


MEMORANDUM

TO: Council, AP and SSC Members

FROM: Clarence G. Pautzke 
Executive Director

DATE: September 17, 1990

SUBJECT: Domestic Observer Program

ACTION REQUIRED

Final review of program changes for 1991. Review potential for conflicts of interest.

BACKGROUND

In August the Council received a status report on the federal observer program. An important component of the program is the Observer Plan which describes the responsibilities of NMFS, the observer contractor, observers, fishermen and processors. NMFS recommended four improvements for 1991. The Council endorsed those plus a fifth concerning insurance coverage. NMFS was requested to develop regulatory amendments for the following changes for 1991:

- 1) Delete the 1,000 to 10,000 mt and the 10,000 mt annual thresholds for requiring observers in shorebased processing plants, but retain the monthly thresholds of 500 mt for 30% coverage and 1,000 mt for 100% coverage.
- 2) Extend observer requirements of shorebased processors to mothership processors and floating processors.
- 3) Require vessel operators in the groundfish fishery to allow their vessel's observed bycatch rates of prohibited species to be released publicly.
- 4) Revise the definition of an observer trip to mean days during which fishing activity occurs.
- 5) Require a designated level of insurance coverage for each observer, paid by the observer contractor.

NMFS will report on the status of these regulatory amendments. The Council also requested ADFG and NMFS to review their respective conflict of interest rules. Concerns have been raised about the integrity of the federal program if NMFS uses observer contractors who have been decertified by the State because of conflict of interest problems. The Council also asked that NMFS explore allowing vessels required to have 30% coverage to pool their operations to allow sharing of the observer and its costs, and consider expanding the vessel size category for 30% coverage from 60'-125' to 59'-125'. A report from NMFS and ADFG staff should be available on these items.

Comments from the public on the observer program are under items C-1(a-c).

AUG 13 1990

August 3, 1990

National Marine Fisheries Service
Don Collingworth
Chairman N.M.F.
O.O. Box 123136
Anchorage, Alaska 99510

NAME	ROUTE TO	INITIAL
	Asst. Dir.	
	Chiefly Dir.	
	Adm. Off.	
	Exec. Sec.	
	Staff Asst. 1	
	Staff Asst. 2	
	Staff Asst. 3	
	Economist	
	Sec./Bkkr.	
	Sec./Typist	

The observer program for my 64' vessel, F/V Fearless, (official # 225401- ADFG # 35883), would be an economic hardship and could put me out of business if required to hire an observer for Rock fish, Halibut, Black Cod, miscellaneous Fin fish and Shrimp Pot fisheries. For outside waters, area (64-68-65) my maximum total poundage for Black Cod and Halibut is less than 30,000. Rock fish and Misc. Fin fish usually less than 7,000 pounds.

Compliance with these regulations in regulatory areas 68-65) would create a mental and physical strain on the crew as living space is very much limited and the boat is not meant to carry more than three crew members. I have tried trips with more people, which was a mistake.

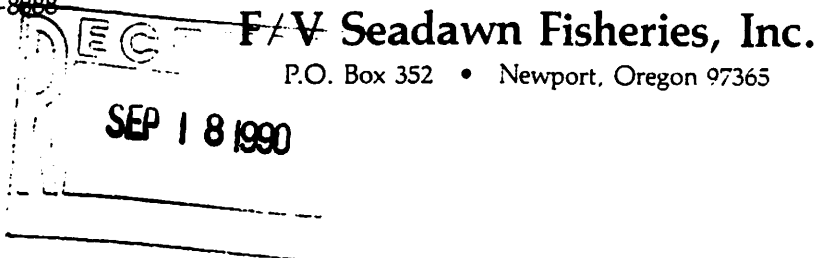
I feel that regulations, on a boat over 60' that has a license to send UNPROCESSED shrimp and rock fish to areas within or out of the State and is incapable of freezing a product, should not be required to carry an observer. Also, that I should not be penalized for the lenght of my boat when I cannot pack as much tonnage as a 58' limit seiner.

I have recently applied for Alaska Fisheries Business License, which classifies me as a processor, even though I deal only with the unprocessed product. I understand the need for observers on vessels which catch large quantities of fish, whether the product is processed or not, but as an Alaskan domestic fisherman I feel there is a need for allowances regarding vessels that deliver under 30,000 pounds a Black Cod trip. Any help in this matter, or anyone else you think I should contact, would be greatly appreciated by myself and my crew.

Sincerely,
James L. Anderson

James L. Anderson
Skipper- F/V Fearless
#24 Anchor Way
Meyers Chuck, Ak. 99903
(temporary mailing add.
P.O. Box 6084, Sitka, Alaska 99835)

FRED A. YECK, President
(503) 867-3911
(503) 265-8888



F/V Seadawn

September 14, 1990

Steve Pennoyer
Regional Director
NMFS
P. O. Box 21668
Juneau, Alaska 99802-1668

NPFMC
P. O. Box 103136
Anchorage, Alaska 99510

RE: Observer Program/Proposed "Penalty Box" System

Dear Mr. Pennoyer and Council Members:

I was extremely disappointed to read a copy of Michael Lake's letter to you, wherein, he, as president of Alaska Observers, Inc., opposed the "penalty box" system, which is meant to punish vessels with high bycatch rates.

We, as vessel operators, take exception to his comments and opposition to the "penalty box" system and would like to go on record in strong support of such a system. In addition, I believe that Mr. Lake's comments relating to problems such as bribes and crews' hostility towards observers is far overstated and an extreme exception rather than the rule. I believe that if Mr. Lake has any evidence of such activity on vessels, he should immediately come forward with that evidence and provide it to you as well as your general Council so that the owners and operators of these vessels, as well as their crew, can be appropriately prosecuted.

On the specific subject of the proposed "penalty box" system, what is the purpose of an observer program, which as a vessel operator, we are paying in excess of \$6,000.00 monthly while we have observers on board, if we cannot depend upon that data and if we cannot get some benefit from the system which we are financing?

I believe the benefit we should receive is that vessels which are operating in a responsible manner should be rewarded and should be allowed to fish, while those operators which are irresponsible should be prohibited from operating in the fishery. The only way that that can be accomplished is through utilizing the observer data which is taken on board the vessel. There is no other way of encouraging responsible

operation of these vessels when it comes to bycatch problems.

Most vessel operators I have discussed this issue with are strongly in favor of a bycatch regime which will reward those who fish "clean" and penalize those who fish "dirty".

In addition, I would like to comment with regard to the apparent position of National Marine Fisheries Service, whereby it may be attempting to avoid the responsibility of enforcing a "penalty box" system, and, in lieu thereof, has suggested that industry set up insurance pool type groups to self police the bycatch problem. My comments on this issue are as follows:

1. I strongly oppose the concept of industry self regulation through insurance type pools for the reason that I do not believe it is a proper role of industry to police itself in the utilization of a public resource and that if one considers the legal implications of the type of mechanisms which would have to be established to create "pools" for management of bycatch by industry, it would be extremely cumbersome to say the least and is probably unworkable. Anyone who has been involved in the formation of an insurance pool can verify it takes many months to get such an organization off the ground and working successfully.

2. I believe it is a proper role of government and National Marine Fisheries, to regulate the fisheries and that it should assume its responsibility in this regard and move forward on this very important bycatch issue. Industry is paying for the observer program and at the very least NMFS should accept its proper role to receive the observer information and enforce penalties against "dirty" operators.

3. It is my understanding that the primary reason for the suggestion that NMFS not take this obligation upon itself is because of the concern over the credibility of the observer information. If that is the case, a simple solution is to improve the education of the observers and the reporting process itself so that the information is credible, otherwise, why should we pay for observers?

Again, in conclusion, we, as vessel owners and operators, are paying very substantial sums for the observer program and if the data which is being collected by the observers cannot be used to improve the fishery by awarding "clean" operators and penalizing "dirty" operators, there is something terribly wrong with the entire system.

Page 3
Steve Pennoyer and NPFMC

We hope that you and the Council will consider our comments and take the necessary action to make this observer program, which we have supported and which we are paying for, work.

Sincerely,



Fred A. Yeck

GROUND FISH FISHERY MANAGEMENT PLAN AMENDMENT PROPOSAL
North Pacific Fishery Management Council

AGENDA C-1(c)
SEPTEMBER 1990

Name of Proposer: Phil Chitwood ..

Date: 8/16/90

Address: Arctic Alaska Fisheries Corporation
P.O. Box 79021
Seattle, WA 98119

AUG 16 1990

Telephone: (206) 282-3445

Fishery Management Plan: Bering Sea and Aleutian Islands and Gulf of Alaska
Groundfish FMP's.

Brief Statement of Proposal: Exempt pot vessel 125 feet and longer from the 100 percent
observer requirement.

Objectives of Proposal: (What is the problem?) Relieve vessel owners from the large and
unnecessary expense associated with the observer requirement.

Need and Justification for Council Action: (Why can't the problem be resolved through other
channels?) The Secretary of Commerce, at the NPFMC's request, has exempt pot gear
from the halibut bycatch limits. Therefore the need for 100 percent observer
coverage on pot boats 125 feet and longer is not necessary. The need for
information on the vessels can be obtained by significantly reduced observer
coverage such as the 30 percent required on smaller vessels.

Foreseeable Impacts of Proposal: (Who wins, who loses?) The only impact of this proposal is a
positive impact for vessel owners. There are no negative impacts.

Are There Alternative Solutions? If so, what are they and why do you consider your proposal the
best way of solving the problem? There are no alternative solutions.

Supportive Data & Other Information: What data are available and where can they be found?
Minutes of the June, 1990 NPFMC meeting and the emergency regulation exempting
pot gear from halibut bycatch restrictions.

Signature:

ATTCHB.11A-3

POLICY



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration

National Marine Fisheries Service

P.O. Box 21668

Juneau, Alaska 99802-1668

AGENDA C-1
SUPPLEMENTAL
SEPTEMBER 1990

September 21, 1990

Clarence Pautzke, Executive Director
North Pacific Fishery Management Council
605 West 4th Avenue
Anchorage, AK 99501

RE: Proposed changes to recordkeeping and reporting requirements

Dear Clarence:

My staff has prepared a notice of draft proposed rulemaking that would implement changes to existing recordkeeping and reporting requirements. A copy of the draft notice is attached that includes examples of revised logbook forms and two new report forms. A summary of the proposed changes and a brief statement on the reason for those changes follow:

New reporting requirements

Daily production report. Groundfish processors would be required to submit daily production reports when requested to do so by the Regional Director. The submission of daily production reports would allow inseason managers to monitor groundfish harvests more effectively and project closure dates for a fishery in a more timely manner. Daily reports are of special importance in fast paced fisheries or as harvest or bycatch amounts approach established quotas or allowances. We anticipate that authority to request daily reports will help prevent over harvest of groundfish quotas and bycatch allowances and reduce the possibility of premature fishery closures.

Shoreside processor check-out report. Managers of shoreside processing facilities would be required to notify the Regional Director of the date the facility ceased to receive groundfish for either an intermittent period or for the year, whichever is applicable (check-out report). A similar requirement already exists for processor vessels and is proposed for shoreside processors to (1) reduce the number of weekly production reports that shoreside facilities must submit during a year; and (2) help estimate the number of processors that may be receiving groundfish at any one time and enhance processor accountability for submitting weekly production reports, non-compliance of which could result in over harvest of groundfish quotas or bycatch allowances.

Revisions to existing recordkeeping and reporting requirements

1. Submission schedule for weekly production reports. The time period that groundfish processors would have to submit weekly production reports would be reduced from one week after a week ending date (midnight Saturday) to 48-hours after a week ending date. Receipt of weekly production reports by the Regional Director within two days after a weekly reporting period would allow management staff to monitor groundfish quotas more effectively and to provide the industry with more timely status of harvests, groundfish quotas, and prohibited species bycatch allowances.

2. Daily logbooks. Two new fields are added to logbooks that would enhance NMFS' ability to monitor vessel and processor compliance with the observer program. The first would record whether or not an observer was onboard each day



of a fishing trip or present each day a processor received or processed groundfish. The second change would require catcher vessels to record, upon offloading of its groundfish catch, the identification of the groundfish processor receiving the vessel's groundfish catch and the ADF&G fish ticket number for each delivery, if applicable. Other proposed changes that reflect recommendations by industry members include the following:

- Expand logbooks to a 11 X 14 inch format;
- Add a comment section to the logbook to enhance the use of the logbook for individual purposes of vessel operators or plant managers;
- Allow depth and weight information to be recorded in either meters or fathoms and metric tons or pounds, respectively;
- Allow catcher vessel operators to record information on gear retrieval on the same logbook page as gear deployment;
- Add a field to catcher vessel logbooks that would record the code for intended target species;
- Provide additional space in logbooks for catcher vessels to maintain cumulative discard amounts for each fishing trip and for processors to separate discard amounts as reported by catcher vessels from discard amounts resulting from processing operations;
- Allow managers of shoreside processors to report employee hours rather than number of employees involved in groundfish operations; and
- Allow catcher vessel operators to remove original logbooks from the vessel provided that all fish or fish products recorded in a logbook are offloaded from the vessel, and the vessel operator submits copies of the logbook to NMFS within seven days of the date when the logbook was removed.

3. Miscellaneous changes. Two other changes that affect recordkeeping and reporting requirements are proposed as follows:

- Gulf of Alaska statistical areas 621 and 631 would be deleted and the Shelikof District statistical area would be redesignated from area 620 to 621 to eliminate unnecessary reporting areas; and
- Products produced from retained species within the "other species" category would be reported separately for each species group, rather than for the category as a whole. Species specific product amounts would allow the application of appropriate standard product recovery rates against reported product and more accurate accounting of absolute harvest levels and quota management for the "other species" category.

I encourage Council members and industry representatives to review these proposed changes and provide comments to my staff prior to the submission of the attached proposed rule to the Secretary for review. OMB review and clearance of the revised logbook forms prior to the beginning of the 1991 fishing year will not be possible. We propose, therefore to issue revised logbooks prior to the 1991 fishing year, but do not intend to enforce new recordkeeping requirements until OMB has approved the revised forms.

Sincerely,



Steven Pennoyer,
Director, Alaska Region

CATCHER VESSEL DAILY FISHING LOG

PAGE	YEAR-MON-DATE	VESSEL NAME & ADF&G NO.		REPORTING AREA	GEAR TYPE	OPERATOR'S SIGNATURE	OBSERVER ONBOARD		CREW SIZE					
							YES _____	NO _____						
HULL SET OR STUDY NO.	TIME OF GEAR DEPLOYMENT	GEAR DEPLOYMENT POSITION LATITUDE LONGITUDE		Avg. SEA DEPTH <small>(Circle M or F)</small>	AVERAGE GEAR DEPTH <small>(Circle M or F)</small>	DATE AND TIME OF GEAR RETRIEVAL	GEAR RETRIEVAL POSITION LATITUDE LONGITUDE		HULL OR SET DURATION	NUMBER OF SKATES OR POTS RUN	NUMBER OF HOOKS OR POTS PER SKATE	ESTIMATED ROUND CATCH WEIGHT <small>(Circle lbs or mt)</small>	INTENDED TARGET SPECIES CODE(S)	COMMENTS

DISCARDED SPECIES

For groundfish and herring, record in lbs or 0.1 mt (circle which): For halibut, salmon, king crab, and Tanner crab, record in numbers

SPECIES CODE														
BALANCE FORWARD														
DAILY TOTAL														
CUMULATIVE TOTAL FOR FISHING TRIP														

CATCH DELIVERY INFORMATION

RECORD ADF&G FISH TICKET NUMBER IF DATE REPRESENTS LANDING DATE	IF CATCH DELIVERY IS MADE TO A U.S. PROCESSOR RECORD PROCESSOR NAME AND ADF&G PROCESSOR CODE	IF CATCH DELIVERY IS TO A FOREIGN PROCESSOR, RECORD PROCESSOR NAME
---	--	--

NOTE: Logbook sheets must be filled out each day of a fishing trip, starting from the first day a vessel leaves an Alaskan port or enters the EEZ off Alaska until a vessel returns to port or leaves the Alaskan EEZ. On days of no fishing activity, record date, vessel I.D., and whether or not an observer is onboard.

CATCHER/PROCESSOR DAILY CUMULATIVE PRODUCTION LOG

PAGE	YEAR-MON-DATE	VESSEL NAME & ADF&G NO.		REPORTING AREA	GEAR TYPE	OPERATOR'S SIGNATURE	OBSERVER ONBOARD		CREW SIZE					
							YES	NO	Fishing: _____	Processing: _____	Other: _____	Total: _____		
HAUL, SET OR BUOY NO.	TIME OF GEAR DEPLOYMENT	GEAR DEPLOYMENT POSITION LATITUDE LONGITUDE		Avg. SEA DEPTH <small>(Circle M or F10)</small>	AVERAGE GEAR DEPTH	DATE AND TIME OF GEAR RETREIVAL	GEAR RETREIVAL POSITION LATITUDE LONGITUDE		HAUL OR SET DURATION	NUMBER OF SKATES OR POTS RUN	NUMBER OF HOOKS OR POTS PER SKATE	ESTIMATED ROUND CATCH WEIGHT <small>(Circle lbs or mt)</small>	INTENDED TARGET SPECIES CODE(S)	COMMENTS

DISCARDED SPECIES

For groundfish and herring, record in lbs or 0.1 mt (circle which): For halibut, salmon, king crab, and Tanner crab, record in numbers

SPECIES CODE														
BALANCE FORWARD														
DAILY TOTAL														
CUMULATIVE TOTAL FOR WEEKLY REPORTING PERIOD														

RETAINED PRODUCT INFORMATION: Circle lbs or mt (to at least the nearest 0.1 mt)

SPECIES CODE/ PRODUCT TYPE CODE														
BALANCE FORWARD														
DAILY TOTAL														
CUMULATIVE TOTAL FOR WEEKLY REPORTING PERIOD														

NOTE: Logbook sheets must be filled out each day of a fishing trip, starting from the first day a vessel leaves an Alaskan port or enters the EEZ off Alaska until a vessel returns to port or leaves the Alaskan EEZ. On days of no fishing activity, record date, vessel I.D., and whether or not observer is onboard.

Ancillary products, begin product type codes with 'A', e.g., A12

SHORESIDE PROCESSING FACILITY DAILY CUMULATIVE PRODUCTION LOG

PAGE	YEAR-MON-DATE	PLANT NAME AND ADF&G PROC CODE	REPORTING AREA	GEAR TYPE	MANAGER'S SIGNATURE	OBSERVER PRESENT YES _____ NO _____	EMPLOYEE HOURS Processing: _____ Other: _____ Total: _____
ALASKA STATE FISH TICKET NO.	RECEIPT TIME	CATCHER VESSEL NAME AND ADF&G NO.			ESTIMATED CATCH RECEIPT WEIGHT (Circle lbs or mt)	COMMENTS	

DISCARDED SPECIES

For groundfish and herring, record in lbs or 0.1 mt (circle which): For halibut, salmon, king crab, and Tanner crab, record in numbers

SPECIES CODE												
BALANCE FORWARD												
DAILY TOTAL REPORTED BY CATCHER VESSELS												
DAILY TOTAL IN PROCESSING OPERATIONS												
CUMULATIVE TOTAL FOR WEEKLY REPORTING PERIOD												

RETAINED PRODUCT INFORMATION: Circle lbs or mt (to at least the nearest 0.1 mt)

SPECIES CODE/ PRODUCT TYPE CODE												
BALANCE FORWARD												
DAILY TOTAL												
CUMULATIVE TOTAL FOR WEEKLY REPORTING PERIOD												

NOTE: Ancillary products, begin product type codes with 'A', e.g., A12

ALASKA GROUND FISH PROCESSOR
DAILY PRODUCTION REPORT

Vessel Name/Processor Name	Federal Permit #:
Call Sign	ADFG Processor #:

Gear Type of Harvester (circle one per page)
(1) Hook & Line (2) Pot (3) Bottom Trawl (4) Pelagic Trawl (5) Jig/Troll (6) Other (specify) _____

Representative	Phone #:	FAX #:
----------------	----------	--------

Harvest/Landing Date	Fed Report Area	Retained Species Code	Product Type Code	Retained Product Weight Circle lbs or 0.1 mt	Discard Species Code	Discard Weight Circle lbs or 0.1mt	Remarks

NOTE: For ancillary products, begin product code with "A", e.g. 'A12'
Report product weight in pounds or metric tons (at least nearest 0.1 mt)

National Marine Fisheries Service P.O. Box 21668, Juneau AK 99802 Telex: RCA 45-337 NMFS AKR JNU FAX: 907-586-7131 Phone: 907-586-7229

OMB Control No.

ALASKA GROUND FISH
CHECK-OUT NOTICE
SHORESIDE PROCESSOR

Send to:
National Marine Fisheries Service
P.O. Box 21668, Juneau, Alaska 99802
Telex: RCA 45-377 NMFS AKR JNU
FAX: 907-586-7131
Phone: 907-586-7229

Representative

FAX/Telex No:

Phone No:

Shoreside Processor Name

ADF&G PROCESSOR CODE

DATE

ENTER DATE FACILITY CEASED TO RECEIVE GROUND FISH

OMB Control No. 0648-0213

Expiration date: 12-31-91



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration

National Marine Fisheries Service

P.O. Box 21668

Juneau, Alaska 99802-1668

AGENDA C-1
SUPPLEMENTAL
SEPTEMBER 1990

DATE: September 17, 1990

TO: Steve Davis, Deputy Director
North Pacific Fishery Management Council

FROM: Raymond Baglin *Raymond Baglin*
National Marine Fisheries Service

SUBJECT: Analysis for consideration of extending 30 percent
observer coverage to vessels 54 feet to 59 feet
length overall

At the August 1990 meeting of the North Pacific Fishery Management Council, the Council requested that the National Marine Fisheries Service (NMFS) consider expanding the vessel size category for 30 percent observer coverage from 60 feet - 125 feet to 54 feet - 125 feet. The Council asked NMFS to prepare an analysis of the effects of such a change for discussion at the September Council meeting.

According to 50 CFR 672.2 and 675.2, length overall of a vessel means the horizontal distance, rounded to the nearest foot, between the foremost part of the stem and the aftermost part of the stern, excluding bowsprits, rudders, outboard motor brackets, and similar fittings or attachments. Vessel owners are required to report this length when applying for a Federal groundfish permit.

Until 1983 the Coast Guard used a registered length which was measured as the forward most part of the rudder to the point where the bow is rabbited (comes together). After 1983 the Coast Guard adopted a new system where length overall is defined as the horizontal distance between the outboard side of the foremost part of the stem and the outboard side of the aftermost part of the stern excluding rudders, outboard motor brackets, and other similar fittings and attachments. The Coast Guard set up two methods for measuring vessels: (1) the simplified method for vessels under 79 feet length overall where the vessel owner himself measures the vessel and sends measurements to the Coast Guard, which determines the tonnage by computer; and (2) the formal method where the Coast Guard measures each vessel 79 feet length overall and longer, and estimates tonnage. Since May 1987, the Coast Guard no longer measures vessels 79 feet and longer. This is now done by the American Bureau of Shipping. Therefore, vessels in the groundfish fleet and other fleets are documented under different systems.

The State of Alaska has recently (July 30, 1990) changed 5 AAC 39.160 regarding the maximum length designation for salmon seine



vessels. The change is from 50 feet official Coast Guard register length and 58 feet "overall length," to 58 feet "overall length," except for vessels that have fished for salmon with seines in waters of the State before January 1, 1962, as 50-foot official Coast Guard register length vessels. The State has defined "overall length" to mean the straight line length between the extremities of the vessel excluding anchor rollers. Therefore, the State definition for "overall length" in reference to limit seiners is similar to the Federal definition of length overall, except the State definition only excludes anchor rollers and the Federal definition excludes bowsprits, rudders, outboard motor brackets, and similar fittings and attachments. For other types of vessels for which the State has no length restriction, such as groundfish vessels, the State uses reported Coast Guard length which could be under the new or old system.

In order to determine the number of vessels and catch by size category for the Bering Sea/Aleutian Islands (BSAI) and Gulf of Alaska (GOA) areas different data sources had to be matched. The State fish ticket data file contains Alaska Department of Fish and Game (ADF&G) vessel number and catch data. The Federal permit file contains length overall and Coast Guard vessel number. The State Commercial Fisheries Entry Commission (CFEC) vessel file contains both Coast Guard and ADF&G vessel numbers. Therefore, the ADF&G vessel number with corresponding catch from the State fish ticket data file was matched with the ADF&G vessel number and corresponding Coast Guard vessel number of the State CFEC vessel file which was then matched with the Coast Guard vessel number and corresponding overall length of the Federal permit file (Figure 1). Many of the smaller vessels do not have a Coast Guard vessel number and therefore no match can be made. Also, if vessels made no landings, a match could not be made. Next year the ADF&G vessel number will be included in the Federal permit data file.

During 1989 length overall data were available from 1,858 vessels from the Federal permit file (Table 1). There was a total of 924 vessels with ADF&G vessel numbers with a match for the vessel in the Federal permit file. There were 652 vessels with fish tickets reporting 126,590 mt of groundfish (about 9 percent of 1989 total groundfish catch) with no match, and 282 vessels with Federal permits and no fish tickets. The 924 vessels with ADF&G vessel numbers that matched the Federal permit file reported a total groundfish catch of 1,318,165 mt. It can be seen (Table 1) that a large number of vessels (575) with no matches occurred in the 0 - 49 foot interval. Many small vessels do not have Coast Guard numbers and may not have made any landings. From these data (Table 1 and Figure 2), it is apparent that the vast majority of the catch (98 percent) is taken by vessels 60 feet and larger in size and that only 0.9 percent of the catch was taken by vessels in the 54 to 59 foot range during 1989.

During 1990, length overall data were available from 2,060 vessels from the Federal permit file (Table 2). There was a total of 947 vessels with ADF&G vessel numbers with a match for the vessel in the Federal permit file. There were 785 vessels with fish tickets reporting 167,217 mt of groundfish (about 14 percent of the 1990 catch through July) with no match and 328 vessels with Federal permits and no fish tickets. The 947 vessels with ADF&G vessel numbers that matched the Federal permit file reported a total groundfish catch of 1,008,071 mt through July, 1990. Again in 1990 there are a large number of vessels (680) where no match occurred in the 0 - 49 foot interval, probably for the same reasons as mentioned for 1989. From these data (Table 2 and Figure 3), it is also apparent for 1990 that the vast majority of the catch (97 percent) is again being taken by the vessels 60 feet and larger in size and that very little catch (1.9 percent) is being taken by vessels in the 54 to 59 foot range.

The observer cost per metric ton of groundfish catch would be much greater for vessels 54-59 feet length overall than for vessels that are currently required to carry observers (Tables 3 and 4). Assuming a cost of \$6,000 a month for 100 percent observer coverage, \$1,800 a month for 30 percent observer coverage, and that vessels fish each month and require observer coverage, the estimated cost of observer coverage per metric ton of groundfish for 1989 would be \$251 for the 54-59 feet category compared to \$18 and \$5 for the 60-124 feet and 125 feet and larger vessel categories respectively. The estimated cost for 1990 through July would be \$97 for the 54-59 feet category compared to \$12 for the 60-124 feet and \$4 for the 125 feet and larger vessel category. These estimates could vary considerably depending on how many months of observer coverage are required for the vessels in each category.

TABLE 1. Numbers of vessels and catch by size category for the BSAI and GOA for 1989.

<u>Length Overall (ft)</u>	<u>Federal Permitted Vessels (N)</u>	<u>Vessels With ADF&G Numbers That Match Federal Permit File (N)</u>	<u>Groundfish Catch (MT)</u>	<u>Percent of Catch for Vessels with Matching Numbers (%)</u>
0-49	1,001	426	6,863	0.5
50-53	101	67	2,556	0.2
54-59	185	133	11,454	0.9
60-124	404	226	267,901	20.3
125 +	<u>167</u>	<u>72</u>	<u>1,029,391</u>	<u>78.1</u>
TOTAL	1,858	924	1,318,165	100.0

TABLE 2. Numbers of vessels and catch by size category for the BSAI and GOA for 1990, including data through July.

<u>Length Overall (ft)</u>	<u>Federal Permitted Vessels (N)</u>	<u>Vessels With ADF&G Numbers That Match Federal Permit File (N)</u>	<u>Groundfish Catch (MT)</u>	<u>Percent of Catch for Vessels with Matching Numbers (%)</u>
0-49	1,116	436	7,504	0.7
50-53	102	60	1,900	0.2
54-59	212	146	19,006	1.9
60-124	425	235	256,041	25.4
125 +	<u>205</u>	<u>70</u>	<u>723,620</u>	<u>71.8</u>
TOTAL	2,060	947	1,008,071	100.0

TABLE 3. BSAI and GOA estimated cost for observer coverage based on size categories of vessels for 1989.

<u>Length Overall (ft)</u>	<u>Vessels with ADF&G Numbers that match Federal Permit File (N)</u>	<u>Estimated Annual¹ Cost for Observers (Millions of Dollars)</u>	<u>Estimated Observer Cost Per Metric Ton of Groundfish Catch (Dollars)</u>
54-59	133	2.9	251
60-124	226	4.9	18
125 +	72	5.2	5

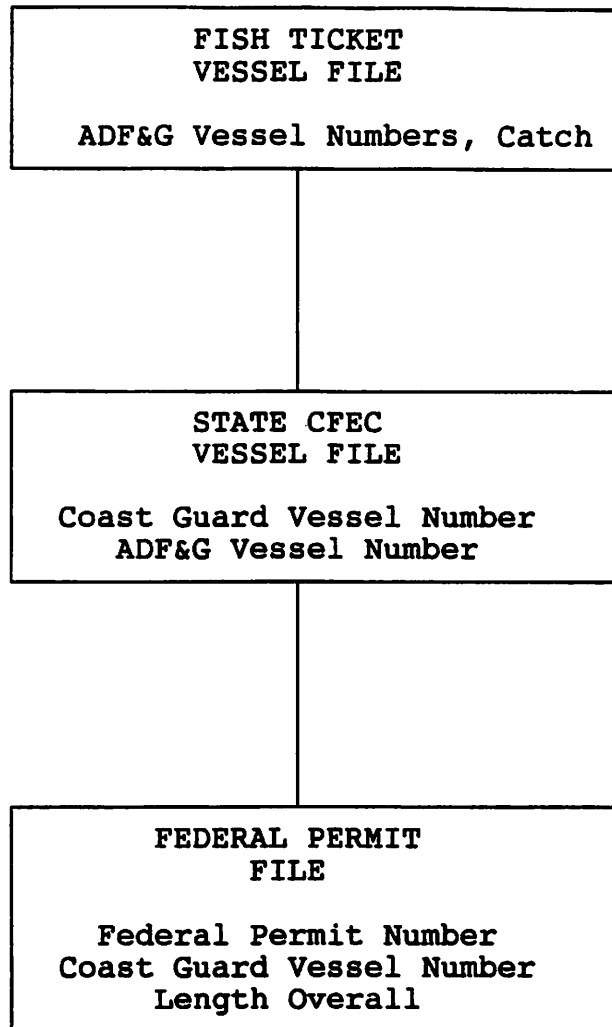
¹ Assumes a cost of \$6,000 a month for 100 percent observer coverage, \$1,800 a month for 30 percent observer coverage, and that vessels fish each month and require observer coverage.

TABLE 4. BSAI and GOA estimated cost for observer coverage based on size categories of vessels for 1990, including data through July.

<u>Length Overall (ft)</u>	<u>Vessels with ADF&G Numbers that match Federal Permit File (N)</u>	<u>Estimated Annual¹ Cost for Observers (Millions of Dollars)</u>	<u>Estimated Observer Cost Per Metric Ton of Groundfish Catch (Dollars)</u>
54-59	146	1.8	97
60-124	235	3.0	12
125 +	70	2.9	4

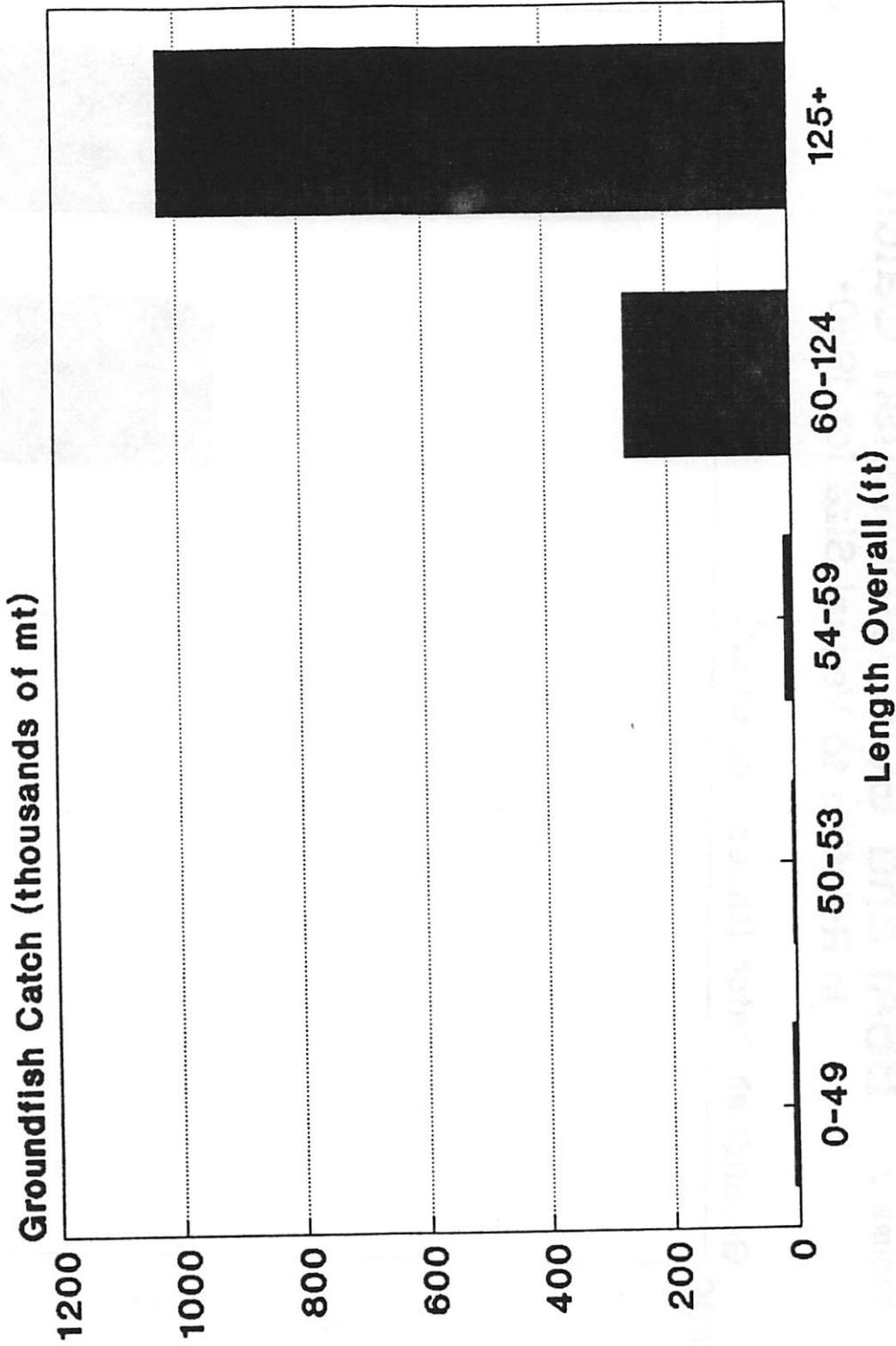
¹ Assumes a cost of \$6,000 a month for 100 percent observer coverage, \$1,800 a month for 30 percent observer coverage, and that vessels fish each month and require observer coverage.

FIGURE 1. Flow diagram for obtaining groundfish catch data for different length overall size intervals.



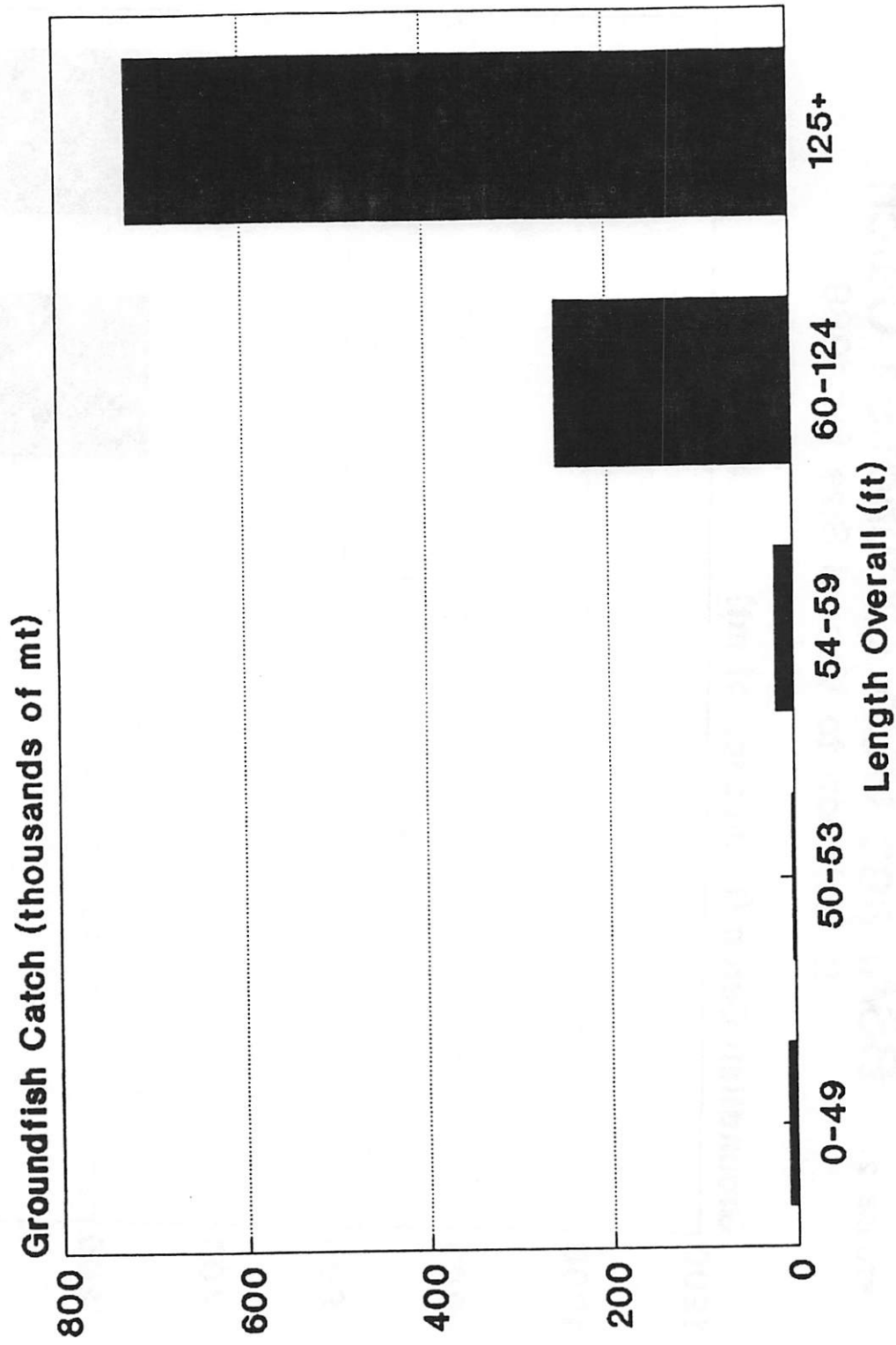
BSAI and GOA Groundfish Catch In Relation to Vessel Size for 1989

FIGURE 2.



BSAI and GOA Groundfish Catch In Relation to Vessel Size for 1990*

FIGURE 3.



*through July



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

DATE: September 20, 1990

MEMORANDUM FOR: Steve Davis, Deputy Director
 North Pacific Fishery Management Council

FROM: Raymond E. Baglin *Raymond E. Baglin*
 National Marine Fisheries Service

SUBJECT: Observer Insurance Coverage

At the August 7 - 9, 1990, meeting of the North Pacific Fishery Management Council (Council), the National Marine Fisheries Service (NMFS) indicated a concern regarding the level of insurance coverage for observers. The Council requested that NMFS conduct analysis and set a requirement for a designated minimum level of insurance coverage for each observer paid for by the observer contractor.

I have discussed the issue with all of the observer contractors, several insurance brokers, Alaska Division of Insurance, Alaska Workers' Compensation Office, and the National Council on Compensation Insurance. I will attempt to summarize my findings, however, maritime insurance is very complex and I recommend that before setting any regulations regarding required observer insurance coverage, that the NMFS seek legal advice from the Justice Department. In the meantime, the Observer Program should consider requiring all observer contractors to provide evidence of insurance or take responsibility for employee related suits that may come under the Jones Act jurisdiction, Federal Longshoreman's and Harbor Workers' Compensation Act (USL&H) jurisdiction, or any other workers' compensation act that may be appropriate.

Under the current observer plan, the contractors are required to provide basic workers' compensation and marine protection and indemnity (P&I) insurance to cover and protect observers injured in the performance of their duties, but no minimum level of coverage is set. The NMFS Observer Program has not received proof of insurance from the contractors but believes that the level of coverage has varied to a great extent and in some cases may not be sufficient.

The NMFS requires the following insurance for the foreign and driftnet programs:

"Provide accident and health insurance for observers while the observer is employed; The accident and health insurance requirement is to provide coverage for observers injured while on the job in performance of their duties, not general health benefits. Public



institutions can provide this coverage through state industrial insurance programs or whatever programs they utilize to cover state employees. Private firms should ensure that coverage for the Jones Act and USL&H are covered. Workers' compensation is required in all cases."

I have determined that currently some observer contractors require a minimum level of insurance coverage which may vary from 0.5 million dollars coverage to 5 million dollars coverage. Some provide much less coverage. Others simply rely on whatever limit the vessel carries. One broker contacted indicated that he would not write a P&I policy for less than 0.5 million dollars.

Currently observer contractors have selected different types of insurance coverage to protect observers. Some of the types of insurance coverage include:

- (1) State workers' compensation insurance to cover observers as state employees with an endorsement adding the observer contractor and observer to the vessels P&I policy;
- (2) Workers' compensation, USL&H, and an endorsement to the vessels P&I policy;
- (3) A special P&I policy for observers;
- (4) Full workers' compensation with a maritime endorsement and USL&H coverage;
- (5) Vessels' P&I policy, with or without an endorsement to the policy, to cover the observer contractor and observer, with or without workers' compensation.

All contractors may not always carry workers' compensation insurance. If an observer is injured, he/she may file a claim under the Alaska Workers' Compensation Act. If the Workers' Compensation Board determines the observer is eligible, the contractor would be in violation of Alaska law if the contractor did not provide workers' compensation. State jurisdiction would be determined on a case-by-case basis. The penalty for not having workers' compensation insurance, when it is necessary, is \$10,000 and imprisonment for not more than one year. If an employer does not pay compensation for an injury, it would be a class B felony if greater than \$25,000 damages with up to 10 years in prison; or a class C felony if less than \$25,000 damages with up to 5 years in prison. Either type of conviction carries a \$50,000 fine. Officers of a corporation would be held responsible.

Alaska and Oregon workers' compensation coverage is provided by private insurance companies. Oregon coverage could be extended

to Alaska if the company is also licensed in Alaska. Washington workers' compensation coverage is provided by the State of Washington and is not authorized to write workers' compensation in Alaska. This type of insurance may cost about 10 percent of observers gross salary for Washington and Oregon workers' compensation coverage, or 30 percent or more of the observers gross salary for Alaska coverage. In some instances workers' compensation may not cover an observer while on a vessel. There is no classification for observers on vessels. Some observers are currently classified as biologists or inspectors. Alaska has a provision to cover employees on processing vessels (see attached Assistant Attorney General opinion, file number 663-89-0189, January 26, 1989). Under Alaska law only fishermen are exempt from being covered under workers' compensation. Alaska also has a classification for vessels not otherwise classified which should cover all vessel types even outside the territorial sea (3 miles). This type of insurance would also cover observers while not on vessels, although some injuries may fall under USL&H compensation jurisdiction. An observer may be able to file a workers' compensation claim in a state other than Alaska. For example, if an observer is a resident of Colorado, signs his contract in Colorado, and is employed by a contractor in Washington and works in Alaska, he could file a claim with the state with the best benefits, which most likely would be Alaska.

Cost estimates were obtained for a master policy from one broker who indicated that at least two companies would insure observers on vessels at about 30 to 35 percent of gross observer payroll and shoreside at about 10 percent of gross observer payroll. Such costs would most likely be passed on to the vessel owners by the contractors. This policy would incorporate workers' compensation with an all states endorsement, USL&H endorsement, and Maritime Employers Liability with one million dollars coverage and no deductible. The first year all contractors would be charged the same amount. Starting the second year there would be some disparity depending on loss experience. Although some feel that this type of coverage is the answer to the observer insurance problem, it would increase the insurance cost of most, if not all, contractors which would be passed on to the vessel owners.

The current observer plan also requires that the contractors provide P&I insurance coverage. A vessel normally carries a hull policy and a marine P&I policy. The objective of the P&I policy is to indemnify the vessel owner for liabilities created by the insured vessel which are not already covered under the hull policy. This specialty coverage is available through marine liability underwriters. In addition to non-employee coverages, the P&I policy protects the vessel owner for liability under general maritime law, the Jones Act, and the Death on the High Seas Act.

According to Nixon "A Commercial Fisherman's Guide to Marine Insurance and Law" (no date), the typical categories of liabilities covered under a P&I policy are:

- (1) Compensation and medical expenses for the injury or death of any member of the crew;
- (2) Damage caused by a vessel to any fixed or movable object or property of any nature;
- (3) Expenses involved in the removal of the wreck of the vessel where that removal is required by law;
- (4) Fines or penalties levied against the vessel by any state, Federal, or foreign government as the result of some violation of laws under certain conditions; and
- (5) Expenses involved in investigating and/or defending claims arising out of a liability of the assured covered by the P&I policy. This is particularly important in the area of crew injuries, where the costs of defending against such claims may be substantial. The application of a P&I policy is complex, especially in the areas of personal injury and death. The P&I policy comes into force only when there is an obligation which the vessel owner is legally liable to pay.

In regard to personal injury, there are three independent causes of action an injured crew member can pursue and for which the vessel owner may be found liable. The first remedy available to an insured crew member is known as maintenance and cure. It is defined as the legal obligation of the vessel owner to maintain and cure a seaman injured in the service of the vessel.

Congress recognized limitations of the maintenance and cure remedy when it passed the Jones Act of 1920. This statute provides that:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury..... Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. (46 U.S.C. 688)

Therefore, by statute, the plaintiff is entitled to a trial by jury. Since a jury is likely to be more sympathetic in the awarding of damages than a judge, the injured seaman will normally allege negligence under the Jones Act in his complaint. Through a legal doctrine known as "pendent jurisdiction," the jury is then able to decide not only the Jones Act negligence

SEP 21 1980 09:00 N.N.F.E. - AM 1907 586-7131

issue, but also the maintenance and cure, and a third type of claim for unseaworthiness as well.

To prevail in a Jones Act case, an injured observer must be prepared to prove the following:

- (1) The plaintiff was a seaman and a crew member of the vessel involved;
- (2) The defendant was the owner of the vessel at the time of the accident;
- (3) The plaintiff was injured while in the service of the vessel;
- (4) Negligence on the part of the defendant was a proximate cause of the plaintiffs injuries; and
- (5) The extent of plaintiffs damages.

The cases applying the Jones Act can be broken down into two basic categories: those alleging that the defendant vessel owner failed to provide a safe place to work; and those alleging that the injury occurred as the result of the negligence of a fellow servant - the captain or another crew member.

The doctrine of unseaworthiness is an important remedy for an injured seaman. This doctrine allows an injured seaman to recover against the vessel if his injury was caused by an unseaworthy condition of the vessel, its equipment, or crew. This is true whether or not the unseaworthy condition was caused by the negligence of the vessel owner. Therefore, the potential liability of the vessel owner and his insurance underwriter is greatly expanded.

An important question, which has not yet been resolved, is whether an observer is a seaman and a crew member of the vessel. If the observer is not considered a seaman and crew member, his/her remedies for injury may be limited or nonexistent. Some argue that since Federal regulations require an observer be aboard a vessel in order for it to fish, the observer should be considered a part of the crew. Others say that since an observer is an employee of the contractor, he/she should not be considered a crew member. The U.S. Supreme Court has agreed to review the Jones Act coverage, but not specifically for observers.

Prior to passing the Jones Act, Congress enacted the Death on the High Seas Act. This act allows the personal representative of any deceased person to recover damages from a vessel when the death is caused by a wrongful act (there must be proof of negligence or unseaworthiness) on the high seas (outside the territorial 3 mile limit). Therefore, a seaman is entitled to

many remedies under both general maritime law and Federal statutes. The seaman is always entitled to maintenance and cure, independent of any other type of remedies. More recently, September 1988, Congress passed a Fisherman's Safety Act, but it has not taken effect yet. The Coast Guard is drafting the new rules and expects to begin implementing them in early 1991.

At first glance it would seem fairly simple to just get rate quotes from a few insurance brokers for different levels of P&I coverage and analyze how the different insurance rates might impact various vessel owners. An attempt was made to obtain rates from several marine insurance brokers, however, all but one declined to furnish rates. The rates furnished showed that the cost (per man per month, subject to a 3-month minimum period) for a Bering Sea and Aleutian Islands (BSAI) vessel would be about twice that of a Gulf of Alaska (GOA) vessel. If vessels were to fish both areas, they would be charged only the highest rate, not both. The cost per vessel increases from \$212 for 0.5 million dollars coverage to \$366 for 10 million dollars coverage in the GOA. The cost per vessel for the BSAI would only increase from \$400 for 0.5 million dollars coverage to \$554 for 10 million dollars coverage. The broker that furnished these rates indicated that if the insurance was paid for all observers by one party, such as NMFS, the bulk rate would be about 15 to 20 percent less. This broker indicated that the cost would not vary by size of vessel, but only by area fished.

Other brokers contacted would not give rates and indicated that rates could vary considerably depending on various factors such as loss history with a particular vessel or company. The marine insurance underwriter has far more control over pricing decisions, and whether or not he wants to accept the risk at all, than in other fields.

There are two reasons for this continued independence in what is otherwise a highly regulated industry, according to Nixon, "A Commercial Fisherman's Guide to Marine Insurance and Law" (no date). The first is the unique nature of every marine trip, including differences in vessels and captains. There is a much greater potential for catastrophic loss in the marine market, and for that reason marine insurers have managed to maintain their independence.

The other reason relates to the international nature of the business of marine insurance. A highly regulated United States marine insurance company would not have flexibility to compete with the comparatively unregulated markets of London, Norway, Sweden, and Japan when they quote on vessels in the United States. Since a broker has the ability to choose either United States or foreign markets, United States insurance companies are under a substantial handicap working in a largely unregulated environment. Unfortunately, this situation does not help in

trying to show what the cost of requiring a certain minimum level of insurance would be.

It may be difficult to require observer contractors to purchase P&I insurance. In general, only vessel owners may purchase P&I insurance from the P&I clubs that sell insurance. However, one contractor was successful, after extensive effort, in obtaining P&I insurance specifically for the contractor's observers. The broker who obtained this coverage for the contractor was not optimistic about finding such coverage for other contractors. If it is possible for the other contractors to obtain such coverage for their observers there would most likely be higher overall costs for all size vessels since the contractors would pass the costs on to the vessel owners.

It is important to remember that the amount of coverage for a standard P&I policy is applied per occurrence. Therefore, if a vessel with nine crew members (one being the observer) and a captain is lost and it carries \$1 million total P&I coverage (primary or primary and excess coverage), the \$1 million coverage would be divided among the ten people, assuming that the courts determine the observer is a seaman and a crew member of the vessel. Also, P&I coverage is provided normally for the benefit of the club member (the vessel owner) only. Any coverage provided for an observer on board a vessel is in respect to the liability of the member to the observer. Therefore, the co-insured clause will cover the observer contractor for liabilities which they may be found liable to pay, provided such liabilities are properly the responsibility of the member. Therefore, the question to ask is whether the amounts claimed would have been recoverable from the club by the member had the claim been enforced against the member. Since the answer to this question is unknown, the observer contractor would be taking a risk that claims of its observer employees could be denied by the insurance company because there was no liability of the insured vessel owner in the first place.

Many larger vessels that belong to P&I clubs have unlimited coverage already or a large amount of coverage (perhaps 20 to 50 million dollars or more). Setting a minimum required amount would have no effect on them if the observer is already added to their policy. In addition, policies on some larger vessels allow for plus or minus a certain number of crew members with no change in cost of the policy. Setting a minimum requirement for P&I coverage and including the observer on the vessel policy could substantially increase the cost of insurance for smaller vessels that are charged per crew member and normally would maintain a lower level of coverage than the minimum required.

Many vessel P&I policies have a deductible of \$5,000, \$10,000, or \$20,000, etc. Therefore, the vessel owner would be responsible for at least the deductible portion when the observer is included

on his policy. This could provide an incentive for the vessel owner to want the observer covered under a separate observer contractor's policy of some type. However, the contractors would most likely raise their costs to the vessels if they are required to assume the extra cost.

Some contractors have also obtained a special USL&H endorsement, in addition to coverage provided by a P&I policy, to provide for compensation under the USL&H Act (33 U.S.C. 901-50). Benefits under the USL&H Act are more liberal than those of many states. Allowable compensation under this law includes a wage allowance and medical expenses as well as scheduled recoveries for temporary or permanent total disability and permanent partial disability. The cost for this coverage is a percentage of the payroll, perhaps up to 5 percent. The employer must have some employees engaged in active full or part-time maritime employment. For a claim to be within the jurisdiction of the USL&H Act, the accident must have occurred on, or adjacent to, navigable waters of the United States.

Therefore, the current requirements of the Observer Plan requiring contractors to provide workers' compensation and P&I insurance to cover and protect observers injured in the performance of their duties appears to be inadequate. There are no minimum levels of coverage set, no evidence of insurance has been provided to NMFS, and uncertainties regarding the status of an observer on a vessel and the corresponding insurance coverage exist.

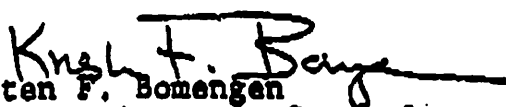
Attachment

MEMORANDUM**State of Alaska**
Department of Law

TO: The Honorable Jim Sampson
Commissioner
Department of Labor

DATE: January 26, 1989
FILE NO: 663-89-0189
TEL. NO: 465-3603
SUBJECT: Floating fish processors
and workers' compensation

FROM:


Kristen F. Bomengen
Assistant Attorney General
Human Services - Juneau

You have asked whether floating fish processor employees who work both within and outside of Alaskan waters are covered by the Alaska Workers' Compensation Act, AS 23.30 et seq.

ANSWER

In brief, the factual circumstances of each case will determine whether Jones Act recoveries under 46 U.S.C. § 688, or a state's workers' compensation award will be upheld by the courts. Floating fish processors that spend periods of time both within and outside of Alaskan waters appear to fall within the "twilight zone," so designated by the courts because the general circumstances give rise to reasonable arguments for coverage under either act. Rather than set out a general rule to determine this issue, the courts have stated that each case must be evaluated by examining the circumstances of the employment, the relationship to issues of "local concern," and whether the application of the state act would interfere with maritime law.

Where a floating processor works exclusively outside of Alaska territorial waters, Jones Act remedies are available to injured employees. But where an employing vessel has significant contacts with a state, it probably will be necessary for the employer to provide for workers' compensation coverage.

DISCUSSION**Recent Legislation**

The question of coverage for fish processor employees has apparently become a recent issue of concern because of two statutory changes that have occurred since 1986. The first change occurred when Alaska Workers' Compensation Act was amended, effective September 4, 1986, to exclude "commercial fisherman" from workers' compensation coverage. AS 23.30.230. The most recent change took effect on September 4, 1988, with the specific exclusion of floating fish processor employees from the

The Honorable Jim Sampson
Commissioner
Our file: 663-89-0189

January 26, 1989
Page 2

definition of "commercial fisherman" set out in AS 16.05.940(4) of the fish and game statutes. As a result, the fish processing employees on floating fish processors are once again entitled to workers' compensation coverage.

At the time of the passage of the 1986 amendment, the definition of "commercial fisherman" in AS 16.05.940(4) included processing employees aboard seafood processors:

(4) "commercial fisherman" means an individual who fishes commercially for, takes, or attempts to take fish, shellfish, or other fishery resources of the state by any means, and includes every individual aboard a boat operated for fishing purposes who participates directly or indirectly in the taking of these raw fishery products, whether participation is on shares or as an employee or otherwise; however, this definition does not apply to anyone aboard a licensed vessel as a visitor or guest who does not directly or indirectly participate in the taking; and the term "commercial fisherman" includes the crews of tenders or other floating craft used in transporting fish;

(Emphasis added.) Floating processor employees were considered to come under this definition because they worked aboard vessels that transported fish.

In 1988, the legislature amended the definition of "commercial fisherman" in AS 16.05.940(4) to specifically exclude floating processor employees who are not involved in the taking of fish:

(4) "commercial fisherman" means an individual who fishes commercially for, takes, or attempts to take fish, shellfish, or other fishery resources of the state by any means, and includes every individual aboard a boat operated for fishing purposes who participates directly or indirectly in the taking of these raw fishery products, whether participation is on shares or as an employee or otherwise; however, this definition does not apply to anyone aboard a licensed vessel as a visitor or guest who does not directly or indirectly participate in the taking; "commercial fisherman" includes the crews of tenders or other floating craft used in transporting fish, but does not include processing workers on floating fish processing vessels who do not operate fishing gear or

The Honorable Jim Sampson
Commissioner
Our file: 663-89-0189

January 26, 1989
Page 3

engage in activities related to navigation or operation of the vessel; in this paragraph "operate fishing gear" means to deploy or remove gear from state water, remove fish from gear during an open fishing season or period, or possess a gill net containing fish during an open fishing period;

(Emphasis added.) One comment in support of this amendment was provided in a letter from a Senator to the Senate Resource Committee Chair, dated March 15, 1987, stating "it was never the intent of the legislature to prevent processing vessel workers from being covered by workers' compensation."

Even though the amendment to definition of "commercial fisherman" was aimed at clarifying a question concerning commercial fishing license requirements, it had the effect of reinstating fish processor employees under the coverage of the Alaska Workers' Compensation Act. As a result floating fish processor employers who operate both within and outside of Alaskan waters probably will have to purchase insurance to cover employees' claims under both the Jones Act and the state Workers' Compensation Act.

In addition, if an employer fails to secure coverage for employees under the Workers' Compensation Act, he or she may be subject to sanctions under a 1988 amendment to AS 23.30.-075(b), which now reads:

(b) If an employer fails to insure and keep insured employees subject to this chapter or fails to obtain a certificate of self-insurance from the board, upon conviction, the court shall impose a fine of \$10,000 and may impose a sentence of imprisonment for not more than one year. If an employer is a corporation, all persons who, at the time of the injury or death, had authority to insure the corporation or apply for a certificate of self-insurance, and the person actively in charge of the business of the corporation shall be subject to the penalties prescribed in this subsection and shall be personally, jointly, and severally liable together with the corporation for the payment of all compensation or other benefits for which the corporation is liable under this chapter if the corporation at that time is not insured or qualified as a self-insurer.

The Honorable Jim Sampson
Commissioner
Our file: 663-89-0189

January 26, 1989
Page 4

This amendment significantly increases the penalties for failure to insure under the act and was part of a legislative package that mandated strict enforcement of AS 23.30.075(b) by governmental entities. Subsec. 1(e) ch 79, SLA 1988.

Historical Interaction of the Jones Act and State Acts

Federal law provided an exclusive remedy for injuries to "seamen" under the Jones Act in 46 U.S.C. § 688. To make a claim under this act, a "seaman" originally had to work aboard a vessel in navigation, have a permanent connection with the vessel and aid in the navigation of the vessel. Over the years, however, the definition of seaman has been broadened to cover any employee aboard a vessel who performs a substantial part of his or her work aboard a vessel and generally contributes to its mission. Larson, Workers' Compensation § 90.21 (1988). Under this expanded definition, processing employees aboard floating fish processors who work outside of a state's territorial waters qualify for "seaman" status.

However, the courts have reviewed many cases involving injuries incurred in employment related to maritime activities, which, because of closely related shore-side activities, is also a matter of "local concern." When presented with cases which contain elements of "local concern or interest," the judiciary has not been inclined to deprive an injured employee of a remedy under a state compensation act if it appears that it may be done without interfering with maritime law. As a result, a "twilight zone" has evolved, in which employees may be subject to the jurisdiction of the Jones Act or the jurisdiction of a state compensation act, depending on the circumstances of their employment.

Prior to the 1986 legislation, the common law, which included this concept of a "twilight zone," determined whether an employee on a floating processor was covered by a state workers' compensation act or the Jones Act.

Under the 1986 amendment to the Alaska Worker's Compensation Act, floating processor employees were inadvertently excluded from workers' compensation coverage by state law. Under the 1988 amendment to the definition of "commercial fisherman," the floating processor employees once again fell into the "twilight zone" in which it is impossible to determine which compensation act will be applied by the court unless the specific circumstances are known. To gain an understanding of the "twilight zone," it will be necessary to examine the circumstances that have been evaluated by the courts.

The Honorable Jim Sampson
Commissioner
Our file: 663-89-0189

January 26, 1989
Page 5

A. The "Twilight Zone" of Concurrent Jurisdiction

The determination of whether a state compensation act can apply to injuries sustained by an employee who performed maritime-related work has undergone an evolution throughout the years. In 1917, the U.S. Supreme Court decided that a longshoreman who was fatally injured while unloading cargo at a pier was not covered by a state compensation act in Southern Pacific Co. v. Jensen, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed 1086 (1917), because it would work material prejudice to general maritime law where the nature of the employee's duties and work was maritime. However, in a subsequent case, the court found that maritime law would not be prejudiced if a state law were applied to injuries incurred by a shipbuilder aboard a floating vessel since his maritime employment was considered to be "local in character." Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469, 42 S. Ct. 157, 66 L. Ed. 321 (1922).

In Alaska Packers Assn. v. Industrial Accident Commission, 276 U.S. 467, 48 S.Ct. 346, 70 L.Ed. 656, decided that an employee hired to do maritime work was nonetheless covered by a state compensation act when he was injured while pushing a boat from shore. Consequently, when the Ninth Circuit Court of Appeals reviewed a case in which a fisherman died on the fishing grounds and claimed a remedy under a state workers' compensation act, the court found that his fishing activity under an employment contract with a cannery was incidental to the primary "shore-based" packing activity, which was "local in character." Alaska Packers Assn. v. Marshall, 95 F.2d 279 (9th Cir. 1938).

The Alaska Supreme Court reviewed a Board decision to make an award to a fisherman under the state's compensation act in Cordova Fish & Cold Storage Company v. Estes, 370 P.2d 180 (Alaska 1962). In Estes, the fisherman was hired under an employment contract with a cannery and was injured while moving crab pots on the boat deck. The court affirmed the award, stating that his employment was primarily local in character and that any maritime interest was slight or marginal, so that application of the state law would not work an interference with maritime law.

A subsequent Alaska case affirmed a denial of benefits under the state act, however, where the Alaska Workers' Compensation Board found that the injured seaman, a captain on a purse seine vessel who was injured on the fishing grounds, was entitled to recover under maritime law and not under the state act. Anderson v. Alaska Packer's Ass'n, 635 P.2d 1182 (Alaska 1981).

The Honorable Jim Sampson
Commissioner
Our file: 663-89-0189

January 26, 1989
Page 6

Both of the Alaska cases turned to the determination of the U.S. Supreme Court in Davis v. Dept. of Labor, 317 U.S. 249, 63 S. Ct. 225, 87 L. Ed. 246 (1942) which reviewed the question of whether compensation was available to a steelworker who fell from a bridge over navigable waters under the state act or a federal act, the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. The Davis court acknowledged the existence of a zone of concurrent jurisdiction, subsequently labeled a "twilight zone," in which an employee's rights to federal or state remedies must be determined on a case by case basis. This "twilight zone" is considered by legal commentators to apply to the many cases that involve employment related to both land and sea in which a reasonable argument can be made for coverage under either a federal or state act.

B. Current Application of the AWCA to "Twilight Zone" cases

In 1987, the Alaska Workers' Compensation Board determined that the state had a "primary and vital concern" with the status and well-being of an employee hired aboard a floating fish processor that spent much of its time anchored in harbors off-shore. Santamaria v. Arctic Enterprises, et al. Nos. 618961, 609069, and 609033 (July 9, 1987) (involving injuries that occurred prior to the 1986 legislative amendments). The Board concluded that the fish processing employee was not employed in traditional maritime work and could be regarded a Jones Act "seaman" only because of the liberal interpretation that has evolved over time. Since it was not likely to cause substantial prejudice to the uniformity of maritime law to allow this employee's claim, just as they would allow the claims of thousands of similarly situated workers who happen to be employed at canneries ashore, the Board determined that the employee's injuries fell within the coverage of the state act.

In order to determine whether the Alaska Workers' Compensation Act extends to a particular set of circumstances, a court will evaluate the state's local interest in the activity, whether the activity is traditionally shore-based, and whether the application of the state act will interfere with maritime law. Where a fish processor operates solely in the Bering Sea and the Gulf of Alaska and work is performed solely beyond the three-mile territorial sea, the processing employees probably come under the exclusive jurisdiction of the Jones Act. However, where a part of the employee's work is performed within the territorial waters of the state, the points of hire and/or discharge are within the state, the employees utilize shore-based medical facilities, and/or supplies are purchased and loaded by these

The Honorable Jim Sampson
Commissioner
Our file: 663-89-0189

January 26, 1989
Page 7

employees within state ports, the circumstances of the case will determine whether the state act or the Jones Act may apply.

CONCLUSION

The courts have generally acknowledged the significance of "local interest" in cases where a state compensation act may be applied without significant interference with maritime law. Where the activity involves seafood processing, an activity which was traditionally performed on shore, and where there may be a significant connection with shore-based facilities, there may often be circumstances that will provide reason to apply the state workers' compensation act to injuries that befall floating processor employees. The courts have clearly stated that the factual circumstances presented by a case will be the determining factor of whether a state act may apply.

Courts have declined to set out a standard that would preclude an employee's claim under a state act where there was a reason for local concern and the circumstances fall within the "twilight zone" of coverage. Given that each case will have to be evaluated on its own merits, it may be impossible for floating processor employers to adequately assure themselves that the circumstances under which injuries occur on their vessels will fall clearly outside of the "twilight zone." Under current law, therefore, it may be necessary for a floating processor employer to carry insurance for both contingencies, unless the processor truly has only incidental contacts with the state.

KFB:jh

cc: Jacquelyn McClintock, Director
Division of Workers' Compensation



UNITED STATES DEPARTMENT
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE

Alaska Fisheries Science Center
7600 Sand Point Way NE.
BIN C15700
Seattle, WA 98115

SEP 21 1990

F/AKC2:RN

Mr. Don Collinsworth, Chairman
North Pacific Fishery Management Council
605 West 4th, Suite 306
Anchorage, AK 99501

Dear Mr. ^{Don}Collinsworth:

I want to take this opportunity to provide you and the Council the enclosed progress report on the implementation of the domestic observer program this year. The report will be presented at the September meeting of the Council. We will be available to answer the Council's questions at that time.

We have been able to meet the Council's primary objectives in implementation of the domestic observer program this year. This does not mean that there haven't been problems, and we expect new problems will arise as the program moves ahead. Whatever success we have had has been due to the efforts of the Council, industry, contractors, NMFS, and the observers themselves. I especially want to acknowledge the work of Russ Nelson and his staff for their efforts in implementing this complex program under extremely difficult conditions. We want this program to succeed and to continue to improve. To do that, we need the continued support and help of all involved and we want to know about problems and concerns when they occur. I want everyone to know that they can contact Russ Nelson or me at any time concerning any issue associated with the program.

Sincerely,

William Aron
Science and Research Director
Alaska Region

Enclosure

cc: F/AKR - Pennoyer
F/AKC2 - Marasco
F/AKC2 - R. Nelson
Fx1 - M. Tillman
F/PC - Marshall
C. Pautzke



NMFS Domestic Groundfish Observer Program - A Progress Report

**Prepared By
Observer Program
Alaska Fisheries Science Center
Seattle, WA**

Introduction

In January, 1990, the National Marine Fisheries Service began the implementation of a mandatory domestic observer program for the groundfish fisheries in Alaska as required by Amendments 13 and 18 to the fishery management plans for groundfish fisheries in the Bering Sea and Gulf of Alaska regions. The first nine months of program operation are now completed. This report provides a review of the progress of the program to date and a summary of problems which have been encountered and measures taken to resolve them.

1990 Accomplishments and Current Program Status

The Observer Program at the Alaska Fisheries Science Center (AFSC) is responsible for the operation of the domestic groundfish observer program, the foreign/joint venture program (for fisheries in the Alaska region and the Washington, Oregon and California region), and the high seas driftnet program. Through September, the program trained and deployed 555 observers for the three programs: 478 deployments were made in the domestic groundfish fishery, 110 in the foreign/joint venture fisheries and 61 were made to foreign high seas driftnet vessels. The primary requirements for acceptance into observer training (college level study in one of the biological sciences) are the same for all three programs. So far, there have been sufficient numbers of applicants who meet the primary entry qualifications.

Observers deployed in domestic groundfish fishery have sampled aboard 259 different vessels and 29 processing plants. Of the 259 vessels, 107 are vessels 125 feet or longer. The remaining 152 vessels were between 60 and 124 feet. In the Bering Sea/Aleutian Islands region, observers provided about 90% coverage of the total groundfish fishery. Observers provided about 40% coverage of the Gulf of Alaska fishery. Observer coverage is defined as the percentage of the total groundfish catch taken in the region by vessels with observers aboard to sample the catch. Compliance by the industry with the program's requirements cannot be verified at this time. Determination of compliance is dependent on the receipt and processing of log books. This process has not been completed.

The Observer Program has provided the required training for all three programs. This was a difficult task due to the limited time available for preparation of training materials and manuals for the new domestic and driftnet programs. The late approval of the winter yellowfin sole joint venture fishery and the reopening

2

of that fishery in late June created scheduling and space problems for the program which were ultimately resolved so that the needed numbers of observers were provided for those fisheries. With respect to the domestic program, the institution of the new domestic log book and reporting programs in 1990 also increased the difficulty associated with the training and preparation of observers since observers need to understand these requirements to fully accomplish their job.

Currently, one three-week training course per month for new observers is being conducted. A 3-day briefing for domestic observers who experienced substantial but resolvable problems in work performance on a previous trip is also being conducted once a month. One and one-half day briefings are scheduled weekly for former domestic observers who satisfactorily performed their work on previous trips.

The program opened a field office in Kodiak, AK in May for briefing observers prior to deployment and debriefing observers between trips and upon the completion of deployments. One full time NMFS program biologist has been stationed in at the NMFS Gibson Cove facility. The Alaska Department of Fish and Game (ADFG) will assign one biologist to work at the office to help brief and debrief observers beginning in October. We are trying to establish a similar facility in Dutch Harbor, AK. Operation of this facility is expected to begin sometime during the first quarter of 1991.

A contract was awarded in June, 1990, to provide about 108 months of observer coverage through federal funding for the placement of natural resource observers as required by the 1988 amendments to the Marine Mammal Protection Act (MMPA). Placement of these observers throughout the Alaska groundfish fishery began in August. The training and duties of these observers are the same as observers provided through industry funding. The placement of the MMPA observers is being coordinated by the Observer Program to meet the objectives established early in 1990 and to integrate the federally and industry funded portions of the program.

Problems Encountered in the 1990 Program

Some problems have been encountered in implementing the domestic program. Many of these problems are of the type that arise on a day-to-day basis and are easily resolved. However, there have been a number of problems or questions concerning the program that have a broader range of impact.

The problem which has received the most attention involves the delays experienced in the completion of debriefing of observers. These delays resulted in greater costs than expected in obtaining observer coverage for vessels or plants. The delays resulted from lack of adequate staff and the return of a unusually large

3

number of observers due to closures of joint venture fisheries in Alaska and off the west coast added to the number of returning domestic observers. The newness of the program to contractors and an inadequate understanding of what was expected of observers in debriefing also contributed to the delays.

A number of actions were taken to attempt to resolve the problem. Debriefings are now taking an average observer from 5 to 8 days to complete as compared to an average of about 2.5 weeks earlier this summer. Improved performance by observers and a more active participation by contractors in supervising the work of their observers can lead to additional reductions in the length of observer debriefing. It is expected that further steps will have to be taken to handle the number of observers which return when the Bering Sea pollock quota is achieved later this year. The program will make every attempt to complete the debriefing of those observers within a reasonable period of time. The debriefing process is important in maintaining the quality of the data and in verifying the work performed by the observers. Further, it is the primary opportunity to identify problems experienced by observers.

A second issue involves the integration of the federally funded Marine Mammal Protection Act (MMPA) natural resource observers with the industry funded portion of the domestic observer program. Through MMPA funding for FY 1990, approximately \$1.37 million was made available to the AFSC. Up to \$750,000 was to be spent on observers for the groundfish fishery in Alaska and the balance of the funding was provided for the combined operational and administrative costs of the industry-funded and MMPA funded domestic observer program.

NMFS headquarters allocated the MMPA funds for natural resource observers to the AFSC to be utilized throughout the groundfish fishery to (1) verify the reliability of data obtained by industry-contracted observers; (2) improve coverage of the winter trawl fisheries in the Shelikof Strait and central Gulf of Alaska areas where high levels of Stellar sea lions have been observed historically; (3) provide additional data which would not otherwise be obtained in the Bering Sea/Aleutian Islands longline fishery where there is interaction with killer whales; and (4) enable NMFS to direct coverage to specific fisheries or to specific times and areas of operation for vessels receiving less than 100% coverage, including trips on vessels less than 60 feet that are exempted by the groundfish program, but have marine mammal interactions.

The federal contract to provide observer services to NMFS was awarded in June. The award of that contract was the result of an open and competitive procurement action which was initiated in May, 1989. The federal contractor cannot utilize the MMPA observers to meet contract obligations they may have with

industry members through the industry funded portion of the domestic program.

The available MMPA observer effort has been divided between fisheries operating in the Bering Sea and the Gulf of Alaska. Fifty-five percent of the effort will be devoted to the Bering Sea and 45% to the Gulf of Alaska. Within each region observers will be deployed among the various fisheries in order to meet the stated program objectives. Effort plans have been received from groundfish participants and are used to identify which fisheries are expected to occur within each region and which vessels plan to participate in the fisheries. Vessels are selected based upon the schedule information provided.

With the exception of some lateness in the receipt of funding and the resulting delay in the award of a contract, the integration of MMPA observers and industry-funded observers in the domestic program has taken place as planned. The program has been implemented to meet NMFS objectives while also trying to be equitable in the distribution of the observers.

A third area of concern involves the sampling procedures utilized by observers. The questions concern how observers collect data in general and whether specific observers have correctly followed procedures on individual vessels. Many of these questions involve sampling by observers on longline vessels, estimation and handling of discards, and sampling for prohibited species bycatch. These questions and concerns are best resolved by addressing the questions directly to the program. Individual fishermen, vessel or plant owners, etc. are encouraged to bring their questions, concerns and comments to the program. Anyone having questions should contact Bob Maier (206-526-6695), Janet Wall (206-526-4195) or Russ Nelson (206-526-4194). This interaction is important to develop an understanding within the industry of how observers operate and to provide important feedback to NMFS on the problems with observers or the program observed by industry.

A fourth issue is the estimation of discard in the groundfish fishery. Catcher-processors and processors report amount of discards in their weekly reports. Observers also estimate the amount of discard in their weekly catch report. Preliminary comparisons of the two data sets show that the observer report of discard is greater than that reported by the vessels. A more thorough examination of these differences will be made. Additionally, a new procedure for estimating discards of groundfish and prohibited species bycatches is being developed and evaluated. The procedure utilizes data from observers and from industry.