907.481.6064

Albert Geiser  
907.481.6064

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Mr. Dave Benton

April 1, 2002

Re: Extending and **Improving** the North Pacific Groundfish Observer Program Beyond  
2002

CC: Al Burch, Alaska Dragger Association  
Brent Paine, United Catcher Boats  
David Jincks, Midwater Trawlers Cooperative  
Craig Cochran, Midwater Trawlers Cooperative  
Et al