

MEMORANDUM

TO: Council, SSC and AP Members  
FROM: Clarence G. Pautzke  
Executive Director  
DATE: September 15, 1993  
SUBJECT: Observer Program



ESTIMATED TIME

1.5 HOURS

**ACTION REQUIRED**

- (a) Status report on North Pacific Fisheries Research Plan
- (b) Observer requirements for 1994
- (c) Releasing observer reports to vessel owners

**BACKGROUND**

(a) Research Plan

The regulations to implement the Research Plan adopted by the Council are still in preparation by NMFS and being reviewed by NOAA GC. They are quite complex and involve considerable paperwork requirements from the industry, which makes the rulemaking subject to provisions of the Paperwork Reduction Act. This has considerably lengthened the timelines for preparation and review. It now appears that the Proposed Rulemaking will not be submitted to and published by the Secretary until later this fall.

Public hearings associated with the Secretarial review process will be scheduled later, when we have a more definite idea of the timing of Secretarial review. If approved, the 12-month start-up period of the Research Plan could begin in 1994, with full implementation in 1995. Full implementation of the Research Plan could occur sooner if start-up funding is provided through some other mechanism, such as Congressional appropriation.

(b) Observer Requirements for 1994

This is the time of year when the Council and NMFS usually consider possible changes to the existing Observer Plan. When the Council took action on a Pacific cod TAC split this past June, they also included some additional observer requirements for vessels participating in the cod fisheries in the BSAI. These changes require a regulatory amendment to the Observer Plan and are being processed separately from the cod split amendment. This change would fall under 1994 Observer Plan changes. Additional items which have surfaced for Council consideration at this meeting include a proposal to have 100% observer coverage requirements on trawl vessels fishing for cod in areas 517, 518, and 519 and the issue of non-payment of observer coverage costs by fishing operations.

Item C-2(b)(1) in your notebook is a letter from FVOA to the Council Chairman regarding the issue of non-payment of observer fees. At least one observer contracting company has ceased business operations, partially due to non-payment of observer costs by fishing vessels. This has also resulted in non-payment of wages to observers employed by this operation. Current regulations do not allow NMFS to intervene in the business relationships between fishing operations and observer contractors, nor is it likely that NMFS can be responsible for wages owed to observers. This situation would change under the Research Plan, but is currently a serious concern of the Observer Program. Item C-2(b)(2) is a letter from Arctic Observers Corp., to the Merchant Marine and Fisheries Committee, concerning this issue.

It is possible that a regulatory amendment could be adopted which would change this situation and put NMFS in a position to have some control. This could, for example, establish prepayment requirements or posting of surety bonds, similar to requirements under the Research Plan. Staff from the Observer Program may wish to comment further to the Council on this issue.

Item C-2(b)(3) is a letter requesting the Council to consider a 100% observer requirement for all trawl vessels engaged in directed fishing for Pacific cod in areas 517, 518, and 519 of the BSAI, due to potentially high bycatch rates of halibut. It is possible that the Regional Director of NMFS could implement such a requirement without a regulatory amendment, but rather through 'hot spot' authority. In this instance, NMFS would publish a notice of intent to implement such a measure, including the reasons for the measure, and solicit public comment prior to implementation. This would greatly shorten the length of time required for implementation. NMFS will provide further discussion of these options at this meeting.

(c) Release of Observer Reports to Vessel Owners

In past meetings the Council has expressed concern over the issue of whether observer reports could be released to vessel owners of the observed vessels. NOAA GC may have an update on this issue for the Council at this meeting.

**FISHING VESSEL OWNERS' ASSOCIATION  
INCORPORATED**

ROOM 232, WEST WALL BUILDING • 4005 20TH AVE. W.  
SEATTLE, WASHINGTON 98199-1290

SINCE 1914

RECEIVED

JUL 12 1993

July 8, 1993

Mr. Rick Lauber, Chairman  
North Pacific Fishery Management Council  
P. O. Box 103136  
Anchorage, AK 99510

Dear Chairman Lauber:

I have just read a letter dated July 7, 1993 addressed to Director Steve Pennoyer from Andy Hollenbeck of Arctic Observers. I have enclosed a copy of the letter. The issue that is brought out in this letter is that owners of vessels that require observer coverage are taking observers and failing to pay the observer companies. I believe this is a very serious problem throughout the industry at this time. I know that the September meeting is scheduled to be rather long; however, in talking to the Council staff, I understand there are several items under Agenda C-1 concerning observer issues. I would like the staff or NMFS to be able to discuss why it is not a Magnuson Act offense when vessels fail to pay their observer fees. The whole observer program was set up on the premise that the vessel had to have coverage in order to fish and had to pay directly to the contractor the costs of the coverage.

If NOAA General Counsel believes this is not prosecutable on this point, I think we have a big problem with our funding on the "Research Plan." Perhaps we need to have a regulatory amendment prepared for the December meeting that says if reasonable observer fees have not been paid by January 31 of any year for observer coverage for the previous year, then that vessel cannot operate in the Alaskan EEC fisheries.

Sincerely,

Robert D. Alverson  
Manager

RDA:cb

FAX  
(206) 283-3341

LATITUDE: 47° 39' 36" NORTH

DIAL "A VESSEL"  
(206) 283-7735

LONGITUDE: 120° 22' 58" WEST



**ARCTIC OBSERVER CORP.**

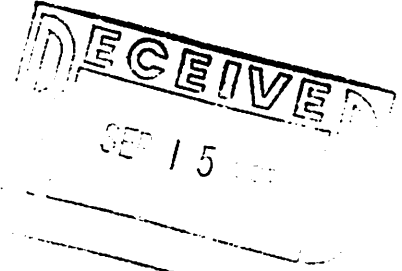
3600 15th Ave. West Suite 203  
Seattle, WA 98119

Billing Address: P.O. Box 99345 Seattle, Washington 98199

AGENDA C-2(b)(2)  
SEPTEMBER 1993

FAX (206) 282-9439  
ALASKA (907) 581-3820

August 31, 1993



**To: Chairman Gerry Studds: Merchant Marine and Fisheries Committee**

**From: Andy Hollenbeck and Bjarni Bergvinsson: Arctic Observer Corporation**

Dear Mr. Studds,

For some time now, we have been trying to get the attention of the Merchant Marine and Fisheries Committee for the purpose of changing current policy practice within a federal program empowered by the Magnuson Act. Our problem deals with non payment for observer costs by the owner operators of harvesting and processing vessels.

Letters have been sent to the Director of National Marine Fisheries Service, Regional Enforcement Office, Representative Unsoeld, the North Pacific Fisheries Management Council and to Operations persons at the Alaska Fisheries Science Center in Seattle. We additionally made personal contact with you and your people at a Press Conference in Seattle and the Committee Meeting in Anchorage. At those engagements, we briefly spoke to Rod Moore and Amy Robins, apparently both staff persons for the Committee. We have been told that you will contact us. As of yet, we have not received any correspondence.

The Domestic Observer Program faces a number of very urgent and detrimental problems all stemming from funding. Since it's beginning in 1989 and currently, observers are deployed to domestic fishing and processing operations via third party contractors who are regulated to perform under strict NMFS guidelines. These companies act as specialized employment agencies providing the appropriate observer personnel to become certified and serve for NMFS. A formal description of business and deployment regulation is outlined in the federally issued Observer Plan and is referred to directly in the Federal Fishing Regulations for the Bering Sea and Gulf of Alaska regulated fishing zones.

Within the Observer Plan, it is specifically stated that the vessel Owner/Operator must pay the costs for the observer directly to the Contractor. This is a specifically stated rule of the plan. It is a rule specifically stated in the same way as the rule mandating that the vessel take coverage at all. Within the **Federal Fishing Regulations** for the above described zones within the EEZ, it is stated that the Owner/Operator of the vessel must follow **all** the rules of the Observer Plan.

To our knowledge and as evidenced in copy available quarterly for public review from the North Pacific Fishery Management Council enforcement reports by NMFS, vessels have regularly been penalized for numerous observer related violations. However, not once has the regulation for payment of observer costs been enforced.

All penalties seem to be for jeopardizing the government's own benefits or jurisdictions regarding noncompliances to regulation. However, where the decision for enforcement rests in non compliance for payment of observer costs to certified contractors, NMFS refuses to become involved saying that it is a private industry problem between two companies. This would be true if not for two reasons.

1.) The Federally Issued Observer Plan Openly Mandates Payment by the Owner/Operator of the Vessel For the costs of the observer to the contractor; according to the the Federal Regulations Language, failure to comply with any or all of the rules of the Observer Plan is a federal violation.

2.) The Person supplied (observer) is a federally issued person with federal credential and assurance by certification to be performing required specific duties for the government means and is under specific government management and direction. The direct management and instruction to the observer persons for job duty performance is delegated from the Operations Office at the Alaska Fisheries Science Center. According to that office, job duty directives to the Observer from NMFS supersede any directives from the Contractor.

Without payment from the vessel, the Federal Observer doing work for the government and under specific direction and management of the government does not get paid.

Since the beginning of this program, there have been problems in securing this payment of funds to the contractor from vessels. As a contractor company, we along with other similar firms have complained to NMFS about lack of enforcement of the regulations. As members of the Observer Oversight Committee to the NPFMC, three separate contractor representatives brought the subject and problem to the the floor of the committee for solution at various meetings. Each time, NMFS refused action under advice of NOAA General Counsel stating that the problem is, "not part of the program's responsibility".

We feel this position is highly **Irresponsible** and **Evasive** on the part of NMFS and NOAA in their overall self stated responsibility to program administration.

Currently, our company has an outstanding accounts receivable balance for unpaid observer costs of \$175,000 plus outstanding amounts due the IRS for wage taxes supposedly accrued but never paid or paid late because of the unenforced payments of observer costs. Approximately 12 vessels have essentially received free coverage from our company alone prior to being refused service by us. Meanwhile dozens of other vessels have paid their observer fees.

If we owned a vessel and legally had to pay roughly \$6,000 monthly for a person to be on our boat but our competitor did not, we would sue NMFS for double standard.

Operationally, it appears the government has decided to give the vessel the choice of whether it chooses to pay for observers or not. That's very nice of the government. However, what happens to the deficits created to the private sector who thought by the stated regulation, the vessel was mandated to pay? We entered into business under the stated Observer Plan and its rules which were to govern all performance of observer coverages and duties. Non compliance with the rules of the plan on our part can disqualify **us** as an eligible contract company. Now, however, it appears the laws are up for interpretation for the federal government's convenience.

As a circumstance of this situation, our company has been forced to stop operations because of the detrimental cash flow situation we absorbed from non payments by the boats. Several observers have also pursued NMFS and NOAA but go without wage payment. We risk disqualification by the program as a contractor for non payment of the observers (under the

observer plan) yet the vessels (harvesting and processing operations) are considered in full compliance and zero action taken by the government.

Our company has been irreparably damaged. Tax paying employees have been put out of work without past wage payments. However, NMFS got their data, and the observers and contractor did their jobs according to the Observer Plan. NMFS however did not do it's duty under the guidelines of the Plan and the vessel failed to comply. Yet, are we expected to pay for it?

Looking ahead of our own plight, the government itself will eventually run into the same problems and deficits we encountered as it works toward a replacement of the existing program to be called the User-Fee Fund. Within this new proposed program, the vessels are to follow payment schedules into a general fund based on past percentage of value of their catch/harvest. This fund is to be initiated by Congressional funding and supplemented by an add-on tax to amounts already being paid by the vessels to the private contractors. The Government will then seek to to solicit contractors to perform the current work of deployments. However, they will be contracted directly with and paid directly by the government.

This is great news to a prospective future Contractor in the short run. However, long run the government will encounter the same collection difficulties we have. What do you think the government will do in collection activity if funding taxes are not paid in? We venture to guess when the government's direct interests are at stake, collection and enforcement actions will be quite strong. Fundamentally, it should be no different now, except of course that the government isn't out any money.

Long term, program deficits from non payment will eventually mean a cut back in program contract awards and attainment of constructive, intended resource management goals by the program. Meanwhile a few vessels who seek to evade the rules continue to profit and operate while others complying with regulations are financially at a disadvantage, not to mention the disadvantaged position the citizens of the country are placed in by their government allowing itself to grow into debt with another poorly structured program.

Your committee has the ability to put in no uncertain language and terms the demand for an enforced mechanism of payment for the originally constructed Observer Plan which will not only insure equal participation

in costs and prevent a double standard of enforcement but insure a healthy operating budget with minimum bad debt drains and deficits in the future program.

It should be structured in the Magnuson Act reauthorization that failure to pay observer user fee costs result in forfeited eligibility for participation in fisheries within the EEZ. Failure to pay past amounts due for observer costs within a set time frame should be punishable with a separate fine structure and consequential loss of federal fishing permit.

Our company's experience is an example model of what will happen if you do not administer the program properly. We have been damaged by negligence and poor administration of the program and by those vessels seeking to beat the system. As an originally certified and assured firm, our company is currently preparing for suit against the Secretary of Commerce and NOAA for financial damages and actions needed to enforce the federally issued regulations. We also continue to pursue maritime liens, Federal and State Court judgments and other complaints for Seaman's Wages from the vessels. The current reality is that if the vessels do not choose to pay us, no one seems willing to follow the federally mandated rule and make them.

These vessels have and will continue to work through multiple contractors, incurring debt, refusing to pay for observer costs etc. because they can. Yet, they are fully eligible for participation in the fisheries and seen as in compliance. Something is grossly wrong here. We feel it is time either:

- a. the government enforce regulations uniformly;
- b. stop coming up with programs which cannot be fairly and uniformly administered;
- c. stop putting the American Tax Payers and Businesses at financial risk due to poor administration, evasiveness and negligence of such programs.

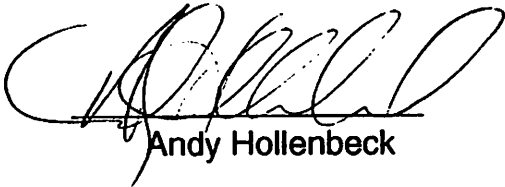
We hope for your attention and help in enforcing the current program and creating one for resource management which can be made work in the future. It is necessary that you take action immediately. The above mentioned plan and regulations are public documents available from the Commerce Department.



Page 6.

We hope upon careful consideration of them, you will recognize the reality of this portion of the program and take action to remedy it's shortfalls. We will be happy to provide you with any additional copies of past correspondances with vessels, the program or our attorneys and any other help in solving this problem.

Sincerely,



Andy Hollenbeck



Bjami Bergvirsson

Arctic Observers Inc.

cc. Don Collingsworth, NMFS Juneau  
Steven Pennoyer, Director NMFS  
Jolene Unsoeld, WA. State Representative  
Don Young, AK. State Representative  
Maria Cantwell, WA. State Representative  
Art Butler, Attorney; Ater Wynne, Hewitt, Dodson & Skerritt  
Bob Alverson; Vice-Chairman, NPFMC

AGENDA C-2(b)(3)  
SEPTEMBER 1993

August 27, 1993

Mr. Richard B. Lauber, Chairman  
North Pacific Fishery Management Council  
P.O. Box 103136  
Anchorage, AK 99510

RE: 100% Observer Coverage in BSAI Areas 517, 518, 519

Dear Mr. Lauber:

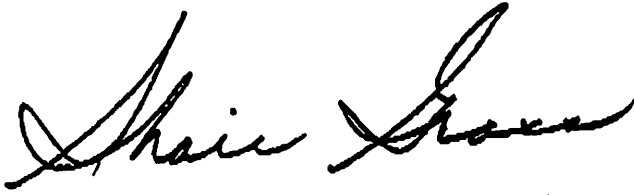
During the 1993 cod season Coast Guard boardings generated information which confirmed reports of high halibut discards from trawl vessels engaged in the directed cod fishery in BSAI Areas 517, 518 and 519 (please see attachment). Longline and pot vessels fishing in the same areas were not found to have a similar problem. Fishermen have reported significant discards of immature cod from trawlers in these areas, as well. At its June meeting the Council recommended that all trawl and longline vessels below 125 feet in length participating in the BSAI directed cod fishery carry an observer at least 30% of the time (vessels less than 42' exempt).

We would like to request that 100% coverage be implemented for all trawl vessels engaged in the directed fishery for cod in BSAI Areas 517, 518 and 519, for 1994 only. It is suspected that halibut and juvenile cod are particularly common in those areas - and the Council should have reliable information on this conservation issue. We are advised that "hot spot" authority could be used to implement this recommendation, with prior notice and comment.

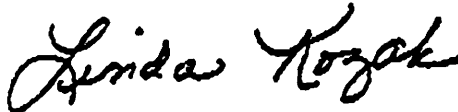
Indications are that longline and pot vessels fishing in this limited area do not experience halibut bycatch mortalities comparable to those of trawlers. In 1994 longliners will be required by law to carefully release all halibut bycatch. For these reasons we feel that observer coverage is adequate for those vessels.

Would you please place this matter on the September Council agenda? Thank you for your attention.

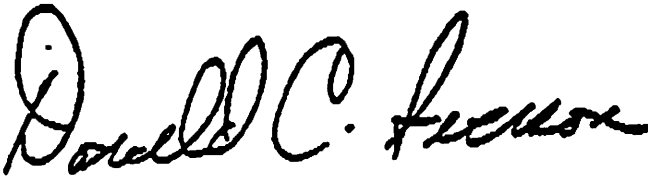
Sincerely,



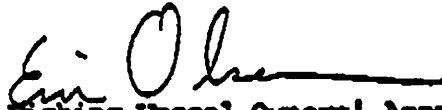
Halibut Association of North America



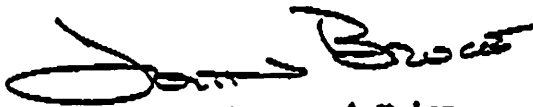
Kodiak Longline Vessel Owners' Association



North Pacific Longline Association



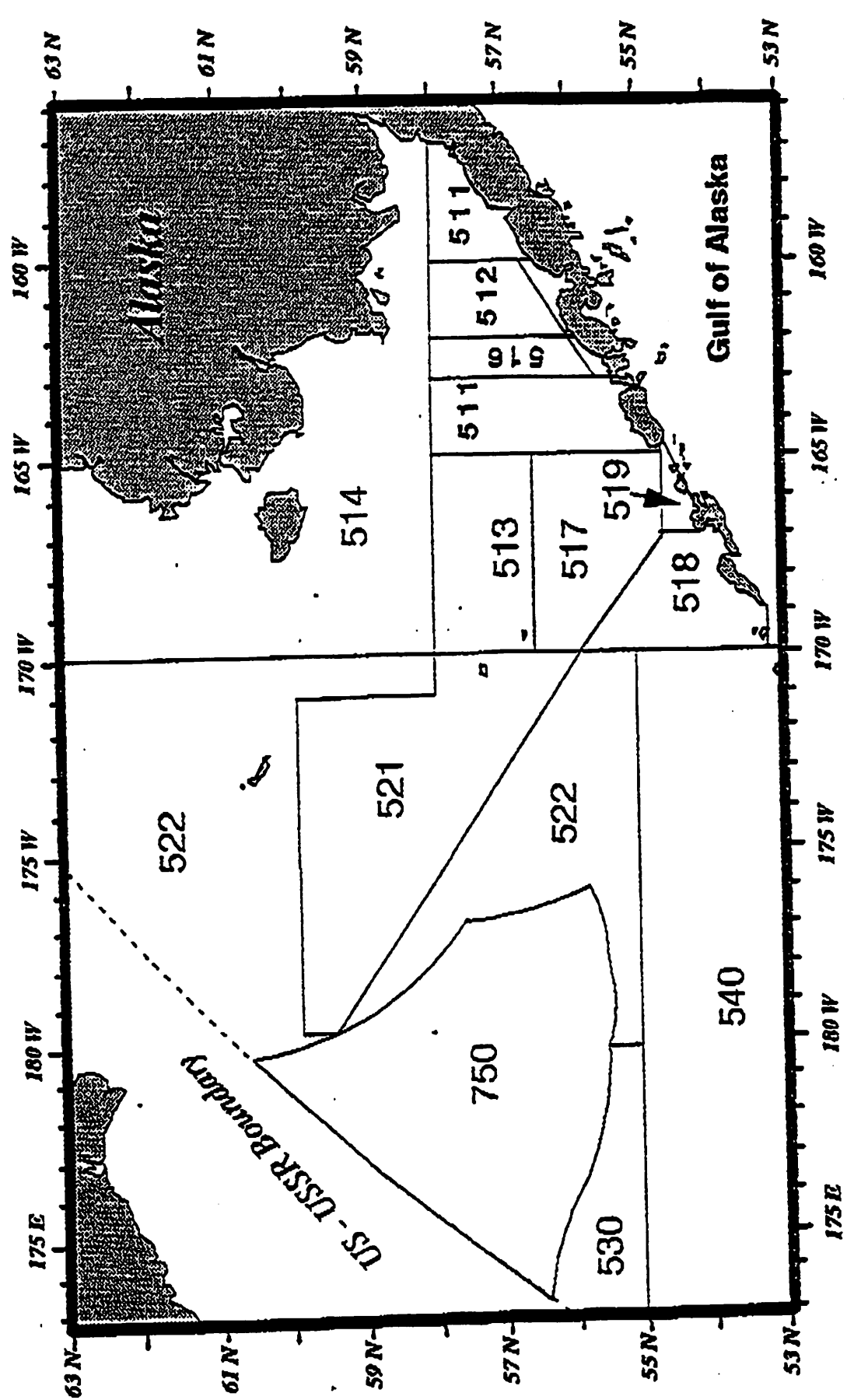
Fishing Vessel Owners' Association



Deep Sea Fishermens' Union

Attachment

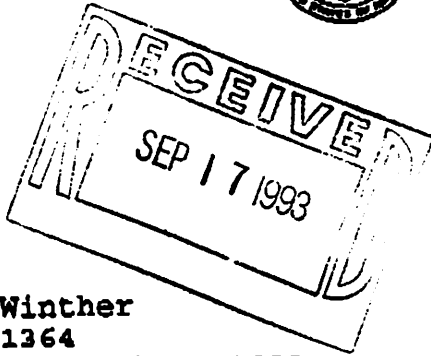
cc: Mr. Bob Alverson  
Mr. Ron Hegge  
Ms. Linda Behnken



Statistical and Reporting Areas of the Bering Sea and Aleutian Islands



**UNITED STATES DEPARTMENT** Supplemental :E  
**National Oceanic and Atmospheric Administration**  
*National Marine Fisheries Service*  
P.O. Box 21668  
Juneau, Alaska 99802-1668



September 17, 1993

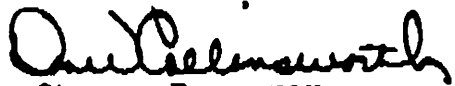
Mr. John Winther  
P.O. Box 1364  
Petersburg, Alaska 99833

Dear John,

Thank you for your letter requesting that all vessels retaining Pacific cod harvested in Federal reporting area 517 be required to have an observer onboard. We are aware of the vessel boarding reports from the U.S. Coast Guard Cutter Midget that suggest under logging of bycatch occurred on the boarded vessels while operating in area 517. We do not depend on vessel reported discard amounts of prohibited species to estimate total bycatch mortality in the groundfish fisheries. Rather, we extrapolate observed bycatch rates to unobserved catch to estimate total bycatch amounts. Concern exists, however, that some vessels in area 517 may have been fishing at bycatch rates higher than observed vessels in the area. Extrapolation of observed bycatch rates to unobserved catch, therefore, may yield lower bycatch estimates than what actually occurred.

Regulations at 50 CFR 675.25(c)(1)(i) authorize the Regional Director to require observer coverage onboard vessels in addition to that specifically set forth in regulations under section 675.25(c)(1)(iii). We are considering a requirement for 100 percent observer coverage in area 517 during 1994. Observer data collected on halibut bycatch rates could be used to develop more long term management measures to address the prohibited species bycatch problem in area 517. We will be prepared to discuss this issue at the North Pacific Fishery Management Council's September 1993 meeting.

Sincerely,

*for*   
Steven Pennoyer  
Director, Alaska Region



**USCGC MIDGEA (WHEC-726)  
SUMMARY OF FISHERIES BOARDINGS**

VESSEL	TYPE	BOARDED	# OF HAULBACKS OBSERVED	HALIBUT COUNTED BY B.O.	HALIBUT BYCATCH LOGGED	# OF HAULS PER DAY	COMMENTS
	FOO	17MAR93		N/O	UNK	N/A	
	FTS	19MAR93	ONE	100	UNK	UNK	
	FTS	24MAR93	NONE	N/O	UNK	UNK	
	FTS	04APR93	ONE	100	30/DAY	3	
	FTS	04APR93	THREE	748 850 365	40/HAUL 100/HAUL 260/HAUL	3-4	
	FTS	04APR93	ONE	200	55/DAY	3	
	FTS	05APR93	ONE	200	13/DAY	3	
	FTS	05APR93	ONE	445	100/DAY	3	
	FTS	05APR93	ONE	109	90/HAUL 175/DAY	3	
	FTS	05APR93	ONE	60	33/DAY	3	
	FTS	06APR93	ONE	230	71/DAY	3	
	FTS	06APR93	TWO	112 96	70/HAUL 80/HAUL	3	NOTE 1
	FTS	08APR93	ONE	750	2217/DAY	4	NOTE 2
	FTS	09APR93	TWO	274	340LBS/HAUL	3	NOTE 3
	FTS	10APR93	PARTIAL	288	228/HAUL	3	NOTE 4

*John Wintke -  
was supposed  
to be att to  
ltr in book*

USCGC MIDGETT (WHEC-726)

SUMMARY OF FISHERIES BOARDINGS

VESSEL	TYPE	BOARDED	# OF HAULBACKS OBSERVED	HALIBUT COUNTED BY B.O.	HALIBUT BYCATCH LOGGED	# OF HAULS PER DAY	COMMENTS
FLL		20MAR93	NONE	N/O	UNK	UNK	
FLL		23MAR93	NONE	N/O	UNK	UNK	
FLL		07APR93	ONE	40	UNK	3	NOTB 5
FLL		07APR93	PARTIAL	4	4/DAY	2	NOTB 6
FLL		08APR93	ONE PLUS PARTIAL	33 37	40 UNK	3	
FPB		19MAR93	NONE	N/O	UNK	UNK	
FPB		11APR93	NONE	N/O	1/DAY	3	
FPB		11APR93	NONE	N/O	1/7 DAYS	2	

Abbreviations:

N/O = Not Observed

UNK = Unknown

N/A = Not Applicable

**USCGC MIDGETT (WHEC-726)**  
**SUMMARY OF FISHERIES BOARDINGS**

**NOTES:**

- (1) [REDACTED] Logs for previous trips showed a total bycatch of 23 halibut for a 3 day trip, 18 halibut for a 4 day trip and 182 halibut for six day trip.
- (2) [REDACTED] The first two days of this opening (no observer on board) the master logged "NO DISCARDS" the other five fishing days (observer onboard) master logged total of 11,089 halibut. Vsl averaged four trawls per day throughout the trips.
- (3) [REDACTED] Logged all prohibited species (including halibut) by weight. Master was estimating average weight of 3 lbs per halibut.
- (4) [REDACTED] Vessel was boarded twice. During the first boarding the vessel had been logging an average bycatch of 55 halibut per day. The boarding team observed one haulback with 200 halibut. Between the first boarding and the second boarding the master had begun logging an average halibut bycatch of 325 halibut per day.
- (5) [REDACTED] Was not able to obtain master's logged halibut baycatch for set observed, however, boarding teams count was 26 halibut and the "roller man's" count was 20.
- (6) [REDACTED] Vsl had just converted to long lining and was using short sets of only 3-5 skates as opposed to other long liners who used 7-10 skates per set.