

MEMORANDUM

TO: Council, SSC and AP Members

FROM: Chris Oliver   
Executive Director

ESTIMATED TIME 2 HOURS
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DATE: November 30, 2007

SUBJECT: Observer Program

**ACTION REQUIRED**

Initial review of Observer Program regulatory amendment package (RIR/IRFA)

**BACKGROUND**

The existing North Pacific Groundfish Observer Program (Observer Program), in place since 1990, establishes coverage levels for most vessels and processors based on vessel length and amount of groundfish processed, respectively. Vessels and processors contract directly with observer providers to procure observer services to meet the coverage levels in regulation. In the past several years, the Council, NMFS, and the Observer Advisory Committee (OAC) have been working to develop a new system for observer funding and deployment in the Observer Program. The concept previously proposed was often called 'observer restructuring.' In general, the program would be restructured such that NMFS would contract directly with observer providers for observer coverage, and this would be supported by a broad-based user fee and/or direct Federal funding. Concerns with the existing program arise from the inability of NMFS to determine when and where observers should be deployed, inflexible coverage levels established in regulation, disproportionate cost issues among the various fishing fleets, and the difficulty to respond to evolving data and management needs in individual fisheries.

The Council thus reviewed an amendment package in 2006, with alternatives intended to address a variety of longstanding issues associated with the existing system of observer procurement and deployment. As part of initial review in February 2006, NMFS presented a letter (**Item C-6(a)**) regarding observer compensation issues and the status of observers with regard to the requirements for overtime pay under the Fair Labor Standards Act (FLSA) and the Service Contract Act (SCA). This issue was brought to the forefront in a memo from Dr. Bill Hogarth in November 2003, which stated that NMFS maintains that fisheries observers are biological technicians and therefore eligible for overtime compensation under the FLSA. NMFS subsequently reaffirmed its position that observers employed by companies which contract directly with the agency or use Federal funds for provision of observer services must apply FLSA and SCA criteria to determine observer compensation requirements.<sup>1</sup>

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<sup>1</sup>Memo from Dr. William Hogarth to industry groups, November 29, 2005. At the same time, Dr. Hogarth also sent a letter to the DOL requesting an interpretation of the applicability of the SCA and FLSA to fisheries observers employed by observer service providers that are either under contract with or permitted by NMFS. This letter requests guidance in computing hours worked, geographical applicability, and the associated rules governing compensation of fisheries observers. Both letters are included in Appendix II of the analysis for Amendments 86/76.

The NMFS letter reviewed in February 2006 outlines ongoing concerns with not being able to provide a definitive assessment of observer costs under a new service delivery model at the time, due to uncertainty about the applicability of the SCA and FLSA. Costs may not be possible to assess until actual contracts between NMFS and observer providers are finalized. In addition, NMFS has not received a response from the Department of Labor on its request for clarification of the applicability of several FLSA provisions. The NMFS letter also outlined the type of increased costs expected under any alternative other than status quo, as well as the need to ensure that funds are available to cover costs associated with oversight and management of a flexible, effective observer program.

Also at the time of final action in June 2006, NOAA General Counsel, Alaska Region (GCAK) provided a preliminary determination that the Research Plan authority provided in the MSA (Section 313) to assess a fee for observer coverage could not be applied to only a subset of the vessels in the fisheries for which the Council and NMFS have the authority to establish a fee program. Therefore, all of the restructuring alternatives, which assessed different fees against different fisheries or sectors, were likely to require new statutory authorization.

Given the cost and statutory issues described above, at the time of final action in June 2006, the Council approved an extension of the current program, by removing the December 31, 2007 sunset date in existing regulations. This action was also recommended to the Council by NMFS and the OAC, given the need for continuing the program in the short-term and the lack of control over Congressional authority and cost issues. The final rule for this action was published on June 13, 2007 (72 FR 32559).

Also in June 2006, the Council recommended that a new amendment proposing restructuring alternatives for the Observer Program should be considered by the Council at such time that: (1) legislative authority is established for fee-based alternatives; (2) the FLSA issues are clarified (by statute, regulation, or guidance) such that it is possible to estimate costs associated with the fee-based alternatives; and/or (3) the Council requests reconsideration in response to changes in conditions cannot be anticipated at this time. Thus, the previous analysis of the restructuring alternatives was intended as a starting point for a future amendment.

Since final action in June 2006, the Magnuson-Stevens Act (MSA) was reauthorized (January 12, 2007). These amendments include changes to Section 313 which allow the Council and Secretary to prepare a fisheries research plan which establishes a system of fees which may vary by fishery, management area, or observer coverage level, to pay for the cost of implementing the plan. The MSA amendments also allow for a fee system to provide for the cost of electronic monitoring systems, as well as human observers. The revisions to Section 313 of the MSA are provided as **Item C-6(b)**.

Thus, while one of the criteria (statutory authority) the Council stated was necessary to meet in order to reconsider an amendment to restructure the Observer Program was provided through MSA reauthorization, the FLSA and cost issues remain unresolved. NMFS has not yet received a response from the Department of Labor on its request for clarification of the applicability of several FLSA provisions, nor have these issues been clarified by statute or regulation, significantly affecting staff's ability to estimate costs associated with a fee-based system. In April, the Council approved a motion to send another letter to Dr. Bill Hogarth, requesting a response from the Department of Labor on the FLSA issues, in order to make further progress on observer restructuring.

Given that the cost issues remain, in March, NMFS sent a letter recommending that the Council continue to set the restructuring amendment package aside, and focus its efforts on necessary changes to the existing Observer Program (**Item C-6(c)**). There are several relatively short-term type actions to change the existing Observer Program that NMFS believes need to occur regardless of observer restructuring; these have been proposed in one regulatory package. The Observer Advisory Committee met on May 21 – 22, and recommendations on the proposed changes and alternatives were provided at the June Council meeting.

The Council initiated this regulatory amendment at the June Council meeting, and initial review of the draft analysis (RIR/IRFA) is scheduled for this December meeting. The analysis is organized under seven different issues. It examines several alternatives to revise Federal regulations relevant to numerous administrative and procedural requirements applicable to observer providers, observers, and industry participating in the Observer Program. Specifically, the proposed actions would:

- Issue 1: Modify the current permit issuance process to reflect that observer and observer provider permit issuance is a discretionary NMFS decision.
- Issue 2: Amend current Federal regulations addressing observer behavior involving drugs, alcohol, and physical sexual conduct to remove NMFS oversight of observer behavior that does not affect job performance. Require that observer providers submit policies related to these activities and continue to notify NMFS upon learning of an incident. NOAA GC advises that current regulations are unenforceable, and/or outside the authority of NMFS.
- Issue 3: Clarify in Federal regulations that observer providers are allowed to provide observers or technical staff for purposes of exempted fishing permits, scientific research permits, or other scientific research activities.
- Issue 4: Revise the definition of "fishing day" in Federal regulations.
- Issue 5: Require observer providers to annually submit detailed economic information to NMFS.
- Issue 6: Specify a date by which observers who have collected data in the previous fishing year would be required to be available for debriefing.
- Issue 7: Implement housekeeping issues related to errors or clarifications in existing regulations at 50 CFR 679.50.

The analysis was sent to you on November 16 and the executive summary is attached as **Item C-6(d)**. Should the Council release the analysis for public review at this meeting, final action is tentatively scheduled for the April 2008 Council meeting.



AGENDA C-6(a)  
DECEMBER 2007  
**COMMERCE**  
**UNITED STATES DEPARTMENT OF**  
**National Oceanic and Atmospheric Administration**  
*National Marine Fisheries Service*  
P.O. Box 21668  
Juneau, Alaska 99802-1668  
January 22, 2006

Ms. Stephanie Madsen, Chair  
North Pacific Fishery Management Council  
605 West 4th Ave., Suite 306  
Anchorage, AK 99501-2252

Dear Madam Chair:

During the last several months, staff from the Alaska Regional Office, the Alaska Fisheries Science Center and the North Pacific Fishery Management Council (Council) have prepared an analysis of the five alternatives for restructuring the North Pacific Groundfish Observer Program (NPGOP) that were identified by the Council at its June 2005 meeting. This analysis will be presented to the Observer Advisory Committee (OAC) at its January 2006 meeting and carried forward to the Council for initial review at its February 2006 meeting in Seattle.

At the June 2005 meeting, some Council members and members of the public expressed concern that changes in the observer service delivery model which would occur under certain alternatives might result in increases in industry costs associated with observer labor. The Fair Labor Standards Act (FLSA) governs pay rate and overtime provisions of observer compensation of both current and future service delivery models. NOAA Fisheries Service has recently reaffirmed its position that observers employed by companies which contract directly with the agency or use federal funds for provision of observer services must apply FLSA and Service Contract Act (SCA) criteria to determine observer compensation requirements. These criteria are specified in federal labor regulations and include exemptions to the requirement to pay overtime for hours worked in excess of 40 hours per week. The exemption criteria include, among others, whether observers are paid on a salary or hourly basis, examination of their specific duties, responsibilities and education, and whether a collective bargaining agreement is in force.

Even though this reaffirmation by NOAA Fisheries Service addresses some of the concerns that were raised at the June 2005 Council meeting, we still are unable to provide a definitive assessment of observer costs under a new service delivery model. The applicability of some FLSA provisions and the actual number of hours worked by observers each day may not be determined until contracts between NOAA and observer providers are finalized. Furthermore, the Department of Labor (DOL) has yet to respond to a November 2005 NOAA Fisheries Service request to clarify uncertainties regarding classification of working and non-working hours, and verification of hours worked in an unsupervised environment. Initial feedback from DOL indicates that we may not receive a reply for several months, and that they may be unable to provide definitive answers to some of the labor-cost related questions.

Changes in industry costs associated with observer wages under different service delivery models are not the only costs warranting evaluation. The preliminary analysis presented to the Council at the June 2005 meeting identified some of the increased costs that would be incurred by NOAA Fisheries Service under alternatives other than status quo. These include:



- Costs of increased staffing for contract development, implementation and management;
- Additional staff that would be necessary to support the AFSC's more "hands-on" role in directing and adjusting observer coverage;
- Increased costs for the development and implementation of technological monitoring approaches and vessel specific monitoring plans (VMPs) also are expected, although these costs will occur even under the status quo alternative; and
- Increases in observer coverage that may be necessary to meet new fishery management program monitoring requirements and which would increase the AFSC's costs for observer training, briefing, debriefing and database management (and a range of other functions).

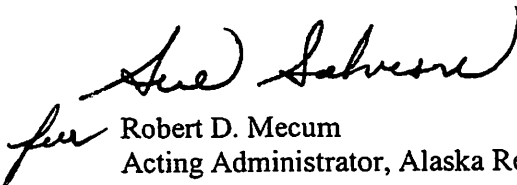
The magnitude of these increased costs depends on the design of the new monitoring system, the complexity and number of VMPs that are put in place and the overall increase in observer deployment days. However, at a minimum, salaries for new FTEs and operational costs would be required.

While agency and industry cost issues should be determined and resolved to the extent possible before restructuring can proceed, they are but one aspect of an effective restructuring program. To be most effective, restructuring alternatives must provide flexibility to adjust coverage levels in all sectors to optimize coverage relative to information needs, and encourage technological innovation when appropriate and cost effective. This requires us to take a more comprehensive approach to restructuring and to ensure that funds are available to cover costs associated with oversight and management of the observer program, as well as direct observer deployment costs.

At the January 2006 OAC meeting, we will discuss these issues with committee members and work towards developing new fisheries monitoring approaches for consideration by the Council. These approaches must recognize the need to constrain industry costs, provide funds necessary for NOAA Fisheries Service to operate the NPGOP, provide flexibility to optimize the benefits of observer coverage when resources are limited, and encourage appropriate use of video and other technologies for fishery monitoring.

We are hopeful that, through our collective efforts, we can build on the analytical work already completed and move forward to design and implement a comprehensive, flexible, and cost effective observation and monitoring system which will meet the needs for fishery-dependent information in the North Pacific groundfish fisheries for the foreseeable future. However, during the time period that the uncertainties outlined above remain unresolved, we recommend that the current structure of NPGOP be maintained and that the OAC and the Council consider Alternative 2 as the approach best suited to address current needs.

Sincerely,

  
for Robert D. Mecum  
Acting Administrator, Alaska Region

**SEC. 313. NORTH PACIFIC FISHERIES CONSERVATION 16 U.S.C. 1862**

104-297

**(a) IN GENERAL.--**The North Pacific Council may prepare, in consultation with the Secretary, a fisheries research plan for ~~all fisheries under the Council's jurisdiction except salmon fisheries and fishery under the Council's jurisdiction except a salmon fishery~~ **which--**

(1) requires that observers be stationed on fishing vessels engaged in the catching, taking, or harvesting of fish and on United States fish processors fishing for or processing species under the jurisdiction of the Council, including the Northern Pacific halibut fishery, for the purpose of collecting data necessary for the conservation, management, and scientific understanding of any fisheries under the Council's jurisdiction; and

(2) ~~establishes a system of fees to pay for the costs of implementing the plan. It establishes a system of system of fees, which may vary by fishery, management area, or observer coverage level, to pay for the cost of implementing the plan.~~

102-582

**(b) STANDARDS.--**

(1) Any plan or plan amendment prepared under this section shall be reasonably calculated to--

(A) gather reliable data, by stationing observers on all or a statistically reliable sample of the fishing vessels and United States fish processors included in the plan, necessary for the conservation, management, and scientific understanding of the fisheries covered by the plan;

(B) be fair and equitable to all vessels and processors;

(C) be consistent with applicable provisions of law; and

(D) take into consideration the operating requirements of the fisheries and the safety of observers and fishermen.

(2) Any system of fees established under this section shall--

(A) provide that the total amount of fees collected under this section not exceed the combined cost of (i) ~~stationing observers, or electronic monitoring systems,~~ on board fishing vessels and United States fish processors, (ii) the actual cost of inputting collected data, and (iii) assessments necessary for a risk-sharing pool implemented under subsection (e) of this section, less any amount received for such purpose from another source or from an existing surplus in the North Pacific Fishery Observer Fund established in subsection (d) of this section;

(B) be fair and equitable to all participants in the fisheries under the jurisdiction of the Council, including the Northern Pacific halibut fishery;

(C) provide that fees collected not be used to pay any costs of administrative overhead or other costs not directly incurred in carrying out the plan;

(D) not be used to offset amounts authorized under other provisions of law;

(E) be expressed as a fixed amount reflecting actual observer costs as described in subsection (A) or a percentage, not to exceed 2 percent, of the unprocessed ex-vessel value of the fish and shellfish harvested under the jurisdiction of the Council, including the Northern Pacific halibut fishery;

(F) be assessed against some or all fishing vessels and United States fish processors, including those not required to carry an observer or an electronic monitoring system under the plan, participating in fisheries under the jurisdiction of the Council, including the Northern Pacific halibut fishery;

(G) provide that fees collected will be deposited in the North Pacific Fishery Observer Fund established under subsection (d) of this section;

(H) provide that fees collected will only be used for implementing the plan established under this section;

~~(I) provide that fees collected will be credited against any fee for stationing observers or electronic monitoring systems on board fishing vessels and United States fish processors and the actual cost of inputting collected data to which a fishing vessel or fish processor is subject under Section 304(d) of this Act; and~~

(J) meet the requirements of section 9701(b) of title 31, United States Code.

**(c) ACTION BY SECRETARY.--**

(1) Within 60 days after receiving a plan or plan amendment from the North Pacific Council under this section, the Secretary shall review such plan or plan amendment and either (A) remand such plan or plan amendment to the Council with comments if it does not meet the requirements of this section, or (B) publish in the Federal Register proposed regulations for implementing such plan or plan amendment.

(2) During the 60-day public comment period, the Secretary shall conduct a public hearing in each State represented on the Council for the purpose of receiving public comments on the proposed regulations.

(3) Within 45 days of the close of the public comment period, the Secretary, in consultation with the Council, shall analyze the public comment received and publish final regulations for implementing such plan.

(4) If the Secretary remands a plan or plan amendment to the Council for failure to meet the requirements of this section, the Council may resubmit such plan or plan amendment at any time after taking action the Council believes will address the defects identified by the Secretary. Any plan or plan amendment resubmitted to the Secretary will be treated as an original plan submitted to the Secretary under paragraph (1) of this subsection.

**(d) FISHERY OBSERVER FUND.--**There is established in the Treasury a North Pacific Fishery Observer Fund. The Fund shall be available, without appropriation or fiscal year limitation, only to the Secretary for the purpose of carrying out the provisions of this section, subject to the restrictions in subsection (b)(2) of this section. The Fund shall consist of all monies deposited into it in accordance with this section. Sums in the Fund that are not currently needed for the purposes of this section shall be kept on deposit or invested in obligations of, or guaranteed by, the United States.

**(e) SPECIAL PROVISIONS REGARDING OBSERVERS.--**

(1) The Secretary shall review--

(A) the feasibility of establishing a risk sharing pool through a reasonable fee, subject to the limitations of subsection (b)(2)(E) of this section, to provide coverage for vessels and owners against liability from civil suits by observers, and

(B) the availability of comprehensive commercial insurance for vessel and owner liability against civil suits by observers.

(2) If the Secretary determines that a risk sharing pool is feasible, the Secretary shall establish such a pool, subject to the provisions of subsection (b)(2) of this section, unless the Secretary determines that--

(A) comprehensive commercial insurance is available for all fishing vessels and United States fish processors required to have observers under the provisions of this section, and

(B) such comprehensive commercial insurance will provide a greater measure of coverage at a lower cost to each participant.

**104-297**

**(f) BYCATCH REDUCTION.--**In implementing section 303(a)(11) and this section, the North Pacific Council shall submit conservation and management measures to lower, on an annual basis for a period of not less than four years, the total amount of economic discards occurring in the fisheries under its jurisdiction.

**104-297**

**(g) BYCATCH REDUCTION INCENTIVES.--**

(1) Notwithstanding section 304(d), the North Pacific Council may submit, and the Secretary may approve, consistent with the provisions of this Act, a system of fines in a fishery to provide incentives to reduce bycatch and bycatch rates; except that such fines shall not exceed \$25,000 per vessel per season. Any fines collected shall be deposited in the North Pacific Fishery Observer Fund, and may be made available by the Secretary to offset costs related to the reduction of bycatch in the fishery from which such fines were derived, including conservation and management measures and research, and to the State of Alaska to offset costs incurred by the State in the fishery from which such penalties were derived or in fisheries in which the State is directly involved in management or enforcement and which are directly affected by the fishery from which such penalties were derived.

(2) (A) Notwithstanding section 303(d), and in addition to the authority provided in section 303(b)(10), the North Pacific Council may submit, and the Secretary may approve, conservation and management measures which provide allocations of regulatory discards to individual fishing vessels as an incentive to reduce per vessel bycatch and bycatch rates in a fishery, *Provided, That--*

(i) such allocations may not be transferred for monetary consideration and are made only on an annual basis; and



(ii) any such conservation and management measures will meet the requirements of subsection (h) and will result in an actual reduction in regulatory discards in the fishery.

(B) The North Pacific Council may submit restrictions in addition to the restriction imposed by clause (i) of subparagraph (A) on the transferability of any such allocations, and the Secretary may approve such recommendation.

**104-297**

**(h) CATCH MEASUREMENT.--**

(1) By June 1, 1997 the North Pacific Council shall submit, and the Secretary may approve, consistent with the other provisions of this Act, conservation and management measures to ensure total catch measurement in each fishery under the jurisdiction of such Council. Such measures shall ensure the accurate enumeration, at a minimum, of target species, economic discards, and regulatory discards.

(2) To the extent the measures submitted under paragraph (1) do not require United States fish processors and fish processing vessels (as defined in chapter 21 of title 46, United States Code) to weigh fish, the North Pacific Council and the Secretary shall submit a plan to the Congress by January 1, 1998, to allow for weighing, including recommendations to assist such processors and processing vessels in acquiring necessary equipment, unless the Council determines that such weighing is not necessary to meet the requirements of this subsection.

**104-297**

**(i) FULL RETENTION AND UTILIZATION.--**

(1) The North Pacific Council shall submit to the Secretary by October 1, 1998 a report on the advisability of requiring the full retention by fishing vessels and full utilization by United States fish processors of economic discards in fisheries under its jurisdiction if such economic discards, or the mortality of such economic discards, cannot be avoided. The report shall address the projected impacts of such requirements on participants in the fishery and describe any full retention and full utilization requirements that have been implemented.

(2) The report shall address the advisability of measures to minimize processing waste, including standards setting minimum percentages which must be processed for human consumption. For the purpose of the report, 'processing waste' means that portion of any fish which is processed and which could be used for human consumption or other commercial use, but which is not so used.

**102-567**



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

March 12, 2007

Stephanie Madsen, Chair  
North Pacific Fishery Management Council  
605 West. 4<sup>th</sup> Avenue  
Anchorage, AK 99501-2252

Dear Madame <sup>Stephanie Madsen</sup> Chair:

At its March 2007 meeting, the North Pacific Fishery Management Council (Council) will consider changes to the regulations governing the North Pacific Groundfish Observer Program (NPGOP). The Council last discussed the NPGOP in June 2006, when they took action to extend the existing program. While recognizing that this action did not meet the majority of the issues identified in the underlying problem statement, the record notes that it did meet the short-term need of preventing the expiration of the observer program. The Council recognized that restructuring of the NPGOP would be necessary to fully address the problem statement. It was noted, however, that it would not be possible to initiate this process until the statutory authority necessary to implement any of the fee-based alternatives had been provided and outstanding questions on observer labor costs under direct NOAA contracts with observer providers had been answered. The statutory authority concern was resolved with the reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) in January 2007.

In an audit report dated March 2004, the Office of the Inspector General (OIG) recommended that:

“NOAA should work with the North Pacific Fishery Management Council to establish requirements for an observer program that includes a vessel selection process that produces random sampling of the fishery.”

In a memorandum dated January 29, 2007 (enclosed), NOAA's National Marine Fisheries Service (NMFS) responded to this recommendation as follows:

“..... NMFS now has the necessary tools and authority in place to implement a program less prone to selection bias, and it is now up to the North Pacific Fishery Management Council to approve one of these (2006 restructuring) alternatives.”

Consistent with this and earlier statements, NMFS continues to support its position that substantive data quality and operational issues facing NPGOP can only be properly addressed through restructuring the entire program and that this process should be initiated as soon as possible. We also recognize that the outstanding observer labor cost



questions must be answered before this process can begin. We continue to seek answers to these questions from the United States Department of Labor and we have initiated an internal process which will document labor costs associated with current direct NOAA contracts for observer services. It is our intent, therefore, to ensure that comprehensive observer cost information is available later this year in the event the Council decides to initiate a new NPGOP restructuring analysis later this year.

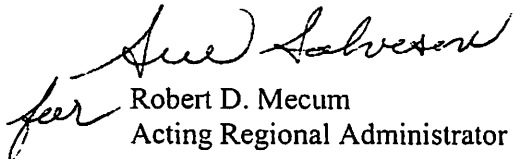
We expect that it would take several years to complete the restructuring process and, therefore, we seek the support of the Council to address several outstanding issues under the current program structure. These include:

- Changes to the observer certification/decertification appeal process
- Clarification on the use of certified observers as sea samplers under EFPs
- Clarification of fishing day definition
- Clarification of regulations governing observer behavior
- Miscellaneous housekeeping corrections and clarifications

A discussion paper detailing these topics will be distributed to Council members before the March meeting and staff will be present during the meeting to summarize the paper and respond to questions.

In summary, we seek the support of the Council to move forward on the above-mentioned issues at the March meeting. In the longer term, however, we wish to again emphasize the importance of restructuring the NPGOP.

Sincerely,

  
Robert D. Mecum  
Acting Regional Administrator

Enclosure



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL MARINE FISHERIES SERVICE  
131B East-West Highway  
Silver Spring, Maryland 20910  
THE DIRECTOR

JAN 29 2007

MEMORANDUM FOR: Mack Cato  
Director  
Audit, Internal Control, and Information Management

FROM:

*William T. Hogarth*  
William T. Hogarth, Ph.D.

SUBJECT:

Status Report on OIG Audit Recommendations –  
*OIG Report Final Audit Report No. IPE-15721/March 2004 NMFS  
Observer Programs Should Improve Data Quality, Performance  
Monitoring, and Outreach Efforts*

This memo describes the actions taken by NOAA's National Marine Fisheries Service (NMFS) to complete OIG Audit recommendations #1 and #9, due January 31, 2007. NMFS is requesting that both of these open recommendations be closed.

**Recommendation #1: The Assistant Administrator for Fisheries should develop and implement statistically valid, unbiased vessel selection procedures for observer programs with contractual relationships with observer providers and continually monitor the implementation to ensure that the vessel selection process is properly implemented.**

**Actions Taken:** NMFS conducted a national workshop on May 17–19, 2006, to evaluate vessel selection bias in 24 observer programs representing all six NMFS regions (see the attached *Report on the National Observer Program Vessel Selection Bias Workshop*). This workshop evaluated the procedures used by all observer programs to select vessels for observation, as well as procedures specific to individual regions. It examined the factors that could bias the estimates of catch and bycatch, and recommended improvements to program designs to reduce the bias. Some of the recommendations were national in scope and others were regional (see Tables 1-6a and 1-6b). The recommendations addressed the causes of bias in three broad categories: (1) errors in the sampling frame; (2) bias caused by how vessels within the sampling frame are selected for observation (i.e., observed vessels may not be representative of the general fleet); and (3) bias caused by changes in fishing behavior because of an observer's presence. The last category of bias is not directly related to the vessel selection method but was considered during the workshop because it applies to a sample of vessels.

A questionnaire was developed before the workshop to collect information about each regional fishery (see Appendix C-1 for questionnaire responses). This questionnaire covered the following topics:

- Observer program goals and objectives
- Description of the fishing fleet being observed
- Description of target and bycatch species
- Description of critical bycatch issues
- Available data sources to estimate total catch and bycatch
- Observer program design and sampling protocols

THE ASSISTANT ADMINISTRATOR  
FOR FISHERIES



- Statistical catch and bycatch estimation procedures
- Bias issues specific to each program, including
  - Sampling frame
  - Vessel and trip selection protocols
  - Spatial and temporal distribution of sampling
  - Bias in estimators

During the workshop, each regional observer program analyst provided an overview of these topics (see Appendix D-1 for presentations). This was the basis for evaluating bias in each regional observer program and for developing recommendations. The fisheries and sources of potential bias were diverse, but some general conclusions could be drawn about how to diagnose and reduce vessel selection bias.

NMFS will continue to monitor all regional observer programs for vessel selection bias. Each regional observer program will provide updates on problem areas to the National Observer Program Advisory Team (NOPAT) before each NOPAT meeting to continually monitor these actions and ensure that the vessel selection process is properly implemented.

**Recommendation #9: NOAA should work with the North Pacific Fishery Management Council to establish requirements for an observer program that includes a vessel selection process that produces random sampling of the fishery.**

**Actions Taken:** The North Pacific Groundfish Observer Program (NPGOP) was implemented in 1972 through industry funding, with fishing vessels contracting directly with observer service providers to obtain observer coverage. This service delivery model limited NMFS' ability to control the distribution of observer coverage and to implement random sampling of catch in many sectors of the fishery. The Magnuson-Stevens Fishery Conservation and Management Act of 1996 did not provide NMFS with sufficient flexibility to collect industry fees and issue a government contract establishing observer program requirements that include random sampling of catch throughout the fishery. However, Section 214 of the reauthorized Magnuson-Stevens Act, enacted in December 2006, now provides NOAA with enhanced authority to collect industry fees to pay for observer coverage. NMFS has worked with the North Pacific Fishery Management Council to develop and evaluate alternatives that can be implemented by the Council to restructure the NPGOP. These alternatives are: (1) restructured program for the Gulf of Alaska groundfish and all halibut fisheries operating throughout Alaska; (2) restructured program for all fisheries with observer coverage less than 100 percent; and (3) restructured program for all groundfish and halibut fisheries off Alaska. Under each alternative, NMFS would determine when and where to deploy observers based on data collection and monitoring needs, and would contract directly for observers using fee proceeds and/or direct federal funding. Therefore, NMFS now has the necessary tools and authority in place to implement a program less prone to selection bias, and it is now up to the North Pacific Fishery Management Council to approve one of these alternatives.

MAR. 8. 2007 11:19AM

SCIENCE&TECHNOLOGY

NO. 0921 P. 4

Cc: Gary Reisner, Brian Brown, Robert Ziobro, Neil Williams, Stephe Bost, Bonnie Ponwith, Lisa DesFosse.  
Stephen Brown

## EXECUTIVE SUMMARY

This Regulatory Impact Review (RIR) was prepared to meet the requirements of Presidential Executive Order 12866 for an evaluation of the benefits and costs, and of the significance, of a proposed Federal regulatory action. Analysts have also drafted an initial regulatory flexibility analysis (IRFA) to comply with the Regulatory Flexibility Act. The IRFA will be revised upon selection of a preferred alternative by the Council, in order to reflect the potential economic effects of the proposed action on directly regulated small entities.

The Council is considering amending Federal regulations relevant to numerous administrative, technical, and procedural requirements applicable to observer providers, observers, and industry participating in the North Pacific Groundfish Observer Program. Specifically, the proposed actions would:

- Modify the current permit issuance process so that observer and observer provider permit issuance is a discretionary NMFS decision.
- Amend current Federal regulations addressing observer behavior involving drugs, alcohol, and physical sexual conduct to remove NMFS oversight of observer behavior that does not affect job performance. Require that observer providers submit policies related to these activities and continue to notify NMFS upon learning of an incident. NOAA GC advises that current regulations are unenforceable, and/or outside the authority of NMFS.
- Clarify in Federal regulations that observer providers are allowed to provide observers or technical staff for purposes of exempted fishing permits, scientific research permits, or other scientific research activities.
- Revise the definition of “fishing day” in Federal regulations.
- Require observer observers to annually submit detailed economic information to NMFS.
- Specify a date by which observers who have collected data in the previous fishing year would be required to be available for debriefing.
- Implement housekeeping issues related to errors or clarifications in existing regulations at 50 CFR 679.50.

### Alternatives Considered

The following outlines the actions under consideration by the Council. Each of seven issues has associated proposed alternatives, some of which also contain options. Each issue represents a mutually exclusive decision point. As structured, the Council would ultimately select a preferred alternative under each of the seven separate issues.

#### **Issue 1. Observer certification and observer provider permitting appeals processes**

Alternative 1. No action. No change would be made to existing Federal regulations at 50 CFR 679.50(j)(1)(iv) that provide an appeals process to an observer candidate in the case that NMFS denies an observer candidate who failed training the opportunity to pursue further Alaska groundfish observer training. No change would be made to existing Federal regulations at 50 CFR 679.50(i)(1)(v) that provide an appeals process to an observer provider applicant in the case that NMFS denies an applicant an initial permit to become an observer provider.

Alternative 2. Remove the Federal regulations that provide an appeals process to an observer candidate in the case that NMFS denies an observer candidate initial certification and the opportunity to pursue further NMFS observer training. Remove the Federal regulations that provide an appeals process to an observer provider applicant in the case that NMFS denies an applicant an initial permit to become an

observer provider. (Note that this alternative does not affect the ability of observers and observer providers to appeal any decision to revoke or sanction a certification or permit that is already issued.)

**Issue 1, Alternative 1** (no action) would not change Federal regulations related to the observer certification and observer provider permitting appeals processes; thus, regulations would continue to provide an appeal opportunity to initial observer candidates and observer provider applicants. Alternative 1 would continue to require that NMFS provide staff resources to the appeals process for both observer candidates that fail training and are not allowed to retake training and applicants that are denied observer provider permits.

Allowing unsuccessful observer provider applicants to appeal an agency denial may increase the chance of a lower quality applicant entering the pool of certified observer providers. This is expected to have negative effects on NMFS, the fishing industry, current certified observer providers, and observers. However, future observer provider applicants trying to gain an observer provider permit may benefit from Alternative 1, as it would retain their ability to appeal any agency denials, thus increasing their chances of receiving a permit upon final resolution of the appeal.

The fishing industry that relies on high quality observer data would be negatively affected if a lower quality observer candidate is certified or a lower quality observer provider applicant is permitted. Alternative 1 would continue to limit NMFS' discretion as to whether to grant or deny an initial observer certification or observer provider permit, by requiring that an appeals process be provided in the case of denials.

**Issue 1, Alternative 2** would change Federal regulations to expand NMFS' discretion in whether to grant or deny an initial observer certification or observer provider permit. There is no statutory entitlement to receiving observer certification or an observer provider permit; thus, the granting or denial of observer certifications and observer provider permits are discretionary agency actions. NMFS discretion would be expanded two ways: 1) by revising regulations such that NMFS "may" grant a permit or certification rather than "will" grant a permit or certification; and 2) by establishing final agency action on the permit application as the point at which the observer program official issues a notice stating that the observer provider permit application is denied or that the observer candidate would not be permitted to re-enter the initial groundfish training course. Note that this alternative does not affect the ability of observers and observer providers to appeal any decision to revoke or sanction a certification or permit that is already issued. An observer or observer provider permit applicant who is denied a permit (although not entitled to a further NMFS review) could initiate an action against NMFS in a United States District Court.

Under Alternative 2, NMFS' role in granting observer certifications and observer provider permits would more clearly reflect the discretionary nature of these processes. NMFS would not have to apply limited staff resources to the appeals process when an observer certification or observer provider permit is denied. The change in observer certification processes would better serve NMFS' interest in having well-qualified observers monitoring the North Pacific groundfish fisheries.

## **Issue 2. Observer conduct**

**Alternative 1. No action.** No change would be made to existing Federal regulations that require that observers refrain from engaging in specified behaviors related to violating the drug and alcohol policy established by the Observer Program; engaging in illegal drug activities; or engaging in physical sexual contact with vessel or processing plant personnel (50 CFR 679.50(j)(2)(ii)(D)). NOAA GC advises that these regulations are unenforceable, and/or outside the authority of NMFS.



Alternative 2. Remove current Federal regulations at 50 CFR 679.50(j)(2)(ii)(D) that attempt to control observer behavior related to activities involving drugs, alcohol, and physical sexual contact, and remove references to the Observer Program's drug and alcohol policy in the regulations. Regulations would be revised to require each observer provider to have a policy addressing observer conduct and behavior, and current copies of each provider's policy would be required to be submitted to NMFS.

Option 1: Add a requirement under 679.50(i)(2)(x)(I)(5) to require observer providers to submit information to NMFS concerning allegations or reports regarding a breach of the observer provider's policy on observer conduct.<sup>1</sup> Notification of such information is required [24 hours, 48 hours, or 72 hours] after the provider becomes aware of the information.

**Issue 2, Alternative 1** (no action) would make no changes to the existing Federal regulations which govern observer conduct related to drugs, alcohol, and physical sexual contact. NOAA GC has advised that these regulations are unenforceable, and/or outside the authority of NMFS. In effect, there may not be a sufficient direct connection between the sanctioned behavior and the activity that NMFS has the statutory authority to regulate (i.e., the collection of statistically reliable fisheries data).

**Issue 2, Alternative 2** would remove current Federal regulations that attempt to control observer behavior related to activities involving drugs, alcohol, and physical sexual conduct and regulations that prohibit observers from engaging in any behavior that adversely affects the public's confidence in the integrity of the observer program or of the government. Further, regulations would be removed that prohibit observers from engaging in any illegal actions or other activities that would reflect negatively on their image as professional scientists, other observers, or the Observer Program as a whole. NMFS would discontinue the Observer Program's existing drug and alcohol policy, as a drug and alcohol policy would instead be the purview of each observer provider. Thus, references to the Observer Program's existing drug and alcohol policy would be removed from Federal regulations.

In effect, Alternative 2 would require each observer provider to have a policy addressing observer conduct and behavior, and current copies of each provider's policy would be required to be submitted to NMFS. However, NMFS would not formally evaluate and approve the submitted policies. The agency's role would be limited to ensuring that the observer providers had developed a policy. All of the existing permitted observer providers currently have standards of professional conduct in their contracts with observers, so expanding or maintaining these standards may involve a minimal amount of time and resources to implement. Alternative 2 would also require that observer providers submit information to NMFS on any allegations or reports of an observer's noncompliance with the observer provider's policy on observer conduct. Three options are provided to establish this notification period (24 hours, 48 hours, or 72 hours). Alternative 2 is intended to clarify the responsibilities between NMFS and observer providers, which may result in less confusion for observers if and when behavior issues arise. Submitting this information to NMFS would provide enforcement officials with additional information about potential MSA violations. It would also provide decertification officials information helpful in decertification proceedings. For example, if an observer had a drug or alcohol abuse issue, that information would be useful in determining whether an observer has a strong chance of rehabilitation, which would mitigate against a full decertification or loss of employment as an observer.

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<sup>1</sup>This notification requirement would mirror the current requirement at 679.50(i)(2)(x)(I)(5) that requires observer providers to submit information to NMFS concerning allegations or reports regarding observer conflict of interest or breach of the standards of behavior within 24 hours after the provider becomes aware of the information. Observer conflict of interest and standards of behavior provisions are at 679.50(j)(2)(i) and (j)(2)(ii), respectively

### **Issue 3. Observer providers' conflict of interest limitations regarding research and experimental permits**

Alternative 1. No action. No change would be made to existing Federal regulations, which are unclear as to whether observer providers may provide scientific data collectors<sup>2</sup> to aid in research activities, including exempted fishing permits, scientific research permits, or other research. Current practice is to allow these activities, but the existing regulations are ambiguous.

Alternative 2. Revise Federal regulations to clarify that observer providers may provide observers or scientific data collectors for purposes of exempted fishing permits, scientific research permits, or other scientific research activities. In this role, NMFS observer program regulations would apply to observers operating under their NMFS certification but would not apply to scientific data collectors<sup>3</sup>

**Issue 3, Alternative 1** (no action) would maintain the current regulations, which do not clarify whether observer providers are allowed to provide observers or scientific data collectors for research activities in Federal regulations. NMFS would likely continue to allow these activities without pursuing enforcement action. However, it is possible that NMFS Enforcement and NOAA GC could determine that observer providers are in violation of Federal regulations. If this occurs, researchers would likely have to obtain scientific data collectors from a different source. In addition, NMFS may not be able to require observers as a condition of a permit, and research may not be able to be conducted within the context of the normal groundfish fishery.

**Issue 3, Alternative 2** would clarify that, in addition to the provision of observer services for purposes of groundfish fisheries managed under the FMPs, observer providers could provide scientific staff for purposes of EFPs, SRPs, and other research activities. There would likely be minimal impacts resulting from Alternative 2, as current practice is to allow these activities, but all parties involved would understand an observer provider's role. Additionally, there would be no chance of enforcement actions as a result of these activities.

### **Issue 4. Fishing day definition**

Alternative 1. No action. The current definition of "fishing day" in Federal regulations allows vessel owners or operators to use any observer coverage incurred during a 24-hour period to count towards observer coverage requirements, which has resulted in vessels fishing and being observed in ways that are not representative of actual fishing behavior. No change would be made to existing Federal regulations at 50 CFR 679.2 which define "fishing day" as follows:

*Fishing day means to (for purposes of subpart E) a 24-hour period, from 0001 hours A.l.t. through 2400 hours A.l.t., in which fishing gear is retrieved and groundfish are retained. Days during which a vessel only delivers unsorted codends to a processor are not fishing days.*

Alternative 2. Revise the definition of "fishing day" in Federal regulations as follows:

*Fishing day means ~~to~~ (for purposes of subpart E) a 24-hour period, from 0001 hours A.l.t. through 2400 hours A.l.t., in which fishing gear is retrieved and groundfish are retained. An observer must be on board for all gear retrievals during the 24-hour period in order to count as*

<sup>2</sup> Note that NMFS has suggested a revision to this alternative. The word "employees" has been removed, and replaced with the words "scientific data collectors." This revision provides consistency with Alternative 2.

<sup>3</sup> Note that there are circumstances in which observers would be required to account for removals or the research is being conducted within the context of the normal fishery.

*a day of observer coverage. Days during which a vessel only delivers unsorted codends to a processor are not fishing days.*

Alternative 3. Establish regulations under 50 CFR 679.7 prohibiting activities that result in non-representative fishing behavior from counting toward an observer coverage day.

**Issue 4, Alternative 1** (no action) would not clarify 30 percent observer coverage requirements, which pertain to all catcher/processors and catcher vessels equal to or greater than 60 ft length overall (LOA), but less than 125 ft LOA. NOAA Enforcement has documented instances in which vessel operators intentionally structure fishing activities only for purposes of obtaining observer coverage. For example, a vessel may fish unobserved until late in the day, pick up an observer and make a short tow prior to midnight, make one more short tow immediately after midnight, and then return the observer to port. Under current regulations, this is interpreted as two "observer coverage" days. Under Alternative 1, vessels would likely continue to conduct non-representative fishing, specifically with the intent of meeting observer coverage requirements. Observers would continue to collect information on total catch, and that information likely would be used by NMFS to manage the groundfish fisheries.

**Issue 4, Alternative 2** would revise Federal regulations to require that affected vessels carry an observer for all fishing activities that occur during a 24-hour period for that fishing day to count as an observer coverage day. This would affect all catcher/processors and catcher vessels greater than or equal to 60 ft LOA, but less than 125 ft LOA that are subject to 30 percent observer coverage requirements. Alternative 2 would likely reduce instances in which vessels conduct fishing operations specifically to meet coverage requirements, and likely increase data quality for this sector. Alternative 2 would also likely increase costs for vessels in some cases, requiring them to carry observers longer than they would be required to under Alternative 1 (status quo). Alternatively, vessels could choose to postpone fishing (in the example described above) such that they do not retrieve hauls without an observer during a 24-hour period in which they also retrieved hauls with an observer, thus increasing trip length and costs. For these reasons, Alternative 2 may have some significant cost implications for industry.

**Issue 4, Alternative 3** would establish regulations that would prohibit activities that result in non-representative fishing behavior from counting toward an observer coverage day. NMFS' intent for Alternative 3 is to identify through analysis activities or behaviors that are specific to vessels exhibiting strategic behavior only to obtain observer coverage, and prohibit those activities. Staff identified several candidate behaviors that could be prohibited in regulation. However, two problems with this methodology were identified. First, differentiating between strategic behavior and the same activity resulting from normal fishing behavior is difficult. Of the candidate fishing behaviors that could be used to regulate strategic behavior, all could be explained by typical fishing operations. Second, for each candidate behavior that could be prohibited, staff determined that the regulatory fix could be circumvented and, in some cases, potentially exacerbate the problem.

**For these reasons, NMFS has determined that Alternative 3 would not be enforceable, and would not decrease instances of vessel captains fishing only to obtain required observer coverage. Therefore, NMFS does not recommend selection of Alternative 3.**

#### **Issue 5. Observer program cost information**

**Alternatives 2 and 3 are recommended to be revised slightly (as shown in the bold text below) from the Council's June 2007 recommendations, and Alternative 4 is recommended to be added. Justifications for these changes are summarized in Section 2.5.5.**

**Alternative 1.** No action. Observer providers would not be required to report various subcategories of costs to NMFS.

**Alternative 2.** Require observer providers to report annual costs to NMFS according to the following subcategories: labor, overhead, transportation, housing, food, and insurance. This information would be reported on an annual basis, broken out by BSAI versus GOA fisheries, and by shoreside, 30 percent, 100 percent, and 200 percent covered vessel/processor categories and gear type. ~~All mandatory cost information would be confidential information.~~

**Option 1:** Limit the mandatory economic data collection program to three years.

**Option 2:** Prohibit a person/entity that receives this confidential information on behalf of NMFS from being certified as an observer provider in the North Pacific.

**Alternative 3.** Require observer providers to report annual costs to NMFS ~~provide the total billing information from the invoices to industry (and amount of observer days~~ by GOA and BSAI subareas; shoreside, 30%, 100% and 200% covered vessel/processor categories; and gear type. ~~All mandatory cost information would be confidential information. Prohibit allowing a person/entity that receives this confidential information on behalf of NMFS from being certified as an observer provider in the North Pacific.~~

**Option 1:** Limit the mandatory economic data collection program to three years.

**Option 2:** Prohibit a person/entity that receives this confidential information on behalf of NMFS from being certified as an observer provider in the North Pacific.

**Alternative 4.** Require observer providers to submit copies of paid invoices to NMFS on a monthly basis. Invoices must contain the following information:

1. Name of each individual vessel or shore plant
2. Name of observer who worked aboard each vessel or at each shore plant
3. Dates of service for each observer on each vessel or at each shore plant (include and identify dates billed that are not coverage days)
4. Rate charged per day for observer services
5. Total observer services charge (number of days multiplied by daily rate)
6. Specified transportation costs (i.e. airline, taxi, bus, etc.)
7. Any specified "other" costs not included above (i.e. excess baggage, lodging, etc.)

**Option 1:** Limit the mandatory economic data collection program to three years.

**Option 2:** Prohibit a person/entity that receives this confidential information on behalf of NMFS from being certified as an observer provider in the North Pacific.

**Issue 5, Alternative 1** (no action) means that observer providers would not be required to report cost information to NMFS. As a result, NMFS would continue to lack sufficiently detailed information on the costs of observer services in order to inform baseline analyses of the industry-funded portion of the groundfish observer program. Analyses to support proposed regulatory changes would continue to rely on an average daily rate, multiplied by the number of observer days incurred by vessels and processors. Thus, NMFS and the Council would continue to make use of the best available data in the development of these analyses, recognizing the data limitations discussed below.

**Issue 5, Alternative 2** would require observer providers to report costs and other economic and socioeconomic information to NMFS by a specified date, according to various subcategories. The proposed subcategories of cost information include labor, overhead, transportation, housing, food, and insurance. The intent is that this information would be reported on an annual basis, broken out by BSAI versus GOA fisheries, and by 30 percent, 100 percent, and 200 percent covered vessel/processor categories and gear type. NMFS is not able to assess the various cost components of the existing groundfish observer program under the information currently required. Most if not all of the observer provider/vessel contracts submitted to NMFS provide only the daily rate for observer services (e.g., \$355/day). The proposed cost categories identify the specific types of information that could be collected to address common questions regarding the baseline costs of the existing program.

The primary benefit of this action is that this information would allow for a more accurate assessment of costs and benefits under potential program changes, which may benefit the groundfish observer program and the fisheries dependent upon observer data for management. The primary cost of this action would be the administrative costs incurred by the observer providers, in effect, the staff time and resources necessary to provide cost information on an annual basis. It is uncertain at this time whether the incremental cost of providing this additional information would represent a substantial cost to the observer providers.

This alternative includes two options. First, the alternative would include an option to limit the economic data collection program to three years. Second, it would include an alternative to prohibit a person or entity that receives confidential financial or business information from observer providers on behalf of NMFS from being permitted as an observer provider in the North Pacific. This second option is intended to address a situation where a person or entity could use confidential information to compete with current observer providers.

**Issue 5, Alternative 3** would require observer providers to provide the total costs to NMFS split out by GOA and BSAI subareas; vessel/processor coverage categories; and gear type on an annual basis. Compared to Alternative 2, Alternative 3 provides more generalized information. Alternative 3 would be less burdensome on observer providers than Alternative 2 and, therefore, would be less costly.

This alternative includes two options. First, the alternative would include an option to limit the economic data collection program to three years. Second, it would include an alternative to prohibit a person or entity that receives confidential financial or business information from observer providers on behalf of NMFS from being permitted as an observer provider in the North Pacific. This second option is intended to address a situation where a person or entity could use confidential information to compete with current observer providers.

**Issue 5, Alternative 4** would require observer providers to submit to NMFS copies of paid, standardized invoices containing specific information on a monthly basis. The intent of this alternative is to reduce the administrative burden and costs associated with calculating and reporting the costs associated with Alternatives 2 and 3. Under Alternative 4, observer providers would submit copies of their standardized paid billing invoices to NMFS, and NMFS would enter the raw information into a database for analytical use when needed. In addition to the benefits described for Alternatives 2 and 3, Alternative 4 has two main advantages. First, observer provider cost information could be verifiable by NMFS, increasing the overall data quality. Second, this approach to economic data collection allows increased flexibility in terms of data analysis.

Alternatives 2 – 4 include two options. First, each alternative includes an option to limit the economic data collection program to three years. Second, they include an option to prohibit a person or entity that receives confidential financial or business information from observer providers on behalf of NMFS from

being permitted as an observer provider in the North Pacific. This second option is intended to address a situation where a person or entity could use confidential information to compete with current observer providers.

#### **Issue 6. Completion of the fishing year**

**Note that NMFS recommends that this issue be removed from the analysis, as preliminary analysis indicates the cost increase and/or imposition upon the industry, observer providers, and observers is not warranted. See Section 2.5.6 for discussion.**

Alternative 1. No action. No change would be made to existing Federal regulations allowing observer deployments to span two different fishing years and last for up to 90 days.

Alternative 2. Revise regulations to require that observers who collect fishing data in one fishing year during a deployment that extends into a second fishing year return from sea and be available for debriefing by February 28 of the second fishing year.

**Issue 6, Alternative 1** (no action) would not change existing regulations to require observers who collected fishing data over a span of two different years to return from sea and be available for debriefing by a specified date. In effect, this alternative allows for the potential to delay completion of the observer annual data set for the first year until all observers have returned and debriefed. Under current regulations, an observer can be deployed for up to 90 days, meaning the maximum deployment could last through late March of the second year. This means that the completed data would not be available to end users working on a variety of analytical documents until the observer returns.

**Issue 6, Alternative 2** would require that observers who collected fishing data over a span of two different years would be required to return from sea and be available for debriefing by February 28 of the second year. Those observers whose cruises span two different fishing years would be impacted by this action. Alternative 2 would likely increase observer provider costs because the efficiency of each deployment that spans two different years would be reduced and fishing industry costs could increase to the extent observer provider costs are incorporated into billable costs. Using the last fishing day as the cut-off, 7 observer deployments would have needed to be truncated in 2006. The actual impact is difficult to predict because it would depend on the composition of the observer providers' clients and the duration of the trips they take.

This action was proposed due to the potential benefit to NMFS and the clients to which it provides observer information, as it would provide a date certain whereby observers would need to return from sea for debriefing, allowing consistency in the completion of the final annual data set. However, in July 2007, NMFS further consulted with the primary internal agency users of observer information to determine if their needs warrant consideration of this action. These consultations were conducted due to preliminary discussions with both the OAC and the Council that the proposed action (Alternative 2) would potentially increase indirect costs to industry (shorten trips) with limited direct benefits. Upon review, while there is interest in obtaining a final observer dataset earlier in the year, there are no compelling analytical requirements that warrant a change to the status quo. **Thus, NMFS recommends that this issue be removed from the analysis, as the cost increase or imposition upon the industry, observer providers, or observers is not warranted.**

#### **Issue 7. Miscellaneous modifications**

Alternative 1. No action. Do not revise existing Federal regulations to address inaccuracies or housekeeping issues.

Alternative 2. Revise existing Federal regulations related to observer program operational issues as follows:

- a. Regulations at § 679.50(c)(5)(i)(A) incorrectly reference a workload restriction at (c)(5)(iii). Replace (c)(5)(iii) with the correct reference at (c)(5)(ii).
- b. Regulations at § 679.50 currently require observer providers to submit to NMFS each type of contract they have entered into with observers or industry. There is no deadline for submission of this information, although most providers currently operate as if there is an annual deadline for all submitted information. Establish a February 1 deadline for annual submissions of this information, which is consistent with the deadline for copies of 'certificates of insurance.'
- c. Update the NMFS Alaska Fisheries Science Center, Fisheries Monitoring and Analysis Division website address throughout 50 CFR 679.50.

**Issue 7, Alternative 1** would not revise existing Federal regulations to address inaccuracies or housekeeping issues.

**Issue 7, Alternative 2** would revise existing Federal regulations related to observer program operational issues. Three changes are proposed, which would serve to correct technical inaccuracies or clarify current regulations. Effects are expected to be none to minimal.

#### Implementation and enforcement issues

The following enforcement and monitoring issues should be considered when selecting a final preferred alternative:

- Removing the appeals process associated with initial observer certification and observer provider permitting would allow for significant staff resource reallocations towards necessary program functions (Issue 1, Alternative 2)
- Placing the burden associated with regulating observer conduct on observer providers, rather than NMFS, would allow for significant agency staff resource reallocations towards necessary program functions (Issue 2, Alternative 2).
- Prohibiting non-representative fishing behavior would likely result in additional NMFS enforcement costs (Issue 4, Alternative 3).
- Requiring observer providers to report cost information would require development and maintenance of a reporting and database system (Issue 5, Alternatives 2, 3, and 4).
- Issue 3 (Alternative 2), Issue 4 (Alternative 2), Issue 6 (Alternative 2), and Issue 7 (Alternative 2) would not result in any implementation or enforcement issues, and minimal costs.

## Initial Review Draft

# Regulatory Impact Review/Initial Regulatory Flexibility Analysis for a Regulatory Amendment to Revise Administrative and Procedural Aspects of the North Pacific Groundfish Observer Program

**Date:** November 15, 2007

**Lead Agency:** National Marine Fisheries Service  
P. O. Box 21668  
Juneau, Alaska 99802

**Responsible Official:** Doug Mecum, Acting Alaska Regional Administrator

**Abstract:** This analysis examines several alternatives to revise Federal regulations relevant to numerous administrative and procedural requirements applicable to observer providers, observers, and industry participating in the North Pacific Groundfish Observer Program. Specifically, the proposed actions would:

- Modify the current permit issuance process to reflect that observer and observer provider permit issuance is a discretionary NMFS decision.
- Amend current Federal regulations addressing observer behavior involving drugs, alcohol, and physical sexual conduct to remove NMFS oversight of observer behavior that does not affect job performance. Require that observer providers submit policies related to these activities and continue to notify NMFS upon learning of an incident. NOAA GC advises that current regulations are unenforceable, and/or outside the authority of NMFS.
- Clarify in Federal regulations so that observer providers are allowed to provide observers or technical staff for purposes of exempted fishing permits, scientific research permits, or other scientific research activities.
- Revise the definition of "fishing day" in Federal regulations.
- Require observer providers to annually submit detailed economic information to NMFS.
- Specify a date by which observers who have collected data in the previous fishing year would be required to be available for debriefing.
- Implement housekeeping issues related to errors or clarifications in existing regulations at 50 CFR 679.50.

This action is not expected to result in a "significant action," as defined in Executive Order 12866, or result in adverse impacts on directly regulated small entities, as defined in the Regulatory Flexibility Act. An initial regulatory flexibility analysis is included in this regulatory package; this analysis will be revised to focus on the preferred alternative(s) once selected.

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## ABBREVIATIONS & ACRONYMS

BSAI	Bering Sea and Aleutian Islands
CEY	Constant Exploitation Yield
E.O.	Presidential Executive Order
EEZ	Exclusive Economic Zone
GOA	Gulf of Alaska
IPHC	International Pacific Halibut Commission
IRFA	Initial Regulatory Flexibility Analysis
lb	Pounds
M	Million
MSA	Magnuson Stevens Fishery Conservation and Management Act
mt	metric ton
NMFS	National Marine Fisheries Service
NOAA GC	National Oceanic and Atmospheric Administration General Counsel
NPFMC	North Pacific Fishery Management Council
NPGOP	North Pacific Groundfish Observer Program
OAC	Observer Advisory Committee
OMB	Office of Management and Budget
RFA	Regulatory Flexibility Act
RIR	Regulatory Impact Review
SBA	U.S. Small Business Administration

## EXECUTIVE SUMMARY

This Regulatory Impact Review (RIR) was prepared to meet the requirements of Presidential Executive Order 12866 for an evaluation of the benefits and costs, and of the significance, of a proposed Federal regulatory action. Analysts have also drafted an initial regulatory flexibility analysis (IRFA) to comply with the Regulatory Flexibility Act. The IRFA will be revised upon selection of a preferred alternative by the Council, in order to reflect the potential economic effects of the proposed action on directly regulated small entities.

The Council is considering amending Federal regulations relevant to numerous administrative, technical, and procedural requirements applicable to observer providers, observers, and industry participating in the North Pacific Groundfish Observer Program. Specifically, the proposed actions would:

- Modify the current permit issuance process so that observer and observer provider permit issuance is a discretionary NMFS decision.
- Amend current Federal regulations addressing observer behavior involving drugs, alcohol, and physical sexual conduct to remove NMFS oversight of observer behavior that does not affect job performance. Require that observer providers submit policies related to these activities and continue to notify NMFS upon learning of an incident. NOAA GC advises that current regulations are unenforceable, and/or outside the authority of NMFS.
- Clarify in Federal regulations that observer providers are allowed to provide observers or technical staff for purposes of exempted fishing permits, scientific research permits, or other scientific research activities.
- Revise the definition of “fishing day” in Federal regulations.
- Require observer observers to annually submit detailed economic information to NMFS.
- Specify a date by which observers who have collected data in the previous fishing year would be required to be available for debriefing.
- Implement housekeeping issues related to errors or clarifications in existing regulations at 50 CFR 679.50.

### Alternatives Considered

The following outlines the actions under consideration by the Council. Each of seven issues has associated proposed alternatives, some of which also contain options. Each issue represents a mutually exclusive decision point. As structured, the Council would ultimately select a preferred alternative under each of the seven separate issues.

#### **Issue 1. Observer certification and observer provider permitting appeals processes**

Alternative 1. No action. No change would be made to existing Federal regulations at 50 CFR 679.50(j)(1)(iv) that provide an appeals process to an observer candidate in the case that NMFS denies an observer candidate who failed training the opportunity to pursue further Alaska groundfish observer training. No change would be made to existing Federal regulations at 50 CFR 679.50(i)(1)(v) that provide an appeals process to an observer provider applicant in the case that NMFS denies an applicant an initial permit to become an observer provider.

Alternative 2. Remove the Federal regulations that provide an appeals process to an observer candidate in the case that NMFS denies an observer candidate initial certification and the opportunity to pursue further NMFS observer training. Remove the Federal regulations that provide an appeals process to an observer provider applicant in the case that NMFS denies an applicant an initial permit to become an

observer provider. (Note that this alternative does not affect the ability of observers and observer providers to appeal any decision to revoke or sanction a certification or permit that is already issued.)

**Issue 1, Alternative 1** (no action) would not change Federal regulations related to the observer certification and observer provider permitting appeals processes; thus, regulations would continue to provide an appeal opportunity to initial observer candidates and observer provider applicants. Alternative 1 would continue to require that NMFS provide staff resources to the appeals process for both observer candidates that fail training and are not allowed to retake training and applicants that are denied observer provider permits.

Allowing unsuccessful observer provider applicants to appeal an agency denial may increase the chance of a lower quality applicant entering the pool of certified observer providers. This is expected to have negative effects on NMFS, the fishing industry, current certified observer providers, and observers. However, future observer provider applicants trying to gain an observer provider permit may benefit from Alternative 1, as it would retain their ability to appeal any agency denials, thus increasing their chances of receiving a permit upon final resolution of the appeal.

The fishing industry that relies on high quality observer data would be negatively affected if a lower quality observer candidate is certified or a lower quality observer provider applicant is permitted. Alternative 1 would continue to limit NMFS' discretion as to whether to grant or deny an initial observer certification or observer provider permit, by requiring that an appeals process be provided in the case of denials.

**Issue 1, Alternative 2** would change Federal regulations to expand NMFS' discretion in whether to grant or deny an initial observer certification or observer provider permit. There is no statutory entitlement to receiving observer certification or an observer provider permit; thus, the granting or denial of observer certifications and observer provider permits are discretionary agency actions. NMFS discretion would be expanded two ways: 1) by revising regulations such that NMFS "may" grant a permit or certification rather than "will" grant a permit or certification; and 2) by establishing final agency action on the permit application as the point at which the observer program official issues a notice stating that the observer provider permit application is denied or that the observer candidate would not be permitted to re-enter the initial groundfish training course. Note that this alternative does not affect the ability of observers and observer providers to appeal any decision to revoke or sanction a certification or permit that is already issued. An observer or observer provider permit applicant who is denied a permit (although not entitled to a further NMFS review) could initiate an action against NMFS in a United States District Court.

Under Alternative 2, NMFS' role in granting observer certifications and observer provider permits would more clearly reflect the discretionary nature of these processes. NMFS would not have to apply limited staff resources to the appeals process when an observer certification or observer provider permit is denied. The change in observer certification processes would better serve NMFS' interest in having well-qualified observers monitoring the North Pacific groundfish fisheries.

## **Issue 2. Observer conduct**

**Alternative 1.** No action. No change would be made to existing Federal regulations that require that observers refrain from engaging in specified behaviors related to violating the drug and alcohol policy established by the Observer Program; engaging in illegal drug activities; or engaging in physical sexual contact with vessel or processing plant personnel (50 CFR 679.50(j)(2)(ii)(D)). NOAA GC advises that these regulations are unenforceable, and/or outside the authority of NMFS.

Alternative 2. Remove current Federal regulations at 50 CFR 679.50(j)(2)(ii)(D) that attempt to control observer behavior related to activities involving drugs, alcohol, and physical sexual contact, and remove references to the Observer Program's drug and alcohol policy in the regulations. Regulations would be revised to require each observer provider to have a policy addressing observer conduct and behavior, and current copies of each provider's policy would be required to be submitted to NMFS.

Option 1: Add a requirement under 679.50(i)(2)(x)(I)(5) to require observer providers to submit information to NMFS concerning allegations or reports regarding a breach of the observer provider's policy on observer conduct.<sup>1</sup> Notification of such information is required [24 hours, 48 hours, or 72 hours] after the provider becomes aware of the information.

**Issue 2, Alternative 1** (no action) would make no changes to the existing Federal regulations which govern observer conduct related to drugs, alcohol, and physical sexual contact. NOAA GC has advised that these regulations are unenforceable, and/or outside the authority of NMFS. In effect, there may not be a sufficient direct connection between the sanctioned behavior and the activity that NMFS has the statutory authority to regulate (i.e., the collection of statistically reliable fisheries data).

**Issue 2, Alternative 2** would remove current Federal regulations that attempt to control observer behavior related to activities involving drugs, alcohol, and physical sexual conduct and regulations that prohibit observers from engaging in any behavior that adversely affects the public's confidence in the integrity of the observer program or of the government. Further, regulations would be removed that prohibit observers from engaging in any illegal actions or other activities that would reflect negatively on their image as professional scientists, other observers, or the Observer Program as a whole. NMFS would discontinue the Observer Program's existing drug and alcohol policy, as a drug and alcohol policy would instead be the purview of each observer provider. Thus, references to the Observer Program's existing drug and alcohol policy would be removed from Federal regulations.

In effect, Alternative 2 would require each observer provider to have a policy addressing observer conduct and behavior, and current copies of each provider's policy would be required to be submitted to NMFS. However, NMFS would not formally evaluate and approve the submitted policies. The agency's role would be limited to ensuring that the observer providers had developed a policy. All of the existing permitted observer providers currently have standards of professional conduct in their contracts with observers, so expanding or maintaining these standards may involve a minimal amount of time and resources to implement. Alternative 2 would also require that observer providers submit information to NMFS on any allegations or reports of an observer's noncompliance with the observer provider's policy on observer conduct. Three options are provided to establish this notification period (24 hours, 48 hours, or 72 hours). Alternative 2 is intended to clarify the responsibilities between NMFS and observer providers, which may result in less confusion for observers if and when behavior issues arise. Submitting this information to NMFS would provide enforcement officials with additional information about potential MSA violations. It would also provide decertification officials information helpful in decertification proceedings. For example, if an observer had a drug or alcohol abuse issue, that information would be useful in determining whether an observer has a strong chance of rehabilitation, which would mitigate against a full decertification of loss of employment as an observer.

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<sup>1</sup>This notification requirement would mirror the current requirement at 679.50(i)(2)(x)(I)(5) that requires observer providers to submit information to NMFS concerning allegations or reports regarding observer conflict of interest or breach of the standards of behavior within 24 hours after the provider becomes aware of the information. Observer conflict of interest and standards of behavior provisions are at 679.50(j)(2)(i) and (j)(2)(ii), respectively



**Issue 3. Observer providers' conflict of interest limitations regarding research and experimental permits**

Alternative 1. No action. No change would be made to existing Federal regulations, which are unclear as to whether observer providers may provide scientific data collectors<sup>2</sup> to aid in research activities, including exempted fishing permits, scientific research permits, or other research. Current practice is to allow these activities, but the existing regulations are ambiguous.

Alternative 2. Revise Federal regulations to clarify that observer providers may provide observers or scientific data collectors for purposes of exempted fishing permits, scientific research permits, or other scientific research activities. In this role, NMFS observer program regulations would apply to observers operating under their NMFS certification but would not apply to scientific data collectors<sup>3</sup>

**Issue 3, Alternative 1** (no action) would maintain the current regulations, which do not clarify whether observer providers are allowed to provide observers or scientific data collectors for research activities in Federal regulations. NMFS would likely continue to allow these activities without pursuing enforcement action. However, it is possible that NMFS Enforcement and NOAA GC could determine that observer providers are in violation of Federal regulations. If this occurs, researchers would likely have to obtain scientific data collectors from a different source. In addition, NMFS may not be able to require observers as a condition of a permit, and research may not be able to be conducted within the context of the normal groundfish fishery.

**Issue 3, Alternative 2** would clarify that, in addition to the provision of observer services for purposes of groundfish fisheries managed under the FMPs, observer providers could provide scientific staff for purposes of EFPs, SRPs, and other research activities. There would likely be minimal impacts resulting from Alternative 2, as current practice is to allow these activities, but all parties involved would understand an observer provider's role. Additionally, there would be no chance of enforcement actions as a result of these activities.

**Issue 4. Fishing day definition**

Alternative 1. No action. The current definition of "fishing day" in Federal regulations allows vessel owners or operators to use any observer coverage incurred during a 24-hour period to count towards observer coverage requirements, which has resulted in vessels fishing and being observed in ways that are not representative of actual fishing behavior. No change would be made to existing Federal regulations at 50 CFR 679.2 which define "fishing day" as follows:

*Fishing day means to (for purposes of subpart E) a 24-hour period, from 0001 hours A.l.t. through 2400 hours A.l.t., in which fishing gear is retrieved and groundfish are retained. Days during which a vessel only delivers unsorted codends to a processor are not fishing days.*

Alternative 2. Revise the definition of "fishing day" in Federal regulations as follows:

*Fishing day means ~~to~~ (for purposes of subpart E) a 24-hour period, from 0001 hours A.l.t. through 2400 hours A.l.t., in which fishing gear is retrieved and groundfish are retained. An observer must be on board for all gear retrievals during the 24-hour period in order to count as*

<sup>2</sup> Note that NMFS has suggested a revision to this alternative. The word "employees" has been removed, and replaced with the words "scientific data collectors." This revision provides consistency with Alternative 2.

<sup>3</sup> Note that there are circumstances in which observers would be required to account for removals or the research is being conducted within the context of the normal fishery.

*a day of observer coverage. Days during which a vessel only delivers unsorted codends to a processor are not fishing days.*

Alternative 3. Establish regulations under 50 CFR 679.7 prohibiting activities that result in non-representative fishing behavior from counting toward an observer coverage day.

**Issue 4, Alternative 1** (no action) would not clarify 30 percent observer coverage requirements, which pertain to all catcher/processors and catcher vessels equal to or greater than 60 ft length overall (LOA), but less than 125 ft LOA. NOAA Enforcement has documented instances in which vessel operators intentionally structure fishing activities only for purposes of obtaining observer coverage. For example, a vessel may fish unobserved until late in the day, pick up an observer and make a short tow prior to midnight, make one more short tow immediately after midnight, and then return the observer to port. Under current regulations, this is interpreted as two “observer coverage” days. Under Alternative 1, vessels would likely continue to conduct non-representative fishing, specifically with the intent of meeting observer coverage requirements. Observers would continue to collect information on total catch, and that information likely would be used by NMFS to manage the groundfish fisheries.

**Issue 4, Alternative 2** would revise Federal regulations to require that affected vessels carry an observer for all fishing activities that occur during a 24-hour period for that fishing day to count as an observer coverage day. This would affect all catcher/processors and catcher vessels greater than or equal to 60 ft LOA, but less than 125 ft LOA that are subject to 30 percent observer coverage requirements. Alternative 2 would likely reduce instances in which vessels conduct fishing operations specifically to meet coverage requirements, and likely increase data quality for this sector. Alternative 2 would also likely increase costs for vessels in some cases, requiring them to carry observers longer than they would be required to under Alternative 1 (status quo). Alternatively, vessels could choose to postpone fishing (in the example described above) such that they do not retrieve hauls without an observer during a 24-hour period in which they also retrieved hauls with an observer, thus increasing trip length and costs. For these reasons, Alternative 2 may have some significant cost implications for industry.

**Issue 4, Alternative 3** would establish regulations that would prohibit activities that result in non-representative fishing behavior from counting toward an observer coverage day. NMFS’ intent for Alternative 3 is to identify through analysis activities or behaviors that are specific to vessels exhibiting strategic behavior only to obtain observer coverage, and prohibit those activities. Staff identified several candidate behaviors that could be prohibited in regulation. However, two problems with this methodology were identified. First, differentiating between strategic behavior and the same activity resulting from normal fishing behavior is difficult. Of the candidate fishing behaviors that could be used to regulate strategic behavior, all could be explained by typical fishing operations. Second, for each candidate behavior that could be prohibited, staff determined that the regulatory fix could be circumvented and, in some cases, potentially exacerbate the problem.

**For these reasons, NMFS has determined that Alternative 3 would not be enforceable, and would not decrease instances of vessel captains fishing only to obtain required observer coverage. Therefore, NMFS does not recommend selection of Alternative 3.**

#### **Issue 5. Observer program cost information**

**Alternatives 2 and 3 are recommended to be revised slightly (as shown in the bold text below) from the Council’s June 2007 recommendations, and Alternative 4 is recommended to be added. Justifications for these changes are summarized in Section 2.5.5.**

**Alternative 1.** No action. Observer providers would not be required to report various subcategories of costs to NMFS.

**Alternative 2.** Require observer providers to report annual costs to NMFS according to the following subcategories: labor, overhead, transportation, housing, food, and insurance. This information would be reported on an annual basis, broken out by BSAI versus GOA fisheries, and by shoreside, 30 percent, 100 percent, and 200 percent covered vessel/processor categories and gear type. ~~All mandatory cost information would be confidential information.~~

**Option 1:** Limit the mandatory economic data collection program to three years.

**Option 2:** Prohibit a person/entity that receives this confidential information on behalf of NMFS from being certified as an observer provider in the North Pacific.

**Alternative 3.** Require observer providers to report annual costs to NMFS ~~provide the total billing information from the invoices to industry (and amount of observer days~~ by GOA and BSAI subareas; shoreside, 30%, 100% and 200% covered vessel/processor categories; and gear type. ~~All mandatory cost information would be confidential information. Prohibit allowing a person/entity that receives this confidential information on behalf of NMFS from being certified as an observer provider in the North Pacific.~~

**Option 1:** Limit the mandatory economic data collection program to three years.

**Option 2:** Prohibit a person/entity that receives this confidential information on behalf of NMFS from being certified as an observer provider in the North Pacific.

**Alternative 4.** Require observer providers to submit copies of paid invoices to NMFS on a monthly basis. Invoices must contain the following information:

1. Name of each individual vessel or shore plant
2. Name of observer who worked aboard each vessel or at each shore plant
3. Dates of service for each observer on each vessel or at each shore plant (include and identify dates billed that are not coverage days)
4. Rate charged per day for observer services
5. Total observer services charge (number of days multiplied by daily rate)
6. Specified transportation costs (i.e. airline, taxi, bus, etc.)
7. Any specified "other" costs not included above (i.e. excess baggage, lodging, etc.)

**Option 1:** Limit the mandatory economic data collection program to three years.

**Option 2:** Prohibit a person/entity that receives this confidential information on behalf of NMFS from being certified as an observer provider in the North Pacific.

**Issue 5, Alternative 1** (no action) means that observer providers would not be required to report cost information to NMFS. As a result, NMFS would continue to lack sufficiently detailed information on the costs of observer services in order to inform baseline analyses of the industry-funded portion of the groundfish observer program. Analyses to support proposed regulatory changes would continue to rely on an average daily rate, multiplied by the number of observer days incurred by vessels and processors. Thus, NMFS and the Council would continue to make use of the best available data in the development of these analyses, recognizing the data limitations discussed below.

**Issue 5, Alternative 2** would require observer providers to report costs and other economic and socioeconomic information to NMFS by a specified date, according to various subcategories. The proposed subcategories of cost information include labor, overhead, transportation, housing, food, and insurance. The intent is that this information would be reported on an annual basis, broken out by BSAI versus GOA fisheries, and by 30 percent, 100 percent, and 200 percent covered vessel/processor categories and gear type. NMFS is not able to assess the various cost components of the existing groundfish observer program under the information currently required. Most if not all of the observer provider/vessel contracts submitted to NMFS provide only the daily rate for observer services (e.g., \$355/day). The proposed cost categories identify the specific types of information that could be collected to address common questions regarding the baseline costs of the existing program.

The primary benefit of this action is that this information would allow for a more accurate assessment of costs and benefits under potential program changes, which may benefit the groundfish observer program and the fisheries dependent upon observer data for management. The primary cost of this action would be the administrative costs incurred by the observer providers, in effect, the staff time and resources necessary to provide cost information on an annual basis. It is uncertain at this time whether the incremental cost of providing this additional information would represent a substantial cost to the observer providers.

This alternative includes two options. First, the alternative would include an option to limit the economic data collection program to three years. Second, it would include an alternative to prohibit a person or entity that receives confidential financial or business information from observer providers on behalf of NMFS from being permitted as an observer provider in the North Pacific. This second option is intended to address a situation where a person or entity could use confidential information to compete with current observer providers.

**Issue 5, Alternative 3** would require observer providers to provide the total costs to NMFS split out by GOA and BSAI subareas; vessel/processor coverage categories; and gear type on an annual basis. Compared to Alternative 2, Alternative 3 provides more generalized information. Alternative 3 would be less burdensome on observer providers than Alternative 2 and, therefore, would be less costly.

This alternative includes two options. First, the alternative would include an option to limit the economic data collection program to three years. Second, it would include an alternative to prohibit a person or entity that receives confidential financial or business information from observer providers on behalf of NMFS from being permitted as an observer provider in the North Pacific. This second option is intended to address a situation where a person or entity could use confidential information to compete with current observer providers.

**Issue 5, Alternative 4** would require observer providers to submit to NMFS copies of paid, standardized invoices containing specific information on a monthly basis. The intent of this alternative is to reduce the administrative burden and costs associated with calculating and reporting the costs associated with Alternatives 2 and 3. Under Alternative 4, observer providers would submit copies of their standardized paid billing invoices to NMFS, and NMFS would enter the raw information into a database for analytical use when needed. In addition to the benefits described for Alternatives 2 and 3, Alternative 4 has two main advantages. First, observer provider cost information could be verifiable by NMFS, increasing the overall data quality. Second, this approach to economic data collection allows increased flexibility in terms of data analysis.

Alternatives 2 – 4 include two options. First, each alternative includes an option to limit the economic data collection program to three years. Second, they include an option to prohibit a person or entity that receives confidential financial or business information from observer providers on behalf of NMFS from

being permitted as an observer provider in the North Pacific. This second option is intended to address a situation where a person or entity could use confidential information to compete with current observer providers.

#### **Issue 6. Completion of the fishing year**

**Note that NMFS recommends that this issue be removed from the analysis, as preliminary analysis indicates the cost increase and/or imposition upon the industry, observer providers, and observers is not warranted. See Section 2.5.6 for discussion.**

Alternative 1. No action. No change would be made to existing Federal regulations allowing observer deployments to span two different fishing years and last for up to 90 days.

Alternative 2. Revise regulations to require that observers who collect fishing data in one fishing year during a deployment that extends into a second fishing year return from sea and be available for debriefing by February 28 of the second fishing year.

**Issue 6, Alternative 1** (no action) would not change existing regulations to require observers who collected fishing data over a span of two different years to return from sea and be available for debriefing by a specified date. In effect, this alternative allows for the potential to delay completion of the observer annual data set for the first year until all observers have returned and debriefed. Under current regulations, an observer can be deployed for up to 90 days, meaning the maximum deployment could last through late March of the second year. This means that the completed data would not be available to end users working on a variety of analytical documents until the observer returns.

**Issue 6, Alternative 2** would require that observers who collected fishing data over a span of two different years would be required to return from sea and be available for debriefing by February 28 of the second year. Those observers whose cruises span two different fishing years would be impacted by this action. Alternative 2 would likely increase observer provider costs because the efficiency of each deployment that spans two different years would be reduced and fishing industry costs could increase to the extent observer provider costs are incorporated into billable costs. Using the last fishing day as the cut-off, 7 observer deployments would have needed to be truncated in 2006. The actual impact is difficult to predict because it would depend on the composition of the observer providers' clients and the duration of the trips they take.

This action was proposed due to the potential benefit to NMFS and the clients to which it provides observer information, as it would provide a date certain whereby observers would need to return from sea for debriefing, allowing consistency in the completion of the final annual data set. However, in July 2007, NMFS further consulted with the primary internal agency users of observer information to determine if their needs warrant consideration of this action. These consultations were conducted due to preliminary discussions with both the OAC and the Council that the proposed action (Alternative 2) would potentially increase indirect costs to industry (shorten trips) with limited direct benefits. Upon review, while there is interest in obtaining a final observer dataset earlier in the year, there are no compelling analytical requirements that warrant a change to the status quo. **Thus, NMFS recommends that this issue be removed from the analysis, as the cost increase or imposition upon the industry, observer providers, or observers is not warranted.**

#### **Issue 7. Miscellaneous modifications**

Alternative 1. No action. Do not revise existing Federal regulations to address inaccuracies or housekeeping issues.

Alternative 2. Revise existing Federal regulations related to observer program operational issues as follows:

- a. Regulations at § 679.50(c)(5)(i)(A) incorrectly reference a workload restriction at (c)(5)(iii). Replace (c)(5)(iii) with the correct reference at (c)(5)(ii).
- b. Regulations at § 679.50 currently require observer providers to submit to NMFS each type of contract they have entered into with observers or industry. There is no deadline for submission of this information, although most providers currently operate as if there is an annual deadline for all submitted information. Establish a February 1 deadline for annual submissions of this information, which is consistent with the deadline for copies of 'certificates of insurance.'
- c. Update the NMFS Alaska Fisheries Science Center, Fisheries Monitoring and Analysis Division website address throughout 50 CFR 679.50.

**Issue 7, Alternative 1** would not revise existing Federal regulations to address inaccuracies or housekeeping issues.

**Issue 7, Alternative 2** would revise existing Federal regulations related to observer program operational issues. Three changes are proposed, which would serve to correct technical inaccuracies or clarify current regulations. Effects are expected to be none to minimal.

#### Implementation and enforcement issues

The following enforcement and monitoring issues should be considered when selecting a final preferred alternative:

- Removing the appeals process associated with initial observer certification and observer provider permitting would allow for significant staff resource reallocations towards necessary program functions (Issue 1, Alternative 2)
- Placing the burden associated with regulating observer conduct on observer providers, rather than NMFS, would allow for significant agency staff resource reallocations towards necessary program functions (Issue 2, Alternative 2).
- Prohibiting non-representative fishing behavior would likely result in additional NMFS enforcement costs (Issue 4, Alternative 3).
- Requiring observer providers to report cost information would require development and maintenance of a reporting and database system (Issue 5, Alternatives 2, 3, and 4).
- Issue 3 (Alternative 2), Issue 4 (Alternative 2), Issue 6 (Alternative 2), and Issue 7 (Alternative 2) would not result in any implementation or enforcement issues, and minimal costs.

## 1.0 INTRODUCTION

The groundfish fisheries in the Exclusive Economic Zone (EEZ) off Alaska are managed by the National Marine Fisheries Service (NMFS) under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (MSA). Under the authority of the MSA, the North Pacific Fishery Management Council (Council) developed Fishery Management Plans for the groundfish fisheries of the Gulf of Alaska management area (GOA) and Bering Sea and Aleutian Islands management area (BSAI).

This Regulatory Impact Review (RIR) evaluates the costs and benefits of proposed regulatory amendments that would make changes to several administrative, technical, and procedural aspects of the North Pacific Groundfish Observer Program (Observer Program). This action is necessary to improve the existing Observer Program. Presidential Executive Order 12866 and the Regulatory Flexibility Act (RFA) mandate that certain issues be examined before a final decision is made.

The RIR and IRFA are contained in Chapters 2.0 and 3.0, respectively. Chapter 4.0 includes a description of how the proposed action is consistent with the Magnuson-Stevens Act. References and lists of preparers and agencies consulted are provided in Chapters 5.0, 6.0, and 7.0, respectively.

## 2.0 REGULATORY IMPACT REVIEW

An RIR is required under Presidential Executive Order (E.O.) 12866 (58 FR 51735; October 4, 1993). The requirements for all regulatory actions specified in E.O. 12866 are summarized in the following statement from the order:

*“In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nonetheless essential to consider. Further, in choosing among alternative regulatory approaches agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.”*

E.O. 12866 requires that the Office of Management and Budget review proposed regulatory programs that are considered to be “significant.” A “significant regulatory action” is one that is likely to:

- Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, local or tribal governments or communities;
- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.

## 2.1 Background

NMFS began placing observers on foreign fishing vessels operating off the Pacific Northwest and Alaskan coasts in 1973, creating the North Pacific Foreign Fisheries Observer Program. Initially, observers were placed on vessels only upon invitation by host countries. In the early years of the program, the primary purpose of observers was to determine incidental catch rates of Pacific halibut in groundfish catches and to verify catch statistics in the Japanese crab fishery. Later, observers collected data on the incidence of king crab, Tanner crab, and Pacific salmon, and obtained biological data on other important species. Following implementation of the MSA in 1976, which mandated that foreign vessels accept observers, observer coverage greatly expanded.

In 1978, U.S. fishermen began large scale fishing for groundfish, through joint ventures with foreign processing vessels. By 1986, all foreign fishing operations were halted in the U.S. EEZ off the west coast, and by 1991, all foreign joint-venture processing within the EEZ of the Bering Sea and Gulf of Alaska was terminated. NMFS began placing observers on domestic vessels in 1986. This was in support of an industry-funded data gathering program on domestic vessels fishing in an area of the Bering Sea, north of Port Moller, where bycatch of red king crab was of concern. Other small-scale domestic observer programs were implemented during the late 1980s.

The current domestic observer program was authorized in 1989, when the Secretary approved Amendments 13 and 18 to the groundfish FMPs for the BSAI and GOA, respectively. An Observer Plan



to implement the program was prepared by the Secretary in consultation with the Council and implemented by NMFS, effective February 7, 1990 (55 FR 4839, February 12, 1990). An EA/RIR prepared for Amendments 13/18 examined the environmental and economic effects of the new program. Under this program, NMFS provides operational oversight, certification training, definition of observer sampling duties and methods, debriefing of observers, and management of the data. Vessel and processing plant owners pay the cost of the observers, and the costs associated with managing the program are paid for by the Federal government.

Under the 1990 Observer Plan, groundfish vessels under 60' length overall (LOA) are not required to carry observers, groundfish vessels longer than 60' but shorter than 125' are required to carry observers 30 percent of their fishing time, and groundfish vessels 125' and longer are required to carry observers 100 percent of their fishing time. Shoreside processors that process between 500 mt and 1000 mt of groundfish in a calendar month are required to have observers 30% of the days that they receive or process groundfish. Shoreside processors that process 1,000 mt or more of groundfish in a calendar month are required to have observers 100 percent of the days that they receive or process groundfish. These coverage levels have been increased to implement certain limited access programs with increased monitoring needs, such as the Western Alaska Community Development Quota (CDQ) Program and the American Fisheries Act (AFA) pollock fishery. However, aside from the CDQ and AFA programs, coverage requirements for the groundfish fleets of the BSAI and GOA have remained largely unchanged since 1990, except that coverage requirements for vessels 125' and over using pot gear were reduced to 30%. Since 1990, the number of observer deployment days per year ranged from about 20,000, to about 36,900 in 2005. In 2006, 398 individual observers served onboard 303 vessels and in 24 processing facilities (Table 1). Table 2 provides the current observer requirements in Federal regulations.

**Table 1 Number of groundfish observers, platforms observed, and observer days in the North Pacific, 2002 - 2006**

<i>Year</i>	<i>Number of observers/vessels observed/plants observed</i>	<i>Number of observer days</i>
2006	398 observers, 303 vessels, 24 plants	36,072
2005	321 observers, 304 vessels, 24 plants	36,907
2004	348 observers, 317 vessels, 21 plants	36,624
2003	332 observers, 325 vessels, 21 plants	37,371
2002	340 observers, 312 vessels, 20 plants	34,811

Source: NMFS, Observer Program Office.

**Table 2 Current observer requirements in Federal regulations**

<i>Vessel/processor type</i>	<i>Observer Requirement</i>	<i>Regulation<sup>1</sup></i>
halibut vessels	0% (no observer requirement)	n/a
groundfish vessels <60' LOA	0% (no observer requirement)	n/a
groundfish vessels ≥60 and <125' LOA and pot vessels of any length	30% of their fishing days or pot retrievals by quarter and one entire trip per quarter	50 CFR 679.50(c)(1)
groundfish vessels ≥125' LOA (With the exception of pot gear. See above.)	100% of their fishing time	50 CFR 679.50(c)(1)
motherships and shoreside processors that process 500-1000 mt of groundfish in a calendar month	30% of the days they receive or process groundfish	50 CFR 679.50(c)(1)
motherships, stationary floating processors, and shoreside processors that process ≥1000 mt of groundfish in a calendar month	100% of the days they receive or process groundfish	50 CFR 679.50(c)(1)
CPs fishing for Atka mackerel in the Aleutian Islands Subarea	200%	50 CFR 679.50(c)(1)
AFA CPs, motherships, and shoreside processors	200%	50 CFR 679.50(c)(5)
CDQ CPs (trawl and hook-and-line)	200%	50 CFR 679.50(c)(4)
CDQ pot CPs	100%	50 CFR 679.50(c)(4)
CDQ fixed gear CVs and trawl CVs ≥60'	100%	50 CFR 679.50(c)(4)

<sup>1</sup>See 50 CFR 679.50 for further details on current observer requirements.

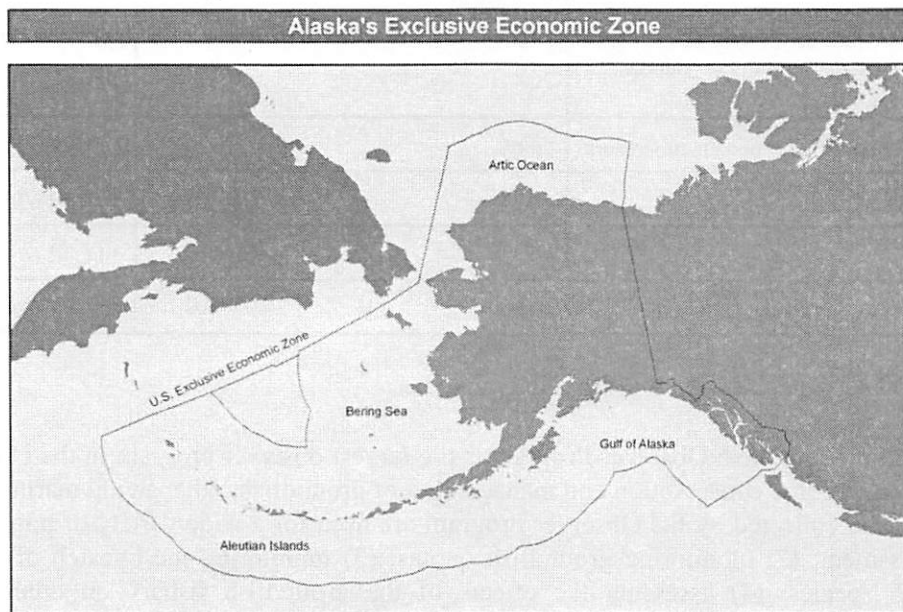
The North Pacific Groundfish Observer Program is the largest observer program in the United States and plays a critical role in the conservation and management of groundfish, other living marine resources, and their habitat. Data collected by the Observer Program are used for a wide variety of purposes including: (1) stock assessment; (2) monitoring groundfish quotas; (3) monitoring the bycatch of groundfish and non-groundfish species; (4) assessing the effects of the groundfish fishery on other living marine resources and their habitat; and (5) assessing methods intended to improve the conservation and management of groundfish and other living marine resources.

The mission of the observer program is to provide the highest quality data to promote stewardship of the North Pacific living marine resources for the benefit of the Nation. The goal of the observer program is to provide information essential for the management of sustainable fisheries, associated protected resources, and marine habitat in the North Pacific. This goal is supported by objectives that include:

1. Provide accurate and precise catch, bycatch, and biological information for conservation and management of groundfish resources and the protection of marine mammals, seabirds, and protected species.
2. Provide information to monitor and promote compliance with NOAA regulations and other applicable programs.
3. Support NMFS and the Council policy development and decision making.
4. Foster and maintain effective communications between managers, scientists, and participants in the fisheries.
5. Conduct research to support the mission of the North Pacific Groundfish Observer Program.

The Observer Program has an integral role in the management of North Pacific fisheries (see Figure 1 below for a map of the EEA off Alaska). Information collected by observers is used by managers, scientists, enforcement agents, and other agencies in supporting their own missions. Observers provide catch information for quota monitoring and management of groundfish and prohibited species, biological data and samples for use in stock assessment analyses, information to document and reduce fishery interactions with protected resources, and information and samples used in marine ecosystem research. The Observer Program provides information, analyses, and support in the development of proposed policy and management measures. Further, observers interact with the fishing industry on a daily basis and the Observer Program strives to promote constructive communication between the agency and interested parties. Observations are used by managers and enforcement personnel to document the effectiveness of the management programs of various entities, including NMFS, the U.S. Coast Guard, and the U.S. Fish and Wildlife Service. In order to provide these services, the Observer Program routinely conducts research projects and analyses designed to assess the efficacy of management programs.

**Figure 1 Alaska's Exclusive Economic Zone**



In designing the domestic Observer Program in 1989, NMFS and the Council had limited options because the MSA provided no authority to charge the domestic industry fees to pay for the cost of observers, and Congress provided no funds to cover the cost of observers (which is still the case today). The need for observers and the data they provide was sufficiently critical and urgent that the Council and NMFS decided not to wait for the MSA to be amended, and instead proceed with Observer Program regulations under Amendments 13/18. These regulations, which were considered "interim" at the time, established observer coverage requirements for vessels and processors participating in the BSAI and GOA groundfish fisheries, and required those vessels and processors to arrange for observer services from an observer provider certified by NMFS. Efforts to change the existing service delivery model for the program have been unsuccessful as of yet for various reasons. As a result, the "interim" Observer Program has been extended three times since its inception.

## 2.2 Purpose and Need for Action

At its June 2006 meeting, the Council again considered replacing the existing service delivery model and restructuring the Observer Program such that NMFS would contract directly with observer providers for observer services, and NMFS would place observers on vessels and in processing plants when determined necessary. The intent was to fund the program through a fee system and/or Federal funding. The Council ultimately recommended to the Secretary of Commerce to remove the sunset date of December 31, 2007, from regulations governing the existing Observer Program, given that two fundamental, external obstacles to restructuring the program continue to exist. This action was necessary to avoid expiration of the current Observer Program, and ensure the continued collection of observer data for supporting science and management functions. This action was published as a proposed rule in February 2007 (72 FR 7948; 2/22/07) and as a final rule in June 2007 (72 FR 32559; 6/13/07).

The Council's June 2006 motion on this issue defined the existing obstacles to a restructured program and indicated its intent to consider initiating a new amendment again proposing restructuring alternatives for the Observer Program when: "1) legislative authority is established for fee-based alternatives; 2) the FLSA issues are clarified (by statute, regulation, or guidance) such that it is possible to estimate costs associated with the fee-based alternatives; and/or 3) the Council requests reconsideration in response to changes in conditions that cannot be anticipated at this time."

On January 12, 2007, the President signed the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act, Pub. Law No. 109-479, (MSA). The reauthorized MSA authorizes the North Pacific Council to adopt fee based alternatives which were considered in the June 2006 analysis. Specifically, the MSA states that the Council may prepare a fisheries research plan which "establishes a system, or system, of fees, which may vary by fishery, management area, or observer coverage level, to pay for the cost of implementing the plan." This, along with other clarifying MSA language, provides the flexibility the Council needs to develop a new fee-based Observer Program. However, the exact nature of the fee program authorized by the Magnuson-Stevens Act must be determined, the Council must consider a new amendment to restructure the current Observer Program, and NMFS must undergo rulemaking to implement a new Observer Program.

The second impediment to restructuring, however, remains unresolved. Without further clarification, it is not possible to provide an adequate estimate of the costs resulting from a change to a fee-based system in the Observer Program. NMFS has not yet received a response to the November 29, 2005 letter from NMFS to the Department of Labor (DOL) that requested guidance on computing hours worked and the associated rules governing compensation of fisheries observers. NMFS specifically requested that the DOL clarify the applicability of the Service Contract Act (SCA) and Fair Labor Standards Act (FLSA) on land, in the territorial sea, the Exclusive Economic Zone, and in international waters. NMFS has continued to seek guidance from DOL and has initiated an internal process to document labor costs associated with current direct NMFS contracts for observer services.

Given that the cost issues remained unresolved, in March 2007, NMFS recommended that the Council continue to set the restructuring amendment package aside, and focus its efforts on several administrative, operational, and procedural changes to the existing Observer Program that are necessary regardless of observer restructuring.<sup>4</sup> NMFS has noted that even if all impediments were resolved, it would still take several years before a restructured Observer Program could be implemented. A discussion paper outlining these proposed regulatory changes was provided to the Council at its April 2007 meeting. At that meeting, the Council requested that the Observer Advisory Committee (OAC) meet to review and provide recommendations on the proposed changes and alternatives outlined in the discussion paper prior

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<sup>4</sup>Letter from S. Salvesson, NMFS to S. Madsen, NPFMC. March 12, 2007.

to the June Council meeting. The OAC convened May 21 – 22 in Seattle, and its report was provided to the Council in June.<sup>5</sup> At its June meeting, the Council approved the suite of alternatives and options for analysis in this regulatory amendment package. Note that NMFS has made a few suggestions for refinement of the alternatives under Issue 5, as highlighted in Section 2.5.5

The regulatory amendments proposed in this analysis are organized under seven issues. The specific need for action associated with each issue is described in Section 2.5 under the expected effects of the alternatives. Generally, however, these actions are proposed to remove Federal regulations that are either unnecessary, unenforceable, or outside the authority of NMFS; or to clarify existing regulations with regard to allowing observer providers to provide observers for exempted fishing permits and scientific research permits/activities. Other issues included in this action would establish new regulations to: prohibit activities that result in non-representative fishing behavior from counting toward an observer coverage day; require observer providers to report more detailed annual billing information to NMFS; and specify a date by which observers who have collected data in the previous fishing year would be required to be available for debriefing. In sum, the proposed actions are intended to improve the operational efficiency of the Observer Program, as well as improve the catch, bycatch, and biological data provided by observers for conservation and management of the North Pacific groundfish fisheries, including that provided through scientific research activities.

### 2.3 Related Documents

The documents listed below include detailed information on the Observer Program, the groundfish fisheries in the North Pacific, and on the natural resources, economic and social activities, and communities affected by those fisheries:

- Groundfish Programmatic Supplemental Environmental Impact Statement (PSEIS) (NMFS 2004)
- Essential Fish Habitat Environmental Impact Statement (EIS) (NMFS 2005b)
- The Harvest Specifications Environmental Impact Statement (EIS)(NMFS 2007)
- Extension or Modification of the Program for Observer Procurement and Deployment in the North Pacific (EA/RIR/IRFA) (NPFMC 2006)

### 2.4 Alternatives Considered

The Council action under consideration includes seven separate issues, with alternatives proposed under each issue. There are also options for consideration under some of the alternatives. Each of the seven issues is described and analyzed separately, and they represent mutually exclusive decision points. As structured, the Council would ultimately select a preferred alternative under each of the seven issues.

#### **Issue 1. Observer certification and observer provider permitting appeals processes**

Alternative 1. No action. No change would be made to existing Federal regulations at 50 CFR 679.50(j)(1)(iv) that provide an appeals process to an observer candidate in the case that NMFS denies an observer candidate who failed training the opportunity to pursue further Alaska groundfish observer training. No change would be made to existing Federal regulations at 50 CFR 679.50(i)(1)(v) that provide an appeals process to an observer provider applicant in the case that NMFS denies an applicant an initial permit to become an observer provider.

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<sup>5</sup>The May 2007 OAC report is available at: [http://www.fakr.noaa.gov/npfinc/current\\_issues/observer/OACreport507.pdf](http://www.fakr.noaa.gov/npfinc/current_issues/observer/OACreport507.pdf).

Alternative 2. Remove the Federal regulations that provide an appeals process to an observer candidate in the case that NMFS denies an observer candidate initial certification and the opportunity to pursue further NMFS observer training. Remove the Federal regulations that provide an appeals process to an observer provider applicant in the case that NMFS denies an applicant an initial permit to become an observer provider. (Note that this alternative does not affect the ability of observers and observer providers to appeal any decision to revoke or sanction a certification or permit that is already issued. Nor does this alternative affect 15 CFR Part 4 hearings addressing MSA violations where permit sanctions can be imposed.)

## **Issue 2. Observer conduct**

Alternative 1. No action. No change would be made to existing Federal regulations that require that observers refrain from engaging in specified behaviors related to violating the drug and alcohol policy established by the Observer Program; engaging in illegal drugs; or engaging in physical sexual contact with vessel or processing plant personnel (50 CFR 679.50(j)(2)(ii)(D)). NOAA GC advises that these regulations are unenforceable, and/or outside the authority of NMFS.

Alternative 2. Remove current Federal regulations at 50 CFR 679.50(j)(2)(ii)(D) that attempt to control observer behavior related to activities involving drugs, alcohol, and physical sexual contact, and remove references to the Observer Program's drug and alcohol policy in the regulations. Regulations would be revised to require each observer provider to have a policy addressing observer conduct and behavior, and current copies of each provider's policy would be required to be submitted to NMFS.

Option 1: Add a requirement under 679.50(i)(2)(x)(I)(5) to require observer providers to submit information to NMFS concerning allegations or reports regarding a breach of the observer provider's policy on observer conduct.<sup>6</sup> Notification of such information is required within [24 hours, 48 hours, or 72 hours] after the provider becomes aware of the information.

## **Issue 3. Observer providers' conflict of interest limitation regarding research and experimental permits**

Alternative 1. No action. No change would be made to existing Federal regulations, which are unclear as to whether observer providers may provide scientific data collectors<sup>7</sup> to aid in research activities, including exempted fishing permits, scientific research permits, or other research. Current practice is to allow these activities, but the existing regulations are ambiguous.

Alternative 2. Revise Federal regulations to clarify that observer providers may provide observers or scientific data collectors for purposes of exempted fishing permits, scientific research permits, or other scientific research activities. In this role, NMFS observer program regulations would apply to observers operating under their NMFS certification but would not apply to scientific data collectors<sup>8</sup>

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<sup>6</sup>This notification requirement would mirror the current requirement at 679.50(i)(2)(x)(I)(5) that requires observer providers to submit information to NMFS concerning allegations or reports regarding observer conflict of interest or breach of the standards of behavior within 24 hours after the provider becomes aware of the information. Observer conflict of interest and standards of behavior provisions are at 679.50(j)(2)(i) and (j)(2)(ii), respectively

<sup>7</sup>Note that NMFS has suggested a revision to this alternative. The word "employees" has been removed, and replaced with the words "scientific data collectors." This revision provides consistency with Alternative 2.

<sup>8</sup>Note that there are circumstances in which observers would be required to account for removals or the research is being conducted within the context of the normal fishery.

#### Issue 4. Fishing day definition

Alternative 1. No action. The current definition of “fishing day” in Federal regulations allows vessel owners or operators to use any observer coverage incurred during a 24-hour period to count towards observer coverage requirements, which has resulted in vessels fishing being observed in ways that are not representative of actual fishing behavior. No change would be made to existing Federal regulations at 50 CFR 679.2 which define “fishing day” as follows:

*Fishing day means to (for purposes of subpart E) a 24-hour period, from 0001 hours A.l.t. through 2400 hours A.l.t., in which fishing gear is retrieved and groundfish are retained. Days during which a vessel only delivers unsorted codends to a processor are not fishing days.*

Alternative 2. Revise the definition of “fishing day” in Federal regulations as follows:

*Fishing day means ~~to~~ (for purposes of subpart E) a 24-hour period, from 0001 hours A.l.t. through 2400 hours A.l.t., in which fishing gear is retrieved and groundfish are retained. An observer must be on board for all gear retrievals during the 24-hour period in order to count as a day of observer coverage. Days during which a vessel only delivers unsorted codends to a processor are not fishing days.*

Alternative 3. Establish regulations under 50 CFR 679.7 prohibiting activities that result in non-representative fishing behavior from counting toward an observer coverage day.

#### Issue 5. Observer program cost information

**NMFS recommends the following suite of alternatives under Issue 4. Alternatives 2 and 3 are recommended to be revised slightly from the Council’s June 2007 recommendations, and Alternative 4 is recommended to be added. Justification for these changes are summarized in Section 2.5.5.**

Alternative 1. No action. Observer providers would not be required to report various subcategories of costs to NMFS.

Alternative 2. Require observer providers to report annual costs to NMFS according to the following subcategories: labor, overhead, transportation, housing, food, and insurance. This information would be reported on an annual basis, broken out by BSAI versus GOA fisheries, and by shoreside, 30 percent, 100 percent, and 200 percent covered vessel/processor categories and gear type.

Option 1: Limit the mandatory economic data collection program to three years.

Option 2: Prohibit a person/entity that receives this confidential information on behalf of NMFS from being certified as an observer provider in the North Pacific.

Alternative 3. Require observer providers to report annual costs GOA and BSAI subareas; shoreside, 30%, 100% and 200% coverage level categories; and gear type.

Option 1: Limit the mandatory economic data collection program to three years.

Option 2: Prohibit a person/entity that receives this confidential information on behalf of NMFS from being certified as an observer provider in the North Pacific.

Alternative 4. Require observer providers to submit copies of paid invoices to NMFS on a monthly basis. Invoices must contain the following information:

1. Name of each individual vessel or shore plant
2. Name of observer who worked aboard each vessel or at each shore plant
3. Dates of service for each observer on each vessel or at each shore plant (include and identify dates billed that are not coverage days)
4. Rate charged per day for observer services
5. Total observer services charge (number of days multiplied by daily rate)
6. Specified transportation costs (i.e. airline, taxi, bus, etc.)
7. Any specified "other" costs not included above (i.e. excess baggage, lodging, etc.)

Option 1: Limit the mandatory economic data collection program to three years.

Option 2: Prohibit a person/entity that receives this confidential information on behalf of NMFS from being certified as an observer provider in the North Pacific.

#### **Issue 6. Completion of the fishing year**

Alternative 1. No action. No change would be made to existing Federal regulations allowing observer deployments to span two different fishing years and last for up to 90 days.

Alternative 2. Revise regulations to require that observers who collect fishing data in one fishing year during a deployment that extends into a second fishing year return from sea and be available for debriefing by February 28 of the second fishing year.

#### **Issue 7. Miscellaneous modifications**

Alternative 1. No action. Do not revise existing Federal regulations to address inaccuracies or housekeeping issues.

Alternative 2. Revise existing Federal regulations related to observer program operational issues as follows:

- a. Regulations at § 679.50(c)(5)(i)(A) incorrectly reference a workload restriction at (c)(5)(iii). Replace (c)(5)(iii) with the correct reference at (c)(5)(ii).
- b. Regulations at § 679.50 currently require observer providers to submit to NMFS each type of contract they have entered into with observers or industry. There is no deadline for submission of this information, although most providers currently operate as if there is an annual deadline for all submitted information. Establish a February 1 deadline for annual submissions of this information, which is consistent with the deadline for copies of 'certificates of insurance.'
- c. Update the NMFS Alaska Fisheries Science Center, Fisheries Monitoring and Analysis Division website address throughout 50 CFR 679.50.



## 2.5 Expected effects of the alternatives

### 2.5.1 Issue 1: Observer certification and observer provider permitting appeal processes

Current Federal regulations at 50 CFR 679.50(j)(1)(iv) grant appeal rights to a candidate for observer certification that fails training and is notified through an Initial Administrative Determination (IAD) that they may not pursue further training.

In addition, current regulations allow an observer provider applicant who is denied an observer provider permit to appeal that decision (50 CFR 679.50(i)(1)(v)). Because there is no statutory entitlement to receiving observer certification or an observer provider permit, the granting or denial of observer certifications and observer provider permits are discretionary agency actions. Thus, there is no requirement that an observer candidate or new observer provider applicant be provided an appeals process. Because of the discretionary nature of granting observer certifications or observer provider permits, NMFS proposes to remove the appeal rights granted to observer candidates that fail training and are notified that they may not retake the course and to observer provider applicants whose permit application is denied. It is not feasible to quantitatively assess the benefits and costs associated with this issue, thus, a qualitative discussion of the tradeoffs is provided below.

#### Alternative 1

Alternative 1. No action. No change would be made to existing Federal regulations at 50 CFR 679.50(j)(1)(iv) that provide an appeals process to an observer candidate in the case that NMFS denies an observer candidate who failed training the opportunity to pursue further Alaska groundfish observer training. No change would be made to existing Federal regulations at 50 CFR 679.50(i)(1)(v) that provide an appeals process to an observer provider applicant in the case that NMFS denies an applicant an initial permit to become an observer provider.

Alternative 1 would not change Federal regulations related to the observer certification and observer provider permitting appeals processes; thus, regulations would continue to provide an appeal opportunity to observer candidates that fail training and are not allowed to pursue further training and observer provider applicants who are denied permits. Alternative 1 would continue to require that NMFS provide staff resources to the appeals process for both observer candidates that fail training and applicants that are denied observer provider permits.

When an observer candidate fails training, one of two things happens, either: 1) they are not certified for that class, but are allowed to retake the training, thus given another chance to become certified; or 2) they are not allowed to retake the training and are denied certification. In the first case, failing the course cannot be appealed, but the applicant can continue to pursue certification in future training classes. Issue 1 does not change this. Issue 1 addresses the second case in which the applicant's ability to continue to retake training is revoked and the observer is able to appeal this decision under the status quo. NMFS proposes to remove the ability for applicants to appeal a NMFS decision to not allow future training if the applicant failed the certification course.

Currently, the process undertaken to notify an observer candidate that he/she has failed training and will not be allowed to retake the training class is relatively extensive. Notification of training performance standards are provided to observer candidates on the first day of training. At that time, training staff explain that the course is rigorous, time-consuming, and hands-on job training. Training staff make it

clear to observer applicants that they need to demonstrate the proficiency level of a certified observer to successfully complete the class, gain certification, and become employed as an observer.

Most often when an observer applicant fails training, it is due to not meeting the required 80 percent passing score on exams, either written or practical. The training course includes two written exams which test methodology, sampling theory and application, and data recording skills. Applicants are allowed to take these exams only once. There are three additional species identification exams which test dichotomous key use, comprehension of issued field guides, and various other identification skills. Trainees who fail one of these three exams are usually allowed to retake the test during the same training session. However, trainees who perform extremely poorly on their exams are not given a second opportunity. When an observer candidate fails training, they are immediately notified verbally by their instructor, shown their exam, allowed to ask any questions of the instructor, and then asked to leave the class.

The process is then passed to the certification official.<sup>9</sup> The certification official formally decides not to certify the observer candidate for the failed training period and decides whether the candidate is allowed to retake the training at a later date. The process continues under the certification official with the following actions:

- The instructor provides all materials completed by the observer candidate to the certification official; including any previous exams, quizzes, and written assignments.
- The instructor provides the certification official with a grade sheet noting the performance of all observer candidates in the course.
- The certification official reviews the entire body of work completed by the candidate during the course. Any trends of poor performance are identified and weighed against the performance standards, which were provided to the candidate at the beginning of the class.
- The standing of the failing candidate in the class is noted, to help determine if the deficiencies began early in the course or if the individual is struggling with a single concept, or with the pace of the class.
- The observer candidate's performance relative to other participants in the same class is also considered in order to rule out instructor error or extremely common mistakes made by most new observers.
- In determining whether a deficiency is not resolvable, the certification official may consider the applicant's resume, background, and any tutoring opportunities provided. For example, if an observer applicant received one-on-one tutoring from NMFS staff and subsequently failed two fish identification exams, this inability may be considered unresolvable.
- The certification official also considers the number of deficiencies that would have to be successfully addressed to achieve certification. This allows NMFS to consider the overall performance of an applicant rather than focusing only on a single exam. For example, in many cases in which an applicant was not allowed to retake training, an applicant had failed a written exam and also had an established pattern of turning in incomplete or unacceptable written assignments.

Once an individual's training failure case is entirely reviewed, the certification official decides whether the candidate is allowed to retake the training. If the certification official decides not to allow retraining, he/she prepares a formal written Initial Agency Decision (IAD), which lays out the observer candidate's unresolvable deficiencies, the rationale for the decision and includes an explanation of the candidate's appeal rights.

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<sup>9</sup>The certification official is an observer program staff person, specifically, the Fisheries Monitoring and Analysis Division Supervisor of Field Office and Training.

To issue this IAD, the certification official currently has 10 business days to complete the review of the observer candidate's failure, write an IAD, complete legal review of the IAD and send the IAD to the observer candidate. Generally, the IAD is sent to the observer applicant by certified mail. If the certification official is aware that the applicant is not at their address of record, an electronic version is also sent to their e-mail.

To appeal the IAD, an observer candidate submits a request for reconsideration to the NOAA Office of Administrative Appeals (OAA). Operating under regulations found at 50 CFR 679.42, OAA reviews the appeal. Reviews can include requests for issues briefing and evidentiary hearings where NMFS and the observer candidate present their arguments and any witnesses in support of their case. OAA, at the conclusion of its review, issues a written decision either upholding the IAD or reversing it. If OAA reverses the IAD, NMFS may address OAA concerns and reissue a revised IAD or choose to allow the observer candidate to retake training. If the decision upholds the IAD, the decision becomes final agency action within 60 days. During that time, the Regional Administrator reviews the decision and may reverse or modify it, or let it stand as written. The observer may appeal a decision to uphold the IAD to the United States District Court of jurisdiction.

The following table provides data on the observer training pass/fail rates from 2004 – 2007. The table includes:

- The number and percent of observer applicants who failed training each year;
- The number of those who failed and were issued an IAD telling them they could not retake training;
- The number of those who appealed their IAD; and
- The number of applicants who were successful in their appeal.

Note that observer candidates who voluntarily withdrew from observer training are also included in Table 3. Observer instructors encourage any struggling candidate to withdraw from the class while they are in passing status if the candidate is uncertain of how he/she will perform on the written exams. Applicants who withdraw do not incur a "penalty" from NMFS and can participate in a future training when they are better prepared for the course.

**Table 3 Number of observer applicants who enrolled in, failed, and appealed a decision to deny further observer training, 2004 - 2007**

Year	2004	2005	2006	2007 (Jan – July 1)	2004 - 2007
Total number of applicants enrolled	120	123	180	56	479
Number of applicants who dropped out of training	2	5	3	2	12
Number and percent of applicants who failed training	3 (2.5%)	12 (10.2%)	14 (7.9%)	3 (5.5%)	32 (6.9%)
Number of failed applicants who were not allowed to retake training and were issued an IAD	3	5	3	1	12
Number of applicants who appealed their IAD	1	1	0	0	2
Number of successful appeals	1 <sup>1</sup>	1 <sup>2</sup>	n/a	n/a	2

<sup>1</sup>The first IAD was appealed and eventually vacated by OAA based on process/review grounds. A new IAD was issued, and it was not appealed.

<sup>2</sup>To date, this applicant has not re-taken the training.

Note: As of the 2007 training cycle (which began in December 2006), the minimum score required to pass written exams was raised from 75% to 80%. The revised standard is consistent with other NMFS observer programs in the U.S. and would comply with a draft National Standard currently under development.

Note that in 2004, the Observer Program operated under a policy that no observer candidate who failed training was allowed to retake the certification course. In 2004, only one of the three candidates who were issued IADs not allowing them to retake the training class appealed the decision. This individual IAD was vacated by the OAA in a ruling that stated, “The certification official must make a determination that a candidate has unresolvable deficiencies in meeting the requirements for observer certification and must provide a basis for that determination.” As was stated earlier, in 2004 internal policy did not allow for the case-by-case nature of such a review. NMFS thus rescinded the IAD, reviewed the case in depth, and issued a new IAD, finding that the observer candidate demonstrated an unresolvable deficiency in the proper identification of fish and determining that the individual would not be allowed to retake the training. This second IAD was not appealed and the more lengthy, case-by-case review has since been undertaken in all subsequent actions.

In 2005, 12 observer candidates failed the training, and 7 of those 12 were allowed to retake the training. Of those 7 provided a second opportunity, 4 chose to retake the training. All four passed the course the second time, but not all are considered successful observers. The performance of these observers runs the entire spectrum, with one excelling at the job, one being a good performer, one being an adequate observer who makes many minor errors, and one who was recommended for decertification after his first cruise. As in 2004, there was one appeal in 2005, which also resulted in OAA reversing the IAD. In 2005, the observer candidate did not contest the fact that they failed training or that their training issues were “unresolvable”. The candidate contested whether they had adequate notice that they could drop out of class due to sickness and have a chance to return and retake the course. OAA found that, after hearing witness testimony, NMFS did not clearly or adequately tell the observer candidate that they could drop out and return to class. The observer has not returned to training to date.

In 2006, 14 candidates failed training, and 11 were allowed to retake it. Of those 11, three candidates chose to retake the training, and all three passed the course the second time. According to Observer Program staff, one of those observers has performed adequately, but suffered from seasickness and has not returned for additional cruises. Another observer has performed adequately on two cruises, and continues to show improvement. The third observer has completed four cruises, continues to be deployed, and is performing very well.

In 2007, 3 candidates failed training, and 2 were allowed to retake it. One applicant is currently retaking the training, thus, there is no further information regarding subsequent performance in the class or in the field.

In sum, Table 3 shows that NMFS has received two IAD appeals to not allow further training. Only one of these appeals considered the substantive issues surrounding the case. This particular appeal took just over one year to complete. The appeal process, as described above, is difficult and lengthy, usually requiring several weeks of NOAA time, both from Observer Program staff and NOAA GC.

Issue 1 also addresses the appeals process for an observer provider applicant, should NMFS deny the applicant an initial permit. Under the current regulations, one entity has applied for, and been issued, an observer provider permit. There have been no denials under these regulations, and thus, no appeals.

Alternative 1 would continue to allow an appeals process for observer applicants who have failed the observer training and are denied the opportunity to retrain. Although there have only been two appeals in the past four years, the agency time and resources necessary to serve this process can be extensive. Alternative 1 would thus continue to draw on limited staff resources, and has the potential to negatively affect other areas of agency responsibility. Since the observer training program is relatively standardized, and work assignments and test questions do not vary between classes or on an annual basis, a poor quality observer candidate who is successful in his or her appeal may have an increased chance of passing subsequent classes without having adequate skills. As a result, additional NMFS staff resources are typically necessary, as poorer quality observers usually require more staff assistance during deployments, more extensive mid-cruise and final debriefings, and lengthier re-briefings before future deployments.

Other observers undergoing training may also be affected by Alternative 1, as students may be negatively affected if a poor performing observer candidate is allowed to retrain. This is because lower quality students often require more instructor attention and frequently slow the pace of training. Generally, a lower quality observer candidate entering the ranks of other certified observers may also negatively affect the image and credibility of the overall observer sector.

Poor performing observers also have an overall negative effect on the quality of observer data, which is crucial to effective management of the fisheries. In this sense, the fishing industry that relies on high quality observer data may be negatively affected if a lower quality observer candidate is certified.

Similarly, allowing unsuccessful observer provider applicants to appeal an agency denial may increase the chance of a lower quality applicant entering the pool of certified observer providers. This could have negative effects on NMFS, the fishing industry, current certified observer providers, and observers. However, future observer provider applicants trying to gain an observer provider permit may benefit from Alternative 1, as it would retain their ability to appeal any agency denials, thus increasing their chances of receiving a permit upon final resolution of the appeal.

In sum, Alternative 1 would continue to limit NMFS' discretion as to whether to grant or deny an initial observer certification or observer provider permit, by requiring that an appeals process be provided in the case of denials. In effect, under Alternative 1, Federal regulations at 50 CFR 679.50(j)(1)(iv) and 50 CFR

679.50(i)(1)(v), that provide these appeal rights, would remain. NOAA GC has determined that because there is no statutory entitlement to receiving observer certification or an observer provider permit, the granting or denial of observer certifications and observer provider permits are discretionary agency actions. Thus, there is no statutory requirement that an observer candidate or new observer provider applicant be provided an appeals process.

## Alternative 2

Alternative 2. Remove the Federal regulations that provide an appeals process to an observer candidate in the case that NMFS denies an observer candidate initial certification and the opportunity to pursue further NMFS observer training. Remove the Federal regulations that provide an appeals process to an observer provider applicant in the case that NMFS denies an applicant an initial permit to become an observer provider. (Note that this alternative does not affect the ability of observers and observer providers to appeal any decision to revoke or sanction a certification or permit that is already issued.)

As stated previously, because there is no statutory entitlement to receiving observer certification or an observer provider permit, the granting or denial of observer certifications and observer provider permits are discretionary agency actions. Under Alternative 2, NMFS' discretion would be reflected two ways in Federal regulations: 1) by revising regulations such that NMFS "may" grant a permit or certification rather than "will" grant a permit or certification; and 2) by establishing final agency action on the permit application as the point at which the observer program official issues a notice stating that the observer provider permit application is denied or that the observer candidate will not be permitted to re-enter the initial groundfish training course. Because final agency action will occur at this stage, the regulations allowing an appeal to NOAA OAA would be unnecessary. Therefore, Alternative 2 would remove relevant language from Federal regulations at 50 CFR 679.50(j)(1)(iv) and 50 CFR 679.50(i)(1)(v) that allow for these appeal processes.

Under Alternative 2, NMFS' role in granting observer certifications and observer provider permits will more clearly reflect the discretionary nature of these processes. NMFS will have more control over applying limited staff resources to the process of granting or denying certifications and permits. The change in observer certification processes is expected to better serve NMFS' interest in having well-qualified observers monitoring the North Pacific groundfish fisheries. To the extent that observer data is improved under Alternative 2, the groundfish fisheries, NMFS, and the fishing industry that relies on high quality observer data may benefit. Industry is not expected to be directly affected by changes to the observer provider permitting or observer certification processes.

Note that this alternative does not affect the ability of current observers and observer providers to appeal any decision to revoke or sanction a certification or permit that is already issued; this action is limited to new observer certifications and new observer provider permits. Thus, current observer providers would not be directly affected by changes to the initial permitting process for new observer providers. Table 3 shows that since 2004, the observer candidate training failure rate has been less than 7 percent, or 32 of 479 candidates. Observer provider companies plan for this possibility while recruiting new observers.

The entities potentially affected by this alternative are future observer candidates and future observer providers seeking permits. It is not possible to speculate how many observer candidates this could potentially affect in the future, but Table 3 shows that since 2004, the observer candidate training failure rate has been less than 7 percent, with less than 1 percent (2 candidates) having appealed NMFS' initial determination to deny certification and the opportunity to pursue further training. Only one of those was ultimately successful. Note, however, that this action would not affect the failure rate of observer trainees taking the certification course. NMFS would continue to evaluate each observer candidate's performance

carefully prior to issuing a final decision as to whether the candidate can re-take the course. NMFS would maintain the option for trainees in passing status to withdraw from the training course with no penalty should they feel unable to meet the performance standards required for certification.

It is also not possible to speculate how many observer provider applicants would be affected in the future. To date, there have not been any observer provider candidates that have sought a permit and been denied. Under Alternative 2, future entities seeking observer provider permits will experience a process less like applying for a permit that must be granted if all requirements of the application are met, and more closely resembling the submission of a contract proposal.

### **2.5.2 Issue 2: Observer conduct**

Current regulations attempt to control observer conduct so that certified observers present themselves professionally on vessels and at plants, at NMFS sites, and in fishing communities. NMFS has been advised by NOAA GC that many of these regulations are unenforceable, and/or are outside of NMFS' authority. For instance, in order for NMFS to decertify an observer that has violated the Observer Program's drug and alcohol policy or the regulation that requires observers to refrain from engaging in physical sexual contact with personnel of the vessel or processing facility to which the observer is assigned, a connection must be made between the sanctioned behavior and the activity that NMFS has the statutory authority to regulate, namely, the collection of reliable fisheries data. Proving that a connection exists between the sanctioned behavior and data collection, especially in cases in which the sanctioned behavior occurs outside of the workplace, can be very difficult. In addition, gathering the necessary evidence to prove that an observer has violated a sanctioned behavior is very difficult, and often not possible.

Preliminary consultations with the USCG indicate that the USCG can ask observers to voluntarily submit to random breath and/or chemical testing for drugs and alcohol. USCG does not have the authority to require observers to submit to these tests except in cases of serious marine incidents. However, if an observer refuses a chemical or breath test, it is unclear if the USCG could impose a sanction against an observer or the observer's employer. Official guidance from the USCG to field offices and vessels is pending. In the event local law enforcement officials have probable cause that an observer was involved in a crime where drugs and/or alcohol were involved, law enforcement may require, through a search warrant, that an observer undergo breath or chemical testing. However, these instances are expected to be rare, and may or may not affect job performance.

NOAA GC has also advised that some of the observer conduct regulations are worded in a broad and ambiguous manner, thus making them unenforceable. For example, current regulations require observers to "refrain from engaging in any activities that would reflect negatively on their image as professional scientists, on other observers, or on the Observer Program as a whole" (50 CFR 679.50(j)(2)(ii)(D)). While it may be possible to promulgate regulations that establish professional standards, investigating violations of these standards, establishing whether violations directly affect observer job performance, and potentially defending appeals cases is extremely difficult with current enforcement resources. In any case, NMFS is not authorized to regulate observer behavior that does not directly affect observer job performance.

#### **Alternative 1**

Alternative 1. No action. No change would be made to existing Federal regulations that require that observers refrain from engaging in specified behaviors related to violating the drug and alcohol policies established by the Observer Program; engaging in illegal drugs; or engaging in

physical sexual contact with vessel or processing plant personnel (50 CFR 679.50(j)(2)(ii)(D)). NOAA GC advises that these regulations are unenforceable, and/or outside the authority of NMFS.

Alternative 1 would not change existing Federal regulations which govern observer conduct related to drugs, alcohol, and physical sexual contact. NOAA GC has advised that these regulations are unenforceable, and/or outside the authority of NMFS. In effect, there may not be a sufficient direct connection between the sanctioned behavior and the activity that NMFS has the statutory authority to regulate (i.e., the collection of statistically reliable fisheries data). Observer conduct while performing observer job duties is relatively straightforward; however, sanctioning behavior outside of the workplace and work hours is more difficult. In that case, NMFS would be required to demonstrate a connection between the off duty behavior in question and the performance of the observer's duties (i.e., the collection of data). Making this connection would be relatively difficult for NMFS; and thus, Alternative 1 may not be a viable alternative for the agency in terms of enforceability.

In addition, Alternative 1 would likely cause confusion regarding NMFS's role in controlling observer behavior, as unenforceable regulations will remain. As a result, observer providers may fail to take remedial action on behavioral issues, given that they may believe this authority is the purview of NMFS. NMFS, however, would likely be unable to correct negative behaviors for the reasons noted above. As a result, negative behaviors may be tolerated that affect vessel and crew safety, as well as the integrity of the data collected. Also, inaction on the part of both NMFS and the observer providers may send the wrong message to observers. Observers should expect immediate and significant action to be taken when violations of behavioral policies occur. When very little or no action is taken, observers may think the behavioral policies are not important or that there are not significant consequences for violating behavioral policies.

Another impact of Alternative 1 would be the continued confusion caused by mixing the roles of NMFS and observer providers. When NMFS attempts to address observer conduct issues and enforce behavioral standards, they are acting in the role of an employer. Since NMFS is not the employer of observers, this causes confusion for observers and others. Also, NMFS has been cautioned by NOAA GC to not act as the employer of observers. NOAA GC contends this increases the liability of NMFS when observer actions result in personal injury, property damage, etc.

## **Alternative 2**

Alternative 2. Remove current Federal regulations at 50 CFR 679.50(j)(2)(ii)(D) that attempt to control observer behavior related to activities involving drugs, alcohol, and physical sexual conduct, and remove references to the Observer Program's drug and alcohol policies in the regulations. Regulations would be revised to require each observer provider to have a policy addressing observer conduct and behavior, and current copies of each provider's policy would be required to be submitted to NMFS.

Option 1: Add a requirement under 679.50(i)(2)(x)(I)(5) to require observer providers to submit information to NMFS concerning allegations or reports regarding breach of the observer provider's policy on observer conduct. Notification of such information is required within [24 hours, 48 hours, or 72 hours] after the provider becomes aware of the information.

Alternative 2 would remove current Federal regulations that attempt to control observer behavior related to activities involving drugs, alcohol, and physical sexual conduct. This also means that NMFS would



discontinue the Observer Program's existing drug and alcohol policies,<sup>10</sup> as drug and alcohol policies would instead be the purview of each observer provider. Thus, references to the Observer Program's existing drug and alcohol policies would be removed from Federal regulations.

Currently, all five observer providers operating in the groundfish observer program have their own drug policies in contracts with their observers, and all but one observer provider has their own alcohol policy. This observer provider instead requires compliance with the current NMFS alcohol policy. If NMFS eliminates their drug and alcohol policy as a result of Alternative 2, it is the intent of the observer provider to include their own alcohol policy in their observer contracts (pers. comm., 7/17/07). All observer providers also currently include a "no sexual contact" provision in their observer contracts. In addition, three observer providers have union agreements with extensive "Observer Codes of Conduct".

Note that none of the current observer provider policies are identical to the current NMFS drug and alcohol policies. However, NMFS considers all to be similarly written with adequate detail and clarity. Currently, all observer provider contracts require observers to also abide by the NMFS drug and alcohol policies. Therefore, if NMFS policies are eliminated, the observer provider contracts would need to be revised to reflect this.<sup>11</sup>

Note also that the use, possession, or distribution of illegal drugs is forbidden by NMFS. This is commonly called a "zero tolerance" drug policy. At the June Council meeting, questions arose about whether observers could be held to a zero tolerance drug policy, similar to other crew onboard a vessel. All current observer provider contracts with observers have essentially the same zero tolerance policy as NMFS. Under the drug laws of the U.S., a vessel owner risks seizure of his vessel if any drugs are found onboard. Because of this strict enforcement of drug laws, NMFS does not anticipate that observer providers would eliminate their current zero tolerance drug policies in the future. NMFS thus finds it unnecessary to issue a regulation requiring observer providers to have zero tolerance drug policies. Also, because of the potential severe penalties inflicted upon vessel owners for violations of U.S. drug laws, NMFS expects that the fishing industry will ensure that strict zero tolerance drug policies continue to be placed in observer contracts. The importance of this issue is also made evident by the fact that all observer provider contracts require observers to submit to random drug testing, as well as drug testing when required by vessel operators or the U.S. Coast Guard.

Additionally, NMFS would continue to monitor observer job performance. To the extent that the use of drugs or alcohol interferes with observer job performance, these activities could indirectly result in decertification actions against an observer. Procedures for monitoring and measuring observer performance are well established, and NMFS has authority to decertify poor performing observers, even if identified deficiencies are related to drug and alcohol use. Note, however, that decertification can be appealed and the observer could continue to work while the appeal was in process.

Alternative 2 should not be interpreted to mean that NMFS does not consider these issues seriously. NMFS continues to consider inappropriate conduct, especially the use of illegal drugs and the abuse of alcohol, a serious issue that warrants appropriate sanctions. Alternative 2 is intended to clarify that the responsibility for addressing these types of issues lies with observer providers in their role as observer employers. In contrast to NMFS, observer providers also have more options available for addressing these behaviors, as well as the ability to take immediate action.

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<sup>10</sup>These policies are available at: [http://www.afsc.noaa.gov/FMA/PDF\\_DOCS/drug\\_policy\\_final.pdf](http://www.afsc.noaa.gov/FMA/PDF_DOCS/drug_policy_final.pdf) and [http://www.afsc.noaa.gov/FMA/PDF\\_DOCS/alcohol\\_policy\\_final.pdf](http://www.afsc.noaa.gov/FMA/PDF_DOCS/alcohol_policy_final.pdf).

<sup>11</sup>Personal communication between Observer Program staff and observer providers, 7/17/07.

In effect, Alternative 2 would impact the (currently five) observer providers, as NMFS would be removed from regulating non-work behavior and observer providers would have the responsibility of addressing observer conduct issues. Alternative 2 would require each observer provider to have a policy addressing observer conduct and behavior, and current copies of each provider's policy would be required to be submitted to NMFS. NMFS would not formally evaluate and approve the submitted policies; the agency's role would be limited to ensuring that the observer providers had developed a policy.

Note that current regulations at 50 CFR 679.50 (i)(2)(x)(G) require observer providers to annually submit a complete, unaltered, signed and valid copy of each type of contract they have with observers (including all attachments, appendices, addendums, and exhibits incorporated into the contract). Regulations at 50 CFR 679.50 (i)(2)(i)(C) also require observer providers to have a signed contract with each observer prior to the observer's deployment, and require that the contract contain certain provisions for continued employment. The first provision states that the observer must comply with the Observer Program's drug and alcohol policies. Alternative 2 would change this provision to require compliance with the observer provider's drug and alcohol policies, since the NMFS policies will be eliminated. Therefore, regulations are already in place that will allow NMFS to review each observer provider's contract to ensure that it contains a drug and alcohol policy and that the policy requires strict adherence for continued employment. NMFS would not formally approve the observer provider's drug and alcohol policies as they will remain incorporated as part of the observer provider contracts; NMFS is not party to these contracts.

At both the May 2007 OAC meeting and the June 2007 Council meeting, there was discussion regarding whether NMFS would continue to emphasize in training the importance of professional observer conduct and the policies governing observer conduct. Under Alternative 2, NMFS would not substantially change the training addressing observer conduct (including drug, alcohol and physical sexual contact), as only minor changes to the curriculum would be necessary. For example, instead of referring to the NMFS drug and alcohol policies in the Observer Manual, reference will be made to the observer providers' policies. Similar changes would be made during class presentations and lectures. However, NMFS will not distribute copies of each observer provider's drug and alcohol policies during training. Federal regulation already requires that each observer provider have contracts with their observers, and that observer providers submit copies of their contracts and any attachments or addendums to NMFS, which would include drug and alcohol policies. Since these documents are submitted to NMFS in compliance with Federal regulations promulgated under the MSA, the documents are considered confidential and cannot be disclosed. Furthermore, they may be confidential as "commercial and financial" information under the Freedom of Information Act. Therefore, the observer provider drug and alcohol policies will not be disseminated to observers or used in training class. However, during observer training, NMFS will direct observers to read the policies in their contracts and emphasize their importance. NMFS will continue to stress the importance of observing the requirements of drug, alcohol and sexual contact policies during training and instruction on the topic of conduct and behavior will remain in the training curriculum.

In addition, NMFS will continue to require observers to sign a "Groundfish Observer Letter of Understanding" (Appendix 1). This document does not represent a Federal regulation or carry the force of law; it is limited to a signed acknowledgement that the observer was presented with the North Pacific Groundfish Observer Manual and that the observer fully understands the guidelines and agrees to abide by the observer duties and responsibilities, groundfish observer standards of conduct, conflict of interest standards, and confidentiality standards. The statement also acknowledges that the observer understands that if these standards are violated, the observer's certification may be revoked, and any illegal activities may result in civil or criminal penalties. If Alternative 2 is selected as the preferred alternative, NMFS intends to revise the Groundfish Observer Letter of Understanding to also require observers to abide by any code of conduct or drug and alcohol policy held by their observer employer.

### Option 1

Alternative 2 is intended to clarify the responsibilities between NMFS and observer providers, which may result in less confusion for observers, observer providers, and industry, when behavior issues arise. NMFS would retain its responsibility for maintaining data quality and integrity without the responsibility of enforcing observer standards of behavior. Because certain negative behaviors have the potential to affect data quality and integrity, Option 1 would require that NMFS continue to be informed of these behaviors if they occur. The difference under Alternative 2 is that the responsibility for taking remedial action would clearly reside with the observer's employer.

Current regulations at 50 CFR 679.50(i)(2)(x)(I) require observer providers to notify the Observer Program via fax or email, within 24 hours after the observer provider becomes aware of:

1. Any information regarding possible observer harassment;
2. Any information regarding any action prohibited under 679.7(g) or 600.725(o), (t) and (u) – *(These are general prohibited actions against observers)*;
3. Any concerns about vessel or processor safety or marine casualty;
4. Any observer illness or injury that prevents the observer from completing any of his or her duties; and
5. Any information, allegations or reports regarding observer conflict of interest or breach of the standards of behavior.

Under Alternative 2, Option 1, the wording under item five would be revised to include the requirement that observer providers must also submit information to NMFS concerning a breach of the observer provider's policy on observer conduct, which includes issues related to drugs, alcohol, or sexual physical contact. Option 1 also provides a choice regarding the time period within which the notification must occur – either within 24 hours, 48 hours, or 72 hours after the provider becomes aware of the information.

One of the primary reasons that NMFS supports including a notification requirement is because of the potential link between these negative behaviors and the quality and integrity of observer data. While establishing such a link is very difficult, and NMFS would not be responsible for enforcing the observer providers' policies, Alternative 2 would continue to allow NMFS to consider such behaviors in the decertification process of an observer. In effect, violation of an observer provider's drug and alcohol policy could be a mitigating factor in a future decertification of the observer involved. When deciding whether an observer has violated performance standards, the decertification official must consider mitigating circumstances. If substantiated by evidence and facts, mitigating factors could mean the decertification official will not decertify the observer. For example, if the observer's performance was affected by alcohol or drug use as shown through the observer provider's report to NMFS, the observer could potentially resolve the issue with treatment. If done, this would be considered a mitigating factor. The observer, having accomplished rehabilitation, could return to duty notwithstanding poor performance on a cruise. Consequently, notification of a breach of a behavioral policy is relevant to observer decertification because it will assist NMFS in determining other causes for poor performance.

A recent informal survey of observer providers, conducted in July 2007 by NMFS Observer Program staff, showed that most observer providers did not have difficulty in complying with the existing notification regulations listed above. All five categories of information involve potentially serious matters, usually involving the safety of the observer and/or others. Given that the notification requirement does not appear to be unduly burdensome to observer providers, and because a violation of an observer provider's drug and alcohol policy could represent a mitigating factor in a future decertification of an observer, NMFS believes it necessary to remain informed of any violations of an observer provider's drug and alcohol policy.

At its June 2007 meeting, the Council recommended making the notification requirement an option under Alternative 2, and approved the consideration of suboptions which would allow a longer timeframe (e.g., 48 hours or 72 hours) within which observer providers must report knowledge of observers violating the drug, alcohol and sexual physical contact policies.<sup>12</sup> Current regulations require that observer providers notify the Observer Program via fax or email, within 24 hours after the observer provider becomes aware of one of the behaviors listed above. Because of potential safety implications, NMFS suggests that the 24-hour notification period is important to maintain if it is extended to behaviors related to a breach of the observer provider's policy on observer conduct under Alternative 2. Note that the 24-hour period begins when the observer provider becomes aware of a problem and not when the problem actually occurs. The provision also does not require that an observer provider speak with Observer Program staff personally or by phone, as fax or email is acceptable.

This notification requirement has not been difficult for observer providers to meet in the past relative to other notifications regarding possible observer harassment, vessel safety, injuries, etc, thus, there does not appear to be a compelling reason to lengthen the notification timeframe for specific categories of serious incidents, i.e., those related to drugs, alcohol, or physical sexual contact. Options to lengthen the notification requirement to 48 hours or 72 hours may allow the observer providers more time to comply with the regulation, but potentially serve to increase the safety risk of the observer and the vessel or processor to which the observer is deployed. It also would add possible confusion since other regulations requiring notification within 24 hours, would not be changed.

### Summary

The proposed action under Alternative 2 is not expected to significantly affect observers or the vessels and processing plants that contract with observer providers for observer services. To the extent that the roles and responsibilities of NMFS and observer providers are clarified, this action may serve to resolve behavioral issues more expeditiously than under Alternative 1. Many industry members currently perceive the observer provider as the point of contact for observer behavior issues, thus, there may not be a substantive practical effect. When a behavioral problem involving drugs, alcohol or inappropriate sexual contact arises, the vessel owner/operator would continue to be able to contact their observer provider directly. The observer provider would be able to take immediate action, including the removal of an observer from a vessel or processing plant, without first receiving approval from NMFS. The notification requirement is not intended as an approval mechanism for NMFS. In practice, many observer providers informally consult with Observer Program staff prior to taking a serious action such as removing an observer from a vessel. NMFS encourages observer providers to continue this practice, and would be informed of the circumstances of such an action under Option 1, but NMFS approval would not be necessary prior to taking such action.

Finally, the impacts of Alternative 2 on NMFS are expected to be relatively minimal but beneficial. NMFS would not be responsible, and not be perceived to be responsible, for developing and enforcing standards of observer behavior that it cannot effectively enforce. NMFS would retain its ability to review observer provider drug, alcohol and sexual contact policies in observer provider contracts, but it would not be approving these policies. If it appeared the policies were deficient, NMFS would recommend changes to the observer providers, but NMFS would not have authority to require changes. Industry, in its role as clients to the observer providers, may take a more active and effective role in making changes to perceived deficient or ineffective observer provider policies. In addition, NMFS would continue to require observer providers to notify them of any violations of their drug, alcohol or sexual contact

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<sup>12</sup>This was also a recommendation of the Observer Advisory Committee. See the May 21 – 22, 2007 OAC report at: [http://www.fakr.noaa.gov/npfmc/current\\_issues/observer/OACreport507.pdf](http://www.fakr.noaa.gov/npfmc/current_issues/observer/OACreport507.pdf).

policies, and NMFS would continue to act upon any behavior issues that directly affected the observer's work performance.

### **2.5.3 Issue 3: Observer providers' scope of authority regarding scientific and experimental research permits**

Currently, regulations at 679.50(i)(3)(i) state that observer providers:

*(i) Must not have a direct financial interest, other than the provision of observer services, in a North Pacific Fishery managed under an FMP for the waters off the coast of Alaska, including, but not limited to,*

*(A) Any ownership, mortgage holder, or other secured interest in a vessel, shoreside or stationary floating processor involved in the catching, taking, or harvesting or processing of fish,*

*(B) Any business involved with selling supplies or services to any vessel, shoreside or stationary floating processors participating in a fishery managed pursuant to an FMP in waters off the coast of Alaska, or*

*(C) Any business involved with purchasing raw or processed products from any vessel, shoreside or stationary floating processors participating in a fishery managed pursuant to an FMP in the waters off the coast of Alaska.*

These regulations were implemented to limit observer providers from other business relationships with industry that could be perceived as compromising objectivity in the Observer Program. However, observer providers have historically provided observers and "scientific data collectors" to researchers operating under exempted fishing permits (EFPs), scientific research permits (SRPs), stock assessment cruises and other research activities in the North Pacific. While the regulations above do not specifically prohibit observer providers from providing observers or scientific data collectors in support of research activities, they are ambiguous as to whether these activities are allowed.

It is important to distinguish between the roles of observers and scientific data collectors. First, NMFS may require observers as a condition of an EFP (see 679.6(e)(5)). Typically, an observer is required when the permit holder will be conducting research within the context of the normal groundfish fishery, and the data collected by the observer is entered into a commercial groundfish fisheries database for use by NMFS managers. Observers in this role are trained and directed by NMFS, and all of the regulations that apply to observers and observer deployments are applicable. In this case, the captain, crew, and research staff do not dictate sampling activities of an observer.

In contrast, NMFS may require a permit holder to employ a scientific data collector for purposes of monitoring catch, collecting biological samples or specimens and other activities specific to the project being conducted under the EFP or SRP. Scientific data collectors are not trained or directed by NMFS. Their work is typically directed by the research plan for the specific project, under the supervision of the principal investigator or vessel personnel. The data is not collected using NMFS observer protocols and it is not used by NMFS to manage fisheries in the normal manner. Lastly, regulations that apply to observers and observer deployments do not apply to scientific data collectors.

NMFS staff determines whether an observer or a scientific data collector would be needed for a research effort, and their duties are outlined in the EFP or SRP issued to the permit holder. However, if this information is not disseminated to everyone involved in the research effort, significant confusion can result for the permit holder, crew, and observer or scientific data collector, because the role of the

observer or scientific data collector is not clear. This situation is exacerbated if the same person switches between observer and scientific data collector roles during the same deployment.

As previously stated, Federal regulations are ambiguous as to whether observer providers are prohibited from providing observers or scientific data collectors for purposes of research activities. Therefore, two alternatives are proposed under this issue, one of which would revise Federal regulations to explicitly allow observer companies to provide observers or scientific data collectors for purposes of EFPs, SRPs, and other research activities (Alternative 2) Alternative 1 would not change current Federal regulations, thus retaining the status quo.

### Alternative 1

Alternative 1. No action. No change would be made to existing Federal regulations, which are unclear as to whether observer providers may provide scientific data collectors<sup>13</sup> to aid in research activities, including exempted fishing permits, scientific research permits, or other research. Current practice is to allow these activities, but the existing regulations are ambiguous.

Alternative 1 would not clarify whether observer providers could provide observers or scientific data collectors for research activities in Federal regulations. Likely, NMFS would continue to allow these activities without pursuing enforcement action. However, it is possible that NMFS Enforcement and NOAA GC could determine that observer providers are in violation of Federal regulations. If this occurs, researchers would likely have to obtain scientific data collectors from a different source. In addition, NMFS may not be able to require observers as a condition of a permit, and research may not be able to be conducted within the context of the normal groundfish fishery.

### Alternative 2

Alternative 2. Revise Federal regulations to clarify that observer providers may provide observers or scientific data collectors for purposes of exempted fishing permits, scientific research permits, or other scientific research activities. In this role, NMFS observer program regulations would apply to observers operating under their NMFS certification but would not apply to scientific data collectors.<sup>14</sup>

Alternative 2 would revise regulations at 679.50(i)(3)(i) to state that observer providers:

*(i) Must not have a direct financial interest in a North Pacific Fishery managed under an FMP for the waters off the coast of Alaska, except as provided for under §679.50(i)(3)(iv), including, but not limited to,*

*(A) Any ownership, mortgage holder, or other secured interest in a vessel, shoreside or stationary floating processor involved in the catching, taking, or harvesting or processing of fish,*

*(B) Any business involved with selling supplies or services to any vessel, shoreside or stationary floating processors participating in a fishery managed pursuant to an FMP in waters off the coast of Alaska, or*

<sup>13</sup> Note that NMFS has suggested a revision to this alternative. The word “employees” has been removed, and replaced with the words “scientific data collectors.” This revision provides consistency with Alternative 2.

<sup>14</sup> Note that there are circumstances in which observers would be required to account for total catch or the research is being conducted within the context of the normal fishery.

*(C) Any business involved with purchasing raw or processed products from any vessel, shoreside or stationary floating processors participating in a fishery managed pursuant to an FMP in the waters off the coast of Alaska.*

Additionally, Alternative 2 would add regulations at 679.50(i)(3)(iv) to state that observer providers:

***(iv) May provide:***

***(A) Observer services under an FMP for the waters off the coast of Alaska as required in 50 CFR 679, or***

***(B) Scientific data collector and observer services to support NMFS approved scientific research or experimental fisheries as defined under §600.10.***

Alternative 2 would clarify that, in addition to the provision of observer services for purposes of groundfish fisheries managed under the FMPs, observer providers could provide observers and scientific data collectors for purposes of EFPs, SRPs, and other NMFS sponsored research activities. Alternative 2 would likely result in minimal impacts, as current practice is to allow these activities; but Alternative 2 would serve to help all parties involved to understand an observer provider's role. Additionally, there would be no chance of enforcement actions as a result of these activities if the regulations were clarified. Alternative 2 is NMFS' preferred alternative.

While the intent of Alternative 2 would be to clarify that observer providers are allowed to provide observers and scientific data collectors for research activities, members of the industry expressed concern about how observer and scientific data collector duties would coincide during the same contract. Currently, the most common practice for vessel owners that conduct groundfish fishing requiring an observer under an FMP in the same trip as fishing under an EFP or SRP that requires a scientific data collector, is to have the same individual fulfill both the observer and scientific data collector roles. This reduces the cost for the vessel owner because the observer does not need to be replaced with a different person who acts as the scientific data collector. However, in these situations, regulations governing the observer would also apply to the scientific data collector.

Current regulations in 50 CFR 679.50 place limits on deployment length and the maximum number of vessels on which an observer may be deployed before debriefing, as well as require observers to record information concerning their sampling efforts in the form of an electronic survey before performing other jobs or duties that are not part of NMFS groundfish requirements. These regulations are listed below:

- Regulations at § 679.50(i)(2)(vii)(A) limit the amount of time an observer may be deployed on any vessel or processor to 90 days during a 12 month period.
- Regulations at § 679.50(i)(2)(vii)(B) limit an observer's cruise duration to 90 days.
- Regulations at § 679.50(i)(2)(vii)(C) limit the number of assignments for an observer to 4 vessels or processors per deployment.
- Regulations at § 679.50(i)(2)(ii)(B) require observers to complete a NMFS electronic vessel and/or processor survey before performing other jobs or duties which are not part of NMFS groundfish observer requirements. These may include working as an ADF&G shellfish observer, a NMFS marine mammal observer, or a scientific data collector for a vessel fishing under an EFP or SRP.

The intent of these regulations is to: (1) help avoid situations where an observer establishes close relationships with vessel crew that could compromise his or her objectivity, and (2) maintain high levels of data quality by requiring debriefings every 90 days or before too much data accumulates (after working on 4 vessels or processors); and (3) insure data quality by requiring the observer to provide a complete description of their work in the form of an electronic vessel and/or processor survey before the observer moves on to other work outside of NMFS groundfish observer duties. Observer Program staff have found that data quality and recollection of sampling events could be reduced as cruise lengths are increased beyond 90 days; more than four vessels are observed during a single deployment; or the observer works on a job that is not related to his or her prior observer duties.

Regulations limiting deployments have been in existence for many years and have proven to be important tools used by NMFS to provide high quality data to the fisheries scientists and managers in the North Pacific. Observer providers have expertise in managing logistics to maximize an observer's utility through multiple assignments without exceeding the 90 day or 4 vessel/processor limits. Under Alternative 2, observer providers would continue to work with vessel and processing companies to ensure observers or scientific data collectors are available in a cost efficient manner. Therefore, the effect of Alternative 2 to industry should be minimal.

All of the existing regulations cited above could limit an observer's ability to work as a scientific data collector under a research activity without first debriefing. An observer that has been deployed for 90 days, or has been deployed on 4 boats, must return for debriefing. An observer who has not reached these limits may be deployed as a scientific data collector until these limits are reached. For example, if an observer was deployed on three groundfish vessels during a 60 day deployment, that observer could complete an electronic survey, and then be deployed as a scientific data collector on one additional boat for 30 days before being required to return for debriefing. Industry has expressed interest in reducing costs, travel in particular, for scientific data collectors. Those cost savings must be balanced by NMFS' need to obtain and provide quality observer information in a timely manner.

In 2006, NMFS issued 29 SRPs. The average length for each SRP was 25 days, with a minimum of 11 days to a maximum of 69 days. In 2006, fishing occurred under five EFPs. EFPs were issued for 61, 92, 29, and 90 days. In the fifth EFP, fishing occurred within the normal context of the groundfish fishery from May 15 through the end of the 2006 calendar year, and observers were deployed under regulations governing the groundfish fishery.

Alternative 2 does not propose to change the existing limits regarding the duration of observer deployments. Relaxing current requirements on observer deployments could negatively impact data quality. For example, if an observer was allowed to be deployed as a scientific data collector prior to debriefing, that observer could be deployed for an extra 92 days in the most extreme case. Much of the information necessary to determine sampling and data collection proficiency may have been forgotten during that time period, as the observer switches to a different role as a scientific data collector. While it is unlikely that an observer/scientific data collector would be deployed for this extended amount of time without debriefing, NMFS is concerned about the effects of additional deployments in general on data quality. In turn, any corrections that would be made to the observer's data as a result of debriefing would also be delayed. These corrections could impact inseason management. For these reasons, NMFS is not considering relaxing existing deployment standards in this action.

Some members of industry have inquired about whether final debriefings could be held in the field, which would allow the individual to be deployed as either an observer or scientific data collector without incurring the expense of additional airfare from Seattle or Anchorage for debriefing. NMFS has found that conducting debriefings in the field places demands on a limited field work force which conflict with their ability to perform their regular functions.



The Observer Program currently maintains offices in Kodiak and Dutch Harbor. One staff member is permanently stationed at each of these offices. These staff members' time is fully allocated performing basic core functions necessary to support observers in the field. Field personnel duties include: maintaining and distributing sampling and safety gear, answering sampling questions, providing a conduit for information exchange between the fishing industry and the observer program, conducting pre-cruise meetings, and conducting mid-cruise debriefings. During busier times, additional staff is deployed to handle additional workload.

Note that mid-cruise debriefings are not the same as final debriefings. The intent of mid-cruise debriefings is to provide an opportunity for inseason coaching on sampling methodologies, conduct some initial data checking, and ensure no major problems are occurring. New observers, and observers in their second cruise, are typically required to report to a NMFS field office for a mid-cruise debriefing. Additionally, debriefers may require observers to complete a mid-cruise debriefing during a subsequent cruise if the observer had significant deficiencies identified during a previous debriefing. Mid-cruise debriefings typically occur when an observer is between vessels, or the vessel he or she is assigned to is offloading. A mid-cruise debriefing typically involves the observer leaving his or her data set with Observer Program staff, the staff member reviewing all data collected to date, and the staff member conducting an interview with the observer. The process is typically completed within the same day.

Final debriefings are significantly more involved. They typically take several days, and there may be a waiting period before an observer can complete a debriefing during busier times of the year. The complete debriefing process is described in Section 2.5.6.1 in detail, and is not repeated here. To summarize however, the process includes completion of an electronic survey, submission of data to NMFS, data review by the debriefer, an interview, an evaluation, and gear check-in.

Because of the significant resource allocations necessary to complete final debriefings, the Observer Program has historically conducted almost all final debriefings in Seattle or Anchorage. The Observer Program currently has 3 staff at the Anchorage field office, all of which conduct debriefings. Thirty-one staff are located in the Seattle office. Of these, 10 routinely conduct debriefings. Additionally, one debriefer has been contracted to assist in Seattle during busier debriefing times. While each of the staff members deployed to the Dutch Harbor and Kodiak field offices are capable of conducting debriefings, they have significantly different roles and are currently fully allocated. To complete debriefings in Dutch Harbor and Kodiak would require resource reallocation to these offices, at a significant expense to the agency.

Based on communication with two current observer providers, regulations limiting observer cruise durations and vessel deployments may constrain flexibility in the deployment of an observer who is also deployed as a scientific data collector. However, observer providers have learned to work with research permit holders to reduce costs as much as possible (*pers. comm.* Diana Star, Saltwater Inc. and Pam Gale Alaskan Observers Inc., 10/18/2007). For example, observer providers can work with a research permit holder to conduct research prior to actual groundfish fishing, and avoid the requirement to complete a vessel survey before performing other jobs or duties. In some cases, however, it may not be possible for an observer provider to arrange for a groundfish observer to also work as a scientific data collector during the same cruise.

Note that EFP permit holders are often allowed to retain and sell fish harvested during the course of their research. Often these catch amounts are beyond those available to participants in the normal groundfish fisheries. Revenues are intended to cover the cost of research activities, including the cost of the research platform and scientific data collector.

In sum, debriefings conducted in field offices are counterproductive to the overall data quality goals of the observer program. Current regulations and policies are in place as data quality control measures. Additionally, observer providers have learned to reduce costs for research permit holders as much as possible. Consequently, current debriefing regulations and policies would not be revised under this alternative.

#### 2.5.4 Issue 4: Fishing day definition

On January 3, 2005, the NMFS Sustainable Fisheries Division received a memorandum from NOAA Fisheries Office for Law Enforcement (OLE) requesting revision of a regulation defining “fishing day” for purposes of enforcing observer coverage requirements (refer to Appendix 2). Specifically, OLE relates concerns that Federal regulations governing the 30 percent observer coverage requirement are unclear as to whether they allow vessel owners and operators to use *any* amount of observer coverage incurred during a 24-hour period to count towards coverage requirements. To clarify 30 percent observer coverage regulations, and to reduce a vessel’s ability to conduct unrepresentative fishing operations specifically for purposes of obtaining coverage, NOAA OLE recommended revising the definition of “fishing day.” The specific recommendation is included as Alternative 2. An alternative approach is included as Alternative 3.

##### Alternative 1

Alternative 1. No action. The current definition of “fishing day” in Federal regulations allows vessel owners or operators to use any observer coverage incurred during a 24-hour period to count towards observer coverage requirements, which has resulted in vessels fishing and being observed in ways that are not representative of actual fishing behavior. No change would be made to existing Federal regulations at 50 CFR 679.2 which define “fishing day” as follows:

*Fishing day means to (for purposes of subpart E) a 24-hour period, from 0001 hours A.l.t. through 2400 hours A.l.t., in which fishing gear is retrieved and groundfish are retained. Days during which a vessel only delivers unsorted codends to a processor are not fishing days.*

Note that observer coverage requirements are currently based on the following regulations at 679.50(c)(1)(v):

*(v) A catcher/processor or catcher vessel equal to or greater than 60 ft (18.3 m) LOA, but less than 125 ft (38.1 m) LOA, that participates for more than 3 fishing days in a directed fishery for groundfish in a calendar quarter must carry an observer during at least 30 percent of its fishing days in that calendar quarter and at all times during at least one fishing trip in that calendar quarter for each of the groundfish categories defined under paragraph (c)(2) of this section in which the vessel participates.*

For purposes of meeting observer coverage requirements, these regulations have been interpreted to mean that an observer must only be onboard a vessel at any point during a 24-hour period when fishing occurs and groundfish are retained to count as a “fishing day.” This would continue to be the interpretation under Alternative 1 (no action). While many vessels operate with an observer as they would without an observer, others intentionally alter their fishing behavior specifically to meet observer coverage requirements. For example, if a vessel needs two additional days to meet coverage requirements, the owner or operator could retrieve one haul at 11:30 pm and retrieve a second haul at 12:30 am the next day, and obtain the needed observer coverage days. Often these hauls are not representative of normal haul durations, location, and depth, and catch composition may vary significantly from normal fishing

behavior. Thus, there is a concern that the resulting observer data do not comprise a representative sample.

NOAA OLE has also documented instances in which vessel operators intentionally structure fishing activities such that they fish unobserved until late in the day, pick up an observer and make a short tow prior to midnight, make one more tow immediately after midnight, and then return the observer to port. Additional fishing activities then occur during the remainder of the day the observer was not onboard. Under the current regulations, this scenario may be interpreted as meeting the requirements for two “observer” days.

Alternative 1 would not clarify 30 percent observer coverage requirements, which pertain to all catcher/processors and catcher vessels equal to or greater than 60 ft LOA, but less than 125 ft LOA. Vessels would likely continue to conduct non-representative fishing, specifically with the intent of meeting observer coverage requirements. Observers would continue to collect information on total catch, and that information likely would be used by NMFS to manage the groundfish fisheries.

For most 30 percent vessels, NMFS currently bases its calculation of species composition, including halibut and crab prohibited species catch (PSC), on basket samples of approximately 300 kg (approximately 660 lb) or less, depending on the time and space available to the observer. Catch composition data are extrapolated (the term commonly used is “expanded”) to determine species composition and PSC use for the entire haul. The catch composition for sampled hauls is expanded to determine the catch composition for unsampled hauls during a trip. NMFS then calculates the species composition and PSC catch rate from the sampled hauls for each directed fishery. These species composition and PSC catch rate estimates are then applied to all unobserved catch to determine total species composition and PSC use. The degree to which a given quantity of groundfish or PSC in a sample is expanded varies substantially, depending on the fraction of total observed hauls and the fraction of sampled catch in each of the observed hauls.

To the extent that catch composition estimates based on vessels that conduct fishing operations expressly to meet observer coverage requirements are not representative of normal fishing operations, additional error could be introduced into the management system under Alternative 1. This error could result in inaccurate fishery removal information, and result in managers making more conservative closure decisions, therefore affecting fishery participants.

## Alternative 2

Alternative 2. Revise the definition of “fishing day” in Federal regulations as follows:

*Fishing day means ~~to~~ (for purposes of subpart E) a 24-hour period, from 0001 hours A.l.t. through 2400 hours A.l.t., in which fishing gear is retrieved and groundfish are retained. An observer must be on board for all gear retrievals during the 24-hour period in order to count as a day of observer coverage. Days during which a vessel only delivers unsorted codends to a processor are not fishing days.*

Alternative 2 was proposed by NOAA OLE in its original letter to NMFS Alaska Region and approved for consideration by the Council. Alternative 2 would affect all non-pot gear catcher/processors and catcher vessels greater than or equal to 60 ft LOA, but less than 125 ft LOA that are subject to 30% observer coverage requirements. These are primarily trawl or hook-and-line catcher vessels  $\geq 60'$  but  $< 125'$  LOA, and hook-and-line catcher processors  $\geq 60'$  but  $< 125'$  LOA. Alternative 2 would revise Federal regulations to require that affected vessels carry an observer for all fishing activities that occur during the 24-hour period for that fishing day to count as an observer coverage day. This would likely

reduce instances in which vessels conduct fishing operations specifically to meet coverage requirements, and likely increase data quality for this sector. Another potential effect is improved accuracy in NMFS closure decisions, which may result in allowing vessels to fish for longer periods of time and increase revenues.

The discussion under Alternative 1 provides examples in which NOAA OLE has documented situations in which vessel operators with 30% observer coverage requirements intentionally structure fishing activities to accrue “observer coverage days” without having an observer present during normal fishing activities. Under Alternative 2, it is anticipated that these situations would be somewhat mitigated. Under Alternative 2, the observer must be present for all hauls within the 24-hour period in order to meet the definition for “fishing day” and accrue an observer coverage day.

Alternative 2 would thus increase costs for vessels in some cases, requiring them to carry observers longer than they would be required to under Alternative 1 (status quo). Alternatively, vessels could choose to postpone fishing (in the example described above) such that they do not retrieve hauls without an observer during a 24-hour period in which they also retrieved hauls with an observer, thus increasing trip length and costs. For these reasons, Alternative 2 may have some significant cost implications for industry.

During the development of the analysis, NMFS has done further work to more fully understand how frequently and by what methods the fleet conducts unrepresentative fishing operations specifically for purposes of obtaining coverage. In July 2007, NMFS reviewed the results of an electronic survey which is completed by all observers in debriefing. The following question was added to the survey in 2004: “Did this vessel ever fish solely for the purpose of obtaining observer coverage?” NMFS asks this question for each vessel the observer boarded during their cruise (cruises last up to 90 days and observers may be onboard four different vessels during a single cruise). Individuals who answer yes to this question are required to then enter a comment field asking them for the specific tow numbers and an explanation for their response. In analyzing the responses to these questions, most observers understood that this question was intended to identify non-representative fishing behavior which was conducted just to obtain coverage for that day. In only one case did the observer appear confused, responding that all fishing was conducted for coverage. A review of the fishing records from that observer indicates that representative fishing effort occurred. This report was excluded from the following results as an error.

Of the 4,820 total cruise/vessel surveys completed between January 2004 and July 2007, 356 (7.4%) responded that the vessel had fished solely for the purposes of obtaining observer coverage. These tows or sets are commonly referred to as “observer tows/sets”. All of the vessels on which “observer tows/sets” were reported were less than 125 feet LOA. Trawl and hook-and-line vessels greater than 125 feet LOA are required to have at least 100% observer coverage, thus, this issue is not relevant to these vessels. However, it is important to note that observer tows/sets have not been identified on vessels that require 100% observer coverage, because it is not advantageous to do so.

Each of the 356 observer reports can represent one to several days of actual coverage obtained through “observer tows/sets”. NMFS reviewed the responses from each of these reports to determine how many days of coverage were obtained (see Table 4). In some cases, the number of days was obvious from the comments. In other cases, the original logbook was consulted to ensure the observer data were correct. In cases where there was any ambiguity, NMFS estimated a single observer day was obtained. In many cases, the observer was aware when a tow was being taken solely to obtain coverage because the captain or crew told him or her that this was what they were doing.

Table 4 shows on an annual basis between 2004 to mid-2007, the number of observer coverage days that were obtained by employing ‘observer tows/sets’ for at least part of a fishing trip varied between 18 and

28 days in the hook-and-line sector and between 120 and 186 days in the trawl sector. This represents 1.2% - 4.7% of the total observed fishing days for the hook-and-line sector and 4.3% - 9.7% for the trawl sector. Note that the highest percentages for the hook-and-line sector are in 2007, for which data are limited to that reported as of July 20.

**Table 4 Percentage of observer days obtained by “fishing for observer coverage” as reported in the observer debriefing survey, by gear type, 2004 – 2007 for 30% observed vessels**

Year	Gear type	Number of “fishing for coverage” days	Total number of observed fishing days for the 30% hook-and-line and trawl sectors	Percent days obtained by fishing for coverage
2004	Hook-and-line	18	1,564	1.2%
2005	Hook-and-line	22	1,450	1.5%
2006	Hook-and-line	22	1,516	1.5%
*2007	Hook-and-line	28	593	4.7%
Total	Hook-and-line	90	5,123	n/a
2004	Trawl	148	2,965	5.0%
2005	Trawl	120	2,769	4.3%
2006	Trawl	186	2,984	6.2%
*2007	Trawl	83	1,716	4.8%
Total	Trawl	537	10,434	n/a

\*Data reported as of July 20, 2007.

Table 5 provides data on the target fisheries and areas associated with the observer coverage days in Table 4. Note that the target fisheries are as identified by the observer in the debriefing survey. Often, observers enter multiple targets; those are categorized as “mixed.” In the hook-and-line fisheries, very few instances of “observer sets” were reported by observers in the BSAI; almost all of them were reported in the GOA Pacific cod or sablefish fisheries. In 2006, 3,007 mt of Pacific cod and 5,332 mt of sablefish were harvested in the GOA by 30% vessels. With the exception of 2005, the majority of the trawl “observer tows” reported by observers were also in the GOA. These were reported as occurring in several fisheries, primarily the flatfish, Pacific cod, pollock, mixed, rockfish, and rock sole fisheries. In 2006, 30% vessels harvested 114,617 mt in these fisheries. Those reported in the BSAI were primarily in the pollock fishery. In 2006, 30% pollock vessels harvested 261,601 mt in the BSAI.

**Table 5 Target fisheries associated with number of observer days obtained by “fishing for observer coverage” as reported in the observer debriefing survey, by gear type, 2004 – 2007 for 30% observer coverage vessels**

Area	Target	2004		2004 Total	2005		2005 Total	2006		2006 Total	2007		2007 Total	Grand Total
		H&L	Trawl		H&L	Trawl		H&L	Trawl		H&L	Trawl		
BSAI	Flatfish				4		4				2		2	2
	IFQ	2		2										6
	Mixed		7	7	2		2	4	4	12		12	25	
	Pacific Cod		20	20	10		10	13	13	8		8	51	
	Pollock		23	23	60		60	40	40	9		9	132	
	Yellowfin Sole		2	2			1	1					3	
BSAI Total		2	52	54	4	72	76		58	58		31	31	219
GOA	Arrowtooth				4		4		20	20	5		5	29
	Flatfish		37	37	3		3	10	10	3		3	53	
	IFQ	13		13	10		10	13	13	14		14	50	
	Mixed		14	14	13		13	27	27	22		22	76	
	Pacific Cod	3	6	9	8	3	11	8	4	12	14	1	15	47
	Pollock		8	8		11	11		35	35		6	6	60
	Rex Sole								1	1				1
	Rock Sole		11	11		8	8		23	23		12	12	54
	Rockfish		5	5					2	2				7
		Yellowfin Sole										2	2	2
GOA Total		16	81	97	18	42	60	21	122	143	28	51	79	379
BSAI and GOA	IFQ							1	1					1
	Mixed		12	12	3		3		6	6				21
	Pacific Cod		2	2							1		1	3
	Pollock		1	1										1
	Rex Sole				3		3							3
BSAI and GOA Total			15	15		6	6	1	6	7		1	1	29
Grand Total		18	148	166	22	120	142	22	186	208	28	83	111	627

Source: Observer debriefing surveys, 2004 – 2007. 2007 data are reported as of July 20, 2007.

IFQ = sablefish IFQ; or sablefish and halibut IFQ in the same trip, if retained sablefish is over the maximum retainable amount. (30% observer coverage applies to these vessels  $\geq 60$  and  $< 125'$  LOA.)

In analyzing responses from observers in the observer debriefing surveys, it is clear there are two distinct strategies being employed by vessels to inappropriately obtain observer coverage. The first strategy combines “observer tows/sets” with actual fishing effort on a trip. In these cases, the vessels may set and retrieve gear shortly after departing to ensure that the first day of a trip is counted as a coverage day. Alternatively, the vessel makes a tow or set after midnight on the last day of a trip to ensure that day is also counted toward the observer coverage requirements. As stated previously, making observer tows or sets at the beginning and end of each trip would result in two additional days of coverage under the current regulations. These observer tows or sets are generally very short and result in a relatively small amount of fish harvested, generally less than two metric tons. Observers on vessels which have ceased fishing due to weather have also reported taking a single observer tow or set in order for the bad weather day to count. Many vessels will obtain one to two additional days of coverage on trips using this strategy. However, in all cases, these observer tows were taken on days during trips when observer tows did not appear to occur.

In contrast, it is also clear that some vessels will take entire trips for the sole purpose of obtaining observer coverage days, and only observer tows or sets are made. These trips are typically of very short duration and consist of taking the observer just outside of port and deploying gear both before and after midnight. No true fishing effort is associated with these tows as they are off the fishing grounds and very short. Based on the observer debriefing surveys, NMFS classified the observer information obtained to assess how much coverage was obtained by the strategies of: 1) combining “observer tows/sets” with actual fishing on a trip, and 2) only taking “observer tows/sets” during a trip. A summary (Table 6) shows that of the 627 total coverage days received by making observer tows or sets at least in part on a given trip, 158 days (25%) counted toward observer coverage requirements when the vessel only made observer tows/sets on a given trip, and no representative fishing occurred. Of those coverage days associated with observer tows/sets only, the great majority (87%) were acquired by trawl vessels.

Note that neither of these strategies violates existing Federal regulations with regard to 30% observer coverage for the specific classes of vessels that must meet these requirements. However, the second strategy does not comply with the intent of the 30% observer coverage regulations and results in

significant concern with the quality of the associated data. In addition, understanding the percentage of the observer coverage days, or total catch for that matter, that is affected by this behavior does not sufficiently define the problem, since observer data are also supposed to provide an adequate representation of the spatial and temporal distribution of the harvest in a target fishery.

**Table 6 Number of coverage days obtained by taking observer tows/sets only or by taking observer tows/sets in conjunction with fishing, by gear type, 2004 – 2007**

Gear Type	Year	Observer Tows/Sets Only	Fishing and Observer Tows/Sets	Total
Hook-and-line	2004	0	18	18
	2005	10	12	22
	2006	0	22	22
	*2007	10	18	28
Hook-and-line total 2004 -07		20	70	90
Trawl	2004	46	102	148
	2005	20	100	120
	2006	50	136	186
	*2007	22	61	83
Trawl total 2004 - 07		138	399	537
<b>Grand total # of coverage days</b>		<b>158 (25%)</b>	<b>469 (75%)</b>	<b>627 (100%)</b>

Source: Observer debriefing surveys, 2004 – 2007.

\*Data reported as of July 20, 2007.

The details of one case included in Table 6 are provided as an example. In this case, a trawl vessel took an observer on four consecutive trips on which only “observer tows” were made. Each trip consisted of one tow before midnight and another tow after midnight. The largest catch of any tow was 0.01 metric tons (approximately 22 lbs). These trips were repeated every other day for a total of eight observer coverage days. While most vessels obtain needed coverage with an occasional “observer tow,” several vessels repeatedly use the strategy noted in this example.

Table 7 provides additional data on the number of vessels that obtained observer coverage days by: 1) taking trips in which only observer tows/sets were made; or 2) observer tows/sets were made on at least part of the fishing trip. For example, in 2006, the 22 coverage days that were identified as observer sets combined with fishing were obtained by 9 hook-and-line vessels. In the trawl sector that is required to have 30% observer coverage, 33 – 53 vessels employed one or both of the two strategies during the same time period. In total, a high of 62 hook-and-line and trawl vessels (2004) were reported as having exhibited this type of fishing behavior, according to observer debriefing surveys.

**Table 7 Number of individual vessels employing at least one of the two strategies to obtain observer coverage days**

Year	Hook-and-Line	Trawl	Total
2004	9	53	62
2005	8	49	57
2006	9	50	59
*2007	8	33	41

Source: Observer debriefing surveys, 2004 – 2007.

\*Data reported as of July 20, 2007.

The subset of individual vessels which observers reported took trips in which *only* observer tows/sets were made is provided in Table 8. For example, the 50 observer coverage days obtained by trawl vessels reported as taking observer tows in 2006 were taken by 19 individual trawl vessels.

**Table 8 Number of individual vessels employing the strategy of taking trips in which only observer tows/sets were made to obtain observer coverage days**

Year	Hook-and-Line	Trawl	Total
2004	0	12	12
2005	2	7	9
2006	0	19	19
*2007	1	7	8

Source: Observer debriefing surveys, 2004 – 2007.

\*Data reported as of July 20, 2007.

NMFS has received reports of “observer tows/sets” for many years, and it is possible that the numbers reported above are underestimates. Three reasons why these events may not be reported by observers in all cases include: 1) the observer may have previously reported such activity and has since ceased reporting because the issue has not been corrected (as reporting does not result in action); 2) the observer did not understand the question and failed to report correctly; and 3) the observer did not fully recognize the vessel activity. For example, NMFS identified one vessel whose behavior appeared to be consistent with observer tows, but the observer did not identify the activity as such in the survey. In this case, NMFS verified the logbooks and found that the observer correctly reported several days of observer tows in their log, but not in the survey.

To further examine whether under-reporting should be of concern, NMFS identified the number of fishing days in the database from vessels less than 125 feet where a single tow/set was made in a day, the catch was less than 2 metric tons, and the observer answered no to the question about fishing for observer coverage in the debriefing survey. This resulted in 466 additional fishing days across all gear types and years (2004 – 2007) which could potentially be “observer tows/sets.” However, it is difficult to differentiate between the results of strategic behavior and similar results arising from poor fishing or inclement weather. Of the 466 fishing days identified above, NMFS systematically selected 22 fishing days that were examined in further detail by retrieving and reading the observer logbooks for further explanation. Of these 22 fishing days, NMFS found that 3 were identified as observer tows in the observer logbook, but were not reported in the survey; 8 were possibly observer tows or sets but inadequate information exists to make a conclusion; and 11 were not observer tows or sets.

Note that NMFS was unable to determine if additional fishing activity occurred on days where observer tows occurred because the logbooks which contain this information are not available electronically. It was clear from the survey comments that on many days, the “observer tow or set” was the only fishing effort that day. Thus, in assessing this relatively small sample, one could assume that the survey report records are more likely to underestimate the number of coverage days obtained from observer tows or sets.

NMFS is also concerned that pot vessels have been known to exhibit strategic behavior to obtain observer coverage. NMFS issued a final rule January 7, 2003 (68 FR 715) that revised observer coverage requirements for all pot vessels and was intended to address this issue. No strategic behavior on pot vessels was identified in the survey responses.

Under Alternative 2, the definition of ‘fishing day’ in Federal regulations would be modified such that an observer must be onboard for all gear retrievals during the 24-hour period in which fishing gear is retrieved and groundfish are retained in order to count as a day of observer coverage. Recall that



Alternative 2 is limited to potentially affecting vessels that are required to have 30% observer coverage. For the general sectors identified, Table 9 provides the number of vessels that participated in the GOA or BSAI groundfish fisheries in 2006 – 2007 that are required to have 30% observer coverage.

**Table 9 Number of individual vessels participating in the GOA and/or BSAI groundfish fisheries by 30% sector, 2006 – 2007**

Sector	2006	2007
Pot CP	5	4
Pot CV	78	78
Trawl CV >60' but ≤125'	95	90
Trawl CP >60' but ≤125'	12	10
H&L CV >60' but ≤125'	97	74
H&L CP >60' but ≤125'	11	11

Source: NMFS catch accounting database, 2006 - July 2007.

Alternative 2 would thus increase costs for the above vessels in some cases, requiring them to carry observers longer than they would be required to under Alternative 1 (status quo), in order to accrue a coverage day. Vessels could also choose to postpone fishing such that they do not retrieve hauls without an observer during a 24-hour period in which they also retrieved hauls with an observer. This modification still increases trip length and costs, although it is not possible to provide a quantitative estimate of those potential costs. However, given that this represents a substantial change from the requirements of the status quo, Alternative 2 may have some significant cost implications for this portion of the industry.

One of the primary concerns discussed at the May 2007 OAC meeting was that there could be legitimate situations in which this type of activity occurs, most notably when nearing a fishery closure or due to (inadvertent) poor planning. This issue is primarily a concern for both the 30% covered hook-and-line and trawl sectors particularly in the GOA. Gulf representatives noted that there have been, at times, observer availability problems, resulting in some vessels becoming apprehensive that they will not be able to meet their coverage requirements before the fishery closes. One vessel may drop an observer off at the dock early in order for another vessel to take them and not be found in violation. However, OAC members also generally agreed that non-representative fishing occurs in various forms, and that this serves to degrade the credibility of observer data. The primary concern was that Alternative 2 would increase costs to all vessels, including those who purposefully manipulate the system.<sup>15</sup>

Note also that while this issue may have been of concern for both the GOA hook-and-line sablefish and Pacific cod sectors and the GOA trawl flatfish, Pacific cod, pollock, rock sole, and rockfish sectors in the recent past, several management changes have recently been approved that will reduce the number of fisheries that are subject to the 30% observer coverage requirements. The GOA rockfish pilot program, effective in 2007, which permits harvesters to form voluntary cooperatives and receive an exclusive harvest privilege to the primary rockfish species in the Central GOA, requires 100% or 200% observer coverage for catcher vessels and catcher processors, respectively.<sup>16</sup> Those catcher processors that opt out of the program are also required to have 100% observer coverage.

<sup>15</sup>At the May 2007 OAC meeting, several members of the OAC and NMFS agreed that true resolution of this issue in the 30% fleet is only possible through a change in the service delivery model for the groundfish observer program (i.e., restructuring of the program). Any other potential solution within the current service delivery model will only offer limited benefits. The OAC thus discussed whether these limited benefits were worth potentially penalizing legitimate operations.

<sup>16</sup>Catcher processors that opt out of the program are required to have 100% observer coverage in July in any Gulf fishery (except Southeast Outside) for purposes of monitoring the July sideboards.

In addition, the GOA trawl pollock and Pacific cod fisheries are fairly short, three or four-day fisheries, the duration of which may mitigate the ability of a vessel to manipulate the system by doing observer tows. In effect, the only Gulf fisheries in the near future to which this issue would likely apply are the flatfish fisheries and the hook-and-line fisheries, although very few vessels  $\geq 60'$  LOA fish in the GOA with hook-and-line gear and are thus subject to 30% coverage requirements.

While the focus has been on GOA fisheries due to the large number of 30% covered fisheries in the GOA prior to implementation of the Rockfish Pilot Project in 2007, 30% covered vessels in the BSAI have also been documented to exhibit observer tow behavior. As noted previously in Table 5, which summarized observer tow information from the debriefing survey, 379 coverage days were obtained from observer tows in the GOA, 219 in the BSAI, and 29 in both the GOA and BSAI. However, as noted above, it is important to remember that these are underestimates. Table 10 below displays the fisheries that would be subject to 30% coverage regulations assuming implementation of Amendment 80 in the BSAI, and the number of vessels that participated in those fisheries in 2006. This serves as a proxy for the number of 30% vessels likely to be operating with those management programs in effect. However, note that some vessels participate in multiple fisheries, and therefore the total number of vessels in the 30% coverage category may be overestimated.

**Table 10 Number of vessels in 2006 that were required to carry an observer 30 percent of their fishing days, reported by fishery, gear type, and area, and would not be subject to 100 percent observer coverage requirements under current or pending management programs**

Gear type	Fishery	Number of vessels	
Longline	Catcher/processor turbot	4	
	Catcher vessel IFQ sablefish	63	
	Catcher/processor IFQ sablefish	6	
	Catcher vessel Pacific cod	11	
	Catcher/processor Pacific cod	10	
	Total	94	
	Trawl	Catcher vessel shallow water flatfish in GOA	25
Catcher vessel deep water flatfish in GOA		23	
Catcher vessel western GOA rockfish outside of July		0	
Catcher vessel west Yakutat rockfish		4	
Catcher vessel pollock (BSAI and GOA)		83	
Catcher vessel Pacific cod		73	
Catcher vessel yellowfin sole		3	
Catcher vessel rock sole		0	
Catcher vessel rockfish in Aleutian Islands		0	
Catcher vessel Atka mackerel		0	
Catcher/processor not subject to Amendment 80 or Rockfish Pilot Program sideboards in GOA		0	
Total		211	
Jig		Vessels in BSAI	0
		Vessels in GOA	0
Pot	All vessels regardless of size or target	68	
	Total	373	

Note that regulations at 679.50(c)(1)(v) require catcher/processor or trawl vessels equal to or greater than 60 ft (18.3 m) length over all (LOA), but less than 125 ft (38.1 m) LOA to meet 30 percent coverage requirements. Regulations at 679.50(c)(1)(vii) require all pot vessels to carry an observer for 30 percent of its pot retrievals. Vessels reported above include only those which fall into these categories. Source: NMFS, Alaska Region.

Based on the analysis to date and informal consultations with industry, Alternative 2 does not appear to correct the problem identified under the status quo, as vessel operators may be able to alter their behavior to manipulate observer coverage levels relative to actual fishing effort. If vessels were required to carry an observer for all hauls within a 24-hour period, the following example is likely to occur. A vessel could carry an observer for hauls that occur in the early morning, offload, and rather than retrieve hauls the evening of the same day, delay fishing activities to the following day. This behavior would still be allowed under Alternative 2, but would not be representative of what would occur had the vessel not carried the observer during that 24-hour period. Therefore, Alternative 2 may adversely affect normal fishing operations and also increase costs for many vessels, including those that are not purposefully fishing solely for observer coverage days.

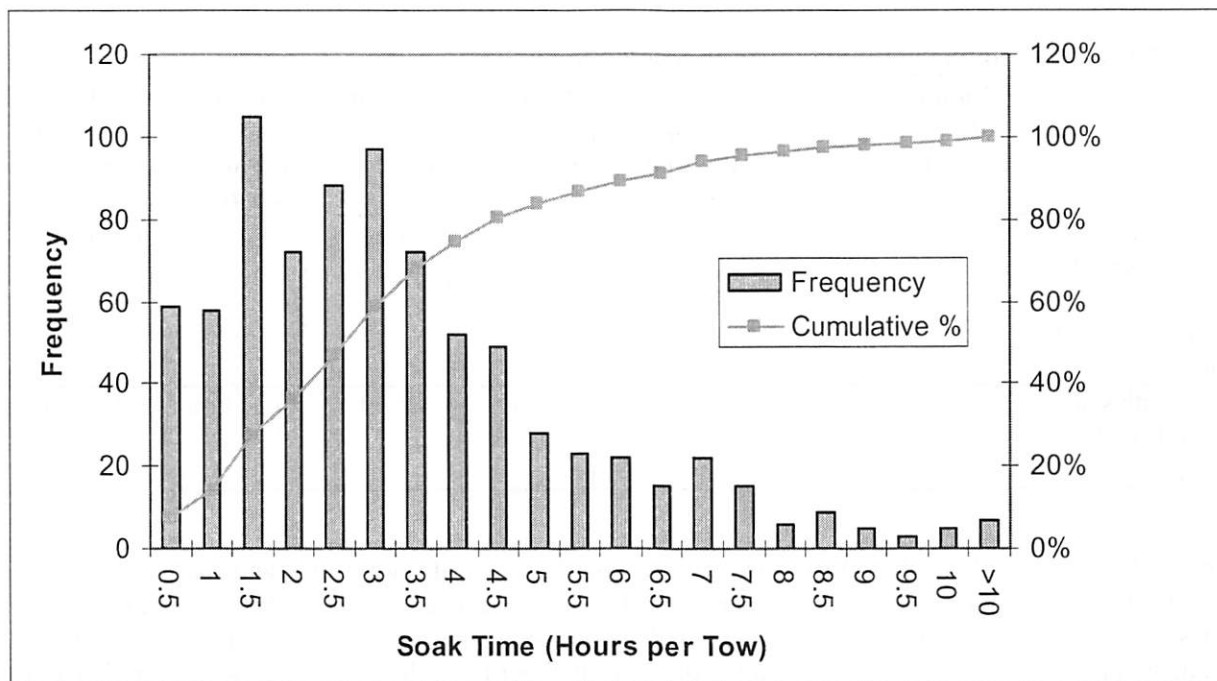
### **Alternative 3**

Alternative 3. Establish regulations under 50 CFR 679.7 prohibiting activities that result in non-representative fishing behavior from counting toward an observer coverage day.

Alternative 3 proposes another regulatory solution to the issues identified under the status quo, which would prohibit the activities that NMFS is trying to prevent. NMFS' intent for Alternative 3 was to identify through analysis activities or behaviors that are specific to vessels exhibiting strategic behavior only to obtain observer coverage, and prohibit those activities. NOAA OLE could review activities on a case-by-case basis and prosecute cases as necessary. The challenge is to identify and eliminate specific activities and behaviors that result in fishing solely for observer coverage (strategic behavior), but not affect normal fishing operations. Additionally, proposed regulations must be enforceable, and not exacerbate the current problem by allowing vessels to modify their behavior further to continue to avoid meeting the intent of coverage regulations. This alternative initially was recommended for inclusion in the analysis by the OAC.

Observer Program, Sustainable Fisheries, and OLE staff met to discuss the enforceability of identifying and prohibiting certain activities that result in non-representative fishing behavior, and whether this would reduce these behaviors. During these discussions, staff identified several candidate behaviors, as outlined under Alternative 1, that could be prohibited in regulation. However, two problems with this methodology were identified. First, as noted above, it is difficult to differentiate between strategic behavior and the same activity resulting from normal fishing behavior. For example, small tows may be a result of a vessel fishing only long enough to obtain necessary observer coverage, poor fishing, or inclement weather. Of the candidate fishing behaviors that could be used to regulate strategic behavior, all could be explained by typical fishing operations.

NMFS staff analyzed data for the last several years to identify observer tow behavior. Two important potential elements of observer tow behavior were explored in the analysis: (1) vessels would likely minimize soak time; and (2) some vessel operators would attempt to maximize observer coverage days while minimizing their time at sea (and associated costs). To explore these behaviors, the analysis examines tow duration, number of tows on a trip, catch, and the timing of tows for trawl catcher vessels with 30 percent coverage that operated in the central GOA (statistical area 630) in 2006. Catcher vessels with a trip target of pollock were excluded from the analysis since the pollock fisheries in this area often have opening periods of less than a full day and would thus not create the same set of incentives as other fisheries that are open for longer periods and may have higher bycatch levels.



**Figure 2** Soak time, measured in hours, as it is distributed across the catcher vessels in statistical area 630 in the GOA for the 2006 fishing season. Soak time bins are delineated into half-hour increments, with the frequency of soak times and cumulative frequency provided for each bin. The maximum value for each bin is indicated on the x-axis.

The analysis explored the distribution of vessels that demonstrated soak periods that were not considered “ordinary” behavior. As a fleet, catcher vessels typically fish two or more days and have soak times, for each tow, that are typically less than 5 hours in duration, with most soak periods occurring between 1.5 to 3 hours in duration (Figure 2). Tows with soak times less than 1 hour (first two bins in Figure 2) were examined based on the assumption that observer tows would likely occur at shorter tow durations. Tows with a soak time of 1 hour or less comprise about 14 percent of the total tows. For comparison, information about tows with soak duration of between 1 and 2.5 hours is provided in Table 11. A reduction in the amount of catch and number of tows was observed. While this behavior might be attributed to observer tows being made, the reduction in catch may also be a result of less fishing effort (and thus less catch) and other variables such as gear failure or weather conditions, which would change to durations and catch amounts. For these reasons, the analysts could not identify an observer tow by only looking at soak time and catch amounts.

**Table 11 Soak periods compared to various catch statistics.**

	Number of vessels	Number of trips	Average number of tows per trip	Average catch per trip	Average catch per tow	Average soak period per trip	Average soak period per tow
Tows with soak periods less than or equal to 2.5 hours and greater than 1.0 hours	34	121	2.3	21.3 mt	9.4 mt	4.0 hours	1.8 hours
Tow with soak periods less than or equal to 1 hour	31	84	1.5	6.7 mt	4.5 mt	0.84 hour	0.56 hours

Note: vessels appear in multiple categories.

The analysis also explores the effect of trip duration on the count of tows, catch, and soak periods. These results are summarized in Table 12. Generally more tows were made on multi-day trips; however, catch rates per tow were comparable for multi-day and single day trips. Vessels on a multi day trips that only made two tows per trip showed a substantial drop in catch per tow when compared with a single day trip, which had an average of 2.1 tows per trip and an average catch of 8.3 mt. The reasons for this drop in catch despite the increase in soak period per tow are unknown, but could be caused by a number of factors including gear problems, target fishery, observer tows being made, and weather.

A total of five vessels making 6 trips were identified as potentially making an observer tow. These vessels all made two hauls across two days and within 4 hours of midnight and are referred to as “paired tows around midnight” in Table 12. Generally the tow duration for these vessels was short; however, the short tow duration was not unique to these vessels. The average tow duration was 0.81 hours, which corresponds to approximately 14 percent of all tows made by vessels in Table 12. Thus, short soak durations may not just be a characteristic of observer tow behavior. In addition, there is not a large difference in catch amounts between multi-day vessels that made 2 tows and those that made paired tows around midnight due to the amount of catch variation for each category.

**Table 12 Trip length and midnight straddling behavior compared to various catch statistics.**

Trip Category	Number of vessels	Number of trips	Average number of tows per trip	Average catch per trip	Average catch per tow	Average soak period per trip	Average soak period per tow
<b>Multi-day trips</b>	33	129	5.7	55.2 mt	9.8 mt	18.0 hours	3.2 hours
<b>Single day trips</b>	26	40	2.1	17.2 mt	8.3 mt	4.1 hours	2.0 hours
<b>Multi-day trips with 2 tows per trip</b>	9	13	NA	5.4 mt	2.7 mt	4.8 hours	2.4 hours
<b>Paired tows around midnight</b>	5	6	NA	3.9 mt	2.0 mt	1.65 hours	0.81 hours

Note: “Paired tows around midnight” refers to a vessel with two tows on a trip that are within 8 hours of midnight, but straddling two days. For example 1 haul at 22:30 and another at 1:20. Also, vessels appear in multiple categories.

Analysts were unable to determine from these data which hauls were from vessels only exhibiting strategic behavior, and those that were conducting normal fishing operations. This is because there is a large amount of variability in the data that covers up behavior patterns that characterize an “observer tow” This variability is a result of fishery characteristics that make identification of covariates difficult, if not impossible. In other words, prohibiting behavior based on analysis is unlikely to result in eliminating a vessel’s ability to conduct observer tows, and may reduce a vessel’s ability to conduct normal fishing operations.

Second, for each candidate behavior that could be prohibited, staff determined that the regulatory fix could be circumvented, and potentially even exacerbate the identified problem. For example, if analysis determined that a large percentage of strategic behavior resulted in hauls less than 300 kg, regulations could be promulgated that prohibited counting hauls less than 300 kg as applying towards coverage requirements. In addition to the fact that vessels sometimes take small hauls to determine fishing quality, or that equipment may break early in a tow requiring early haul backs, vessel captains could circumvent this prohibition by ensuring catch amounts exceeded 300 kg. Captains interested in only fishing to obtain required observer coverage would only need to exceed 300 kg by a very small amount, which would not meet the intent of the coverage requirements to obtain data from representative fishing behavior.

Analysis was not conducted to identify the impacts of observer tows on the outputs of NMFS catch accounting system (CAS). However, NMFS did consider different ways to analyze these impacts. For example, NMFS considered and discussed initiating a project to extract the specific tows which were definitively identified as observer tows from the data and analyze the impacts to the CAS. However, NMFS is concerned about doing this work on the production system as it would alter existing records and reports. To conduct this work, NMFS would need to construct a test database that mirrors the production system and conduct any analytical work on that test system. A test system does not currently exist and resources are currently fully allocated in both the AFSC and Regional offices to ensuring our production data systems are ready for the 2008 fishing year. NMFS also considered examining a smaller subset of the data which could be used as an example. This approach, however, would not result in a comprehensive analysis, and would also require development of a test system which mirrors the production data system.

The above analyses would identify the magnitude of impact from the observer tows identified above. However, it is important to recognize that we have not identified a viable regulatory solution to this problem. NMFS recommends that any additional analytical work on this issue only be considered should the Council proceed with broad restructuring of the Observer Program.

**For the reasons described above, NMFS has determined that regulatory options available under Alternative 3 would not be enforceable, and would not reduce instances of vessel captains fishing only to obtain required observer coverage. Therefore, NMFS does not recommend selection of Alternative 3.**

### **2.5.5 Issue 5: Observer program cost information**

#### **Background**

Currently, NMFS lacks precise information on the total costs, and components of those costs, for the industry-funded portion of the groundfish observer program. Thus, NMFS is not able to assess the various cost components of the existing groundfish observer program using information required in the current regulations.

Federal regulations (50 CFR 679.50(i)(2)(x)(G)) require observer providers to submit a completed and unaltered copy of each type of signed and valid contract between the observer provider and those entities requiring observer services. Signed and valid contracts include the contracts an observer provider has with vessels and shoreside or stationary floating processors required to have observer coverage, as well as the contracts the observer provider has with observers. Upon request by NMFS, observer providers must also provide a complete and unaltered copy of the most recent contract between the provider and a particular vessel or processor or a specific observer. These contracts submitted to NMFS provide only a daily rate for observer services and observer contracts that are submitted contain only pay and per diem rates for observers.

The action alternatives under Issue 5 propose requiring specific types of cost information from observer providers to address common analytical questions regarding the baseline costs of the existing groundfish observer program. Each action alternative involves revisions to existing regulations that would establish new requirements for mandatory cost reporting by observer providers. This approach to gathering more complete cost information was discussed at the Council's OAC meeting in May 2007. The outcome of the OAC meeting provided the Council with two alternatives to collect cost information from observer providers. One alternative, originally proposed by NMFS, would require observer providers to report annual costs broken out by various fishery subgroups using business expense categories of: labor, overhead, transportation, housing, food and insurance. The second alternative recommended by the OAC. It also proposed an annual cost reporting by fishery subgroups, but did not require observer providers to break down their costs by business expense categories. This second alternative also included options to limit mandatory cost reporting to three years, and to prohibit any person/entity receiving this cost information on behalf of NMFS from becoming a permitted observer provider in the North Pacific.

At its June 2007 meeting, the Council directed NMFS to include for analysis the following alternatives:

Alternative 1. No action. Observer providers would not be required to report various subcategories of costs to NMFS.

Alternative 2. Require observer providers to report annual costs to NMFS according to the following subcategories: labor, overhead, transportation, housing, food, and insurance. This information would be reported on an annual basis, broken out by BSAI versus GOA fisheries, and by 30 percent, 100 percent, and 200 percent covered vessel/processor categories. All mandatory cost information would be confidential information.

Alternative 3. Require observer providers to provide the total billing information from the invoices to industry (and amount of observer days) by GOA and BSAI subareas; shoreside, 30%, 100% and 200% coverage level categories; and gear type. All mandatory cost information would be confidential information. Prohibit allowing a person/entity that receives this confidential information on behalf of NMFS from being certified as an observer provider in the North Pacific.

Option 1: Limit the mandatory economic data collection program to three years.

As NMFS began preliminary analysis, it became evident that some clarification was needed to allow a clear comparison among the alternatives. NMFS discovered slight wording differences between Alternatives 2 and 3 that if not changed or clarified, would lead to confusion. For instance, Alternative 2 contains the words "annual costs" while Alternative 3 contains the words "total billing information." NMFS interpreted these words to have identical meanings; that is, both alternatives would require observer providers to report total costs on an annual basis. Thus, the difference between the two alternatives would be limited to way the costs are broken out and submitted. Alternative 2 would require

costs to be broken out by expense categories (labor, overhead, transportation, etc.) and Alternative 3 would not. In other words, Alternative 2 would require more detailed reporting by observer providers. Another wording difference was found when comparing the description of fishery subgroups in the two alternatives. Alternative 3 includes “gear type” and “shoreside” in the fishery subgroups while Alternative 2 does not. Analysts have interpreted this as an unintentional wording error and therefore, both alternatives are interpreted to propose requiring costs to be broken out by the same fishery subgroups. The fishery subgroups are:

1. Fishing Area (BSAI vs. GOA);
2. Observer Coverage Level (30%, 100%, 200%);
3. Vessel/processor Type (mothership, catcher/processor, catcher vessel, shoreside processor, floating processor; and
4. Gear Type (trawl, hook-and-line, pot).

The interpretation above allows a clear and meaningful comparison in the way annual costs would be required to be reported by observer providers under Alternatives 2 and 3. Under Alternative 2, annual costs would be broken out by expense categories for each fishery subcategory shown above. Under Alternative 3, annual costs would be broken out by fishery subcategories, but not by expense categories.

In addition, clarification is necessary regarding penultimate sentence of Alternative 3 that states: “All mandatory cost information would be confidential information.” Because confidentiality provisions in the Magnuson-Stevens Fishery Conservation and Management Act (MSA) apply equally to all required data submissions, this sentence is not needed and should be removed from the alternative. Adding new regulations requiring confidentiality would be superfluous.

Additionally, NMFS proposes to revise the last sentence of Alternative 3 into a separate option for each action alternative. This sentence states, “Prohibit allowing a person/entity that receives this confidential information on behalf of NMFS from being certified as an observer provider in the North Pacific”. NMFS recommends adding this sentence as an option for all action alternatives. NMFS also recommends adding the option to “limit the mandatory economic data collection program to three years” to all action alternatives.

One other wording change was recommended for Alternative 3. The alternative originally required the observer providers to report the number of observer days by each fishery subgroup. NMFS removed this requirement from the alternative because this information can be accurately retrieved from observer data. Thus, there is no reason to require this information from the observer providers.

**In addition, to reflect some of the ideas discussed in the OAC meeting and in order to more fully complete the analysis, NMFS recommends the Council consider a fourth alternative.** This fourth alternative was raised during the OAC meeting and was identified in follow-up discussions with observer providers as a potential option. The alternative involves submission of paid invoices for observer services to NMFS. By combining the information contained in these invoices with observer-collected information, NMFS would be able to calculate costs by fishery subcategories as needed. The concept of using billing information from invoices to generate total cost figures was originally contained in the language of Alternative 3. However, as stated earlier, NMFS is proposing to reword Alternative 3 to allow a more meaningful comparison with Alternative 2. Alternative 4 builds on the original concept of using billing information from invoices to calculate observer costs, thus preserving the OAC and Council’s intent to utilize invoices and reduce the reporting burden on observer providers.

Alternative 4 would read as follows:



Alternative 4. Require observer providers to submit copies of paid invoices to NMFS on a monthly basis. Invoices must contain the following information:

1. Name of each individual vessel or shore plant
2. Name of observer who worked aboard each vessel or at each shore plant
3. Dates of service for each observer on each vessel or at each shore plant (include and identify dates billed that are not coverage days)
4. Rate charged per day for observer services
5. Total observer services charge (number of days multiplied by daily rate)
6. Specified transportation costs (i.e. airline, taxi, bus, etc.)
7. Any specified "other" costs not included above (i.e. excess baggage, lodging, etc.)

Alternative 4 would require observer providers to submit standardized invoices with specified information to NMFS on a monthly basis. NMFS could enter the raw data from the invoices into a data base and provide this information to analysts to support future management actions. Additional justification for this alternative, and comparisons with Alternative 1-3, are provided below in Section 2.5.5.4.

In summary, the revised alternatives, including NMFS suggested changes, would read as follows:

**Alternative 1.** No action. Observer providers would not be required to report various subcategories of costs to NMFS.

**Alternative 2.** Require observer providers to report annual costs to NMFS according to the following subcategories: labor, overhead, transportation, housing, food, and insurance. This information would be reported on an annual basis, broken out by BSAI versus GOA fisheries, and by shoreside, 30 percent, 100 percent, and 200 percent covered vessel/processor categories and gear type.

Option 1: Limit the mandatory economic data collection program to three years.

Option 2: Prohibit a person/entity that receives this confidential information on behalf of NMFS from being certified as an observer provider in the North Pacific.

**Alternative 3.** Require observer providers to report annual costs to NMFS by GOA and BSAI subareas; shoreside, 30%, 100% and 200% covered vessel/processor categories; and gear type.

Option 1: Limit the mandatory economic data collection program to three years.

Option 2: Prohibit a person/entity that receives this confidential information on behalf of NMFS from being certified as an observer provider in the North Pacific.

**Alternative 4.** Require observer providers to submit copies of paid invoices to NMFS on a monthly basis. Invoices must contain the following information:

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2. Name of observer who worked aboard each vessel or at each shore plant
3. Dates of service for each observer on each vessel or at each shore plant (include and identify dates billed that are not coverage days)
4. Rate charged per day for observer services
5. Total observer services charge (number of days multiplied by daily rate)
6. Specified transportation costs (i.e. airline, taxi, bus, etc.)

7. Any specified “other” costs not included above (i.e. excess baggage, lodging, etc.)

Option 1: Limit the mandatory economic data collection program to three years.

Option 2: Prohibit a person/entity that receives this confidential information on behalf of NMFS from being certified as an observer provider in the North Pacific.

### **Authority for collecting economic data**

Under Section 402(a) of the Magnuson-Stevens Act, the Secretary is authorized to develop an information collection program if the Secretary determines that additional information is beneficial for developing, implementing, or revising a fishery management plan, or for determining whether a fishery is in need of management. This program may also be initiated by a regional Council request to the Secretary. Fishery management plans must, according to Sec. 303(a)(5), specify pertinent economic data necessary to meet the Act’s requirements. Sec. 303(a)(9) adds support for economic data collection: in addition to specifying necessary economic data, fishery management plans must also be accompanied by impact statements that describe the economic and social impacts of the action. National standards also support economic data collection from observer providers. Sec. 301(a)(2) provides that FMPs be developed with the best scientific information; a data collection program would provide economic data about observer costs and contribute the best scientific information to FMP revision or development.

Section 402(a) is provided below, as amended by the Magnuson-Stevens Reauthorization Act of 2006.

SEC. 402. INFORMATION COLLECTION<sup>7</sup> 16 U.S.C. 1881a

#### **(a) COLLECTION PROGRAMS. –**

- (1) **COUNCIL REQUESTS.** – If a Council determines that additional information would be beneficial for developing, implementing, or revising a fishery management plan or for determining whether a fishery is in need of management, the Council may request that the Secretary implement an information collection program for the fishery which would provide the types of information specified by the Council. The Secretary shall undertake such an information collection program if he determines that the need is justified, and shall promulgate regulations to implement the program within 60 days after such determination is made. If the Secretary determines that the need for an information collection program is not justified, the Secretary shall inform the Council of the reasons for such determination in writing. The determinations of the Secretary under this paragraph regarding a Council request shall be made within a reasonable period of time after receipt of that request.
- (2) **SECRETARIAL INITIATION.** – If the Secretary determines that additional information is necessary for developing, implementing, revising, or monitoring a fishery management plan, or for determining whether a fishery is in need of management, the Secretary may, by regulation, implement an information collection or observer program requiring submission of such additional information for the fishery.

### **Confidentiality of economic data**

Alternatives 2 and 3 propose mandatory reporting of detailed cost information by the (currently five) entities operating as observer providers in Alaskan fisheries. Both Alternative 2 and Alternative 3 also specify that all mandatory cost information submitted by observer providers would be considered confidential information. These data would meet the definition of confidential information under a

number of Federal statutes as summarized in NOAA Administrative Order (NAO) 216-100. This NAO provides the principal administrative guidance on protection of confidential data, including definitions, policies, operational responsibilities and procedures, penalties, and statutory authorities. The NAO specifies conditions for authorization for access to confidential data by Federal, Council, and state employees and contractors. With respect to FOIA applicability, the NAO directs NMFS to withhold data under applicable FOIA exemptions. The NAO also directs NMFS to consider all other laws that protect data confidentiality, such as the Privacy Act and Trade Secrets Act. Any individual who receives access to confidential data must sign an agreement of nondisclosure, violation of which is punishable by dismissal, fines, and imprisonment.

The MSRA strengthened data protection in a number of ways, primarily by articulating standards for disclosing to persons authorized to work with confidential fisheries information and by establishing a categorical protection for observer information. Observer information is defined in the MSRA and it captures a wide variety of information. Because the MSRA established a variety of new and additional data confidentiality provisions, the NAO is scheduled for revision in the next year. A NMFS workshop to develop NAO revision recommendations is being held in November, 2007, in Seattle, Washington. Additional information on the effects of the MSRA on observer data confidentiality will be provided in subsequent versions of this analysis.

Note that the NAO is not the exclusive guidance for administrators handling confidential fisheries data. Federal regulations at 50 CFR 600.405, et seq, also address how to handle confidential fisheries data.

Collection, maintenance, and protection of confidential data are routinely conducted by NMFS, and procedures for preventing disclosure are well-established. For example, to prevent the release of confidential data in public documents, there are rules for aggregating data. Given that there are only five observer providers serving the North Pacific groundfish fisheries currently, it is assumed that all cost data provided would need to be highly aggregated for release to the public. Note that there are ongoing concerns raised by the Council and industry with regard to the nature of the financial data intended to be collected under the comprehensive socioeconomic data collection program currently being developed for vessels and processors by the AFSC.

In addition, at the December 2006 meeting, the Council requested that staff develop protocols for Council review to address rules for aggregation to maintain data confidentiality, and assess the quality of the data to ensure accuracy of data collected in the crab economic data reporting system. AFSC staff noted at the April 2007 Council meeting that because the comprehensive data collection program is similar in nature to the crab economic data reporting program, it is expected that the data handling protocols developed for the crab data will also apply to these new data.<sup>17</sup> The Council will have an opportunity to review these protocols as they are developed, and the first update on the progress of development of confidentiality and data quality protocols is scheduled for the October 2007 Council meeting. It is expected that confidential financial information from observer providers collected under Alternative 2 or Alternative 3 would also be subject to protocols consistent with those developed for crab and the comprehensive socioeconomic data collection program.

Section 402(b) of the Magnuson-Stevens Act, as recently amended by the Magnuson Stevens Reauthorization Act of 2006, pertains to confidentiality of information. Section 402(b) provides that any information submitted to the Secretary in compliance with any requirement under the Act is considered confidential. The amendments to Section 402(b) included: 1) a few additional disclosures for information that is considered confidential under the MSA, and 2) stricter standards by which the government can

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<sup>17</sup> *Comprehensive Socioeconomic Data Collection for Alaskan Fisheries: A Discussion and Suggestions*, AFSC, Seattle WA, pp. 17- 18.

disclose information to entities that are authorized to receive this information. This section is provided as **Appendix 3** to this document.

Note that in May 2007, the observer providers present at the OAC meeting appeared to have fewer problems with providing proprietary information to NMFS than with the potential implementation of the confidentiality provisions provided in the MSA. Several members expressed a lack of confidence in the confidentiality aspects of the proposed action alternatives. The confidentiality issue in this case is exacerbated by the fact that there are only five observer providers, three of which provide the majority of observer days. In addition, some providers also service small specific markets. Thus, there is concern that even aggregation rules may not prevent the public from being able to discern confidential cost information relative to a specific provider. NMFS would still be able to analyze and understand cost differences but great care would need to be exercised in public disclosures to ensure confidential information was not disclosed. In some cases, certain disclosures could not be made without releases of confidentiality from the observer providers.

### Alternative 1

Alternative 1. No action. Observer providers would not be required to report various subcategories of costs to NMFS.

As stated above, existing Federal regulations require observer providers to submit a completed and unaltered copy of each type of signed and valid contract between the observer provider and those entities requiring observer services and observers. The cost information in observer providers' current contracts with industry and observers includes the following:

1. Daily fees charged to industry. These vary by observer provider and vessel/plant coverage requirement levels.
2. Daily rates of pay for observers. These vary by experience level and activity (i.e. time spent working, waiting, traveling, briefing, training, debriefing, etc.)
3. Meal and lodging (per diem) reimbursement for observers. This varies by location.

In addition, some contracts identify other particular components of cost specific to individual contractors. Those cost components are not identified in this analysis in order to protect confidentiality.

NMFS has collected a limited amount of other cost information voluntarily from observer providers. Cooperation on the part of observer providers has varied and verification for accuracy is not possible. The type of cost information collected voluntarily has included:

1. Airline costs
2. Reimbursement costs for ground transportation while deployed (i.e. taxi fares)
3. Reimbursement costs for excess baggage fees charged by airlines

NMFS has used this information, as well as estimates of airfare costs and per diem rates in past analyses, to develop a roughly estimated cost per day of \$355<sup>18</sup>. However, this figure is currently out-dated and the use of this information is relatively limited. For instance, the information cannot be used to compare costs between sectors of the industry.

The need for more detailed cost information has been highlighted by recent requirements for vessels and processors participating in the BSAI crab rationalization program and the cooperative structure proposed

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<sup>18</sup> Based on an estimated daily cost of \$355/day for 2000-2003 which includes estimated travel costs of \$25/day and meal costs of \$15/day

under BSAI Amendment 80 for the non-AFA trawl catcher processor fleet. Only in these recent programs has socioeconomic data collection been mandated in order to conduct sufficient economic analysis to determine whether and how these programs are working.

In addition, NMFS staff in the Economic and Social Sciences Research Program at the Alaska Fisheries Science Center, are currently working with the Council and State agencies to develop a mandatory data collection program for vessels and processing plants participating in Alaskan fisheries. The intent is to develop a comprehensive program for collecting revenue, ownership, employment, cost, and expenditure data from vessels and processors. Prior to implementation, Federal fisheries management actions must first undergo sufficient economic analysis as required by the MSA, NEPA, Executive Order 12866, and other applicable Federal laws. At present, analysts can rarely calculate the net benefits generated by Alaska's fisheries, and thus frequently cannot quantitatively account for all of the parties affected by proposed fisheries management decisions.

The comprehensive mandatory economic data collection program is thus intended to capture a core set of data that is currently unavailable, yet necessary, to answer many of the analytical questions raised when evaluating past and future management decisions and conducting regulatory analyses. The primary goal is to better inform decision-makers and improve decision-making capability by improving 1) the ability to account for the relevant entities whose net benefits are affected by Alaskan fisheries; and 2) the knowledge of the elements that comprise each entity's net benefits.<sup>19</sup> In terms of relevant entities, the Council has expressed a need to consider not only the harvesting sector, but also the shoreside processors, motherships, crewmembers, and communities involved in Alaska's fisheries.<sup>20</sup>

The need to require cost data from observer providers is similar to the need identified for economic data collection described above for the rest of the industry. The most significant factor affecting the ability to estimate net benefits, or understand the effects of various management actions, is the lack of data on costs incurred by vessels and processors to harvest and process fish. Analysts generally provide quantitative data where available, but rely heavily on qualitative analysis of the costs and benefits that are expected to result from a specific, proposed action. Because costs vary substantially across different fishery sectors, it is very difficult to estimate the differing effects on different sectors.

Similarly, under the status quo, NMFS currently lacks sufficiently detailed information on the costs incurred by observer providers in order to inform analyses as to the costs of the portion of the groundfish observer program funded by vessels and processors required to meet specified observer coverage levels. Recent analyses have provided an estimation of about \$16 million annually to implement the program, with about \$12 million funded by industry.<sup>21</sup> The average cost of the program funded by industry in both the BSAI and GOA combined during 2000 – 2003 represented about 1.66% of groundfish ex-vessel values. These estimates are based on a daily observer cost of \$355/day (based on information collected in 2000 – 2003), which includes estimated travel costs of \$25/day and meal costs of \$15/day, based on information provided by observer providers and a salary range for observers that approximates the 2003 unionized salary rate.

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<sup>19</sup>*Comprehensive Socioeconomic Data Collection for Alaskan Fisheries: A Discussion and Suggestions*, AFSC, Seattle WA. Presented at the April 2007 Council meeting.

<sup>20</sup>See the October 2006 Council motion on this issue.

<sup>21</sup>NMFS groundfish observer program data provided in the *Public Review Draft EA/RIR/IRFA for BSAI Amendment 86/GOA Amendment 76: Extension or modification of the program for observer procurement and deployment in the North Pacific* (May 2006). Note that the NMFS cost for the groundfish observer program was \$4.8 million in 2007.

Additionally, cost information is necessary to analyze costs under a restructured observer program. If NMFS and the Council reconsider observer program restructuring, which includes a maximum fee level to cover the cost of observer services, it is necessary to know how much observer coverage is afforded under that maximum. A comprehensive cost collection program would allow analysts to better understand the costs that would likely occur under a service delivery model where NMFS contracts directly with observer providers.

The standard observer cost of \$355/day is typically used in analyses supporting a proposed fisheries management action, although these costs vary on a case by case basis, depending on the fishery, duration of observer coverage, and logistics. Specifically, in some smaller scale short duration fisheries that operate out of remote ports, observer costs may greatly exceed \$355/day. Some of the factors that tend to increase observer coverage costs for certain vessels and fisheries under the status quo include:

- *Operation out of remote ports with high transportation costs.* Observer costs generally factor in airfare to major fishing ports such as Kodiak and Dutch Harbor that receive regular air service from Anchorage. When vessel operators or processors wish to obtain coverage in more remote ports or rural locations that require chartered air service, transportation costs can greatly increase.
- *Short-term "pulse" fisheries.* When vessel operators wish to obtain coverage for short-term fisheries, the costs of coverage may increase because observer providers do not have the time to rotate observers through a pool of 30% covered vessels. In these instances, a vessel operator may be forced to pay the entire transportation cost for the observer when those costs cannot be shared with a pool of other vessels operating in the same fishery, due to the short duration of the opening.
- *Small-scale fisheries with few participants.* The fewer the number of participants in a particular fishery, the more difficult it will be for observer providers to develop cost-effective methods of rotating observers among vessels. At the extreme, a single vessel fishing alone out of a remote port will realize the highest coverage costs because there are no other vessels that can share coverage costs.
- *Fishery disruptions, changing plans, and lack of advance planning.* Observer providers are often able to contain costs to industry by carefully managing the number of observers they have deployed at any given moment to minimize the number of observers who are on salary in Alaska but not deployed. This requires careful coordination between observer providers and the fishing industry, such that observer providers can anticipate when and where observers will be needed. However, the nature of the fishing industry is such that vessel operators cannot always anticipate when and where they will need future coverage. Adverse weather, breakdowns, changing markets, and unexpected fishery closures can force fishermen to change plans at the last minute. Fishermen who unexpectedly require observer coverage, whether due to external circumstances or poor planning, often find that the cost of last-minute coverage can greatly exceed the average daily rates, primarily because an observer must be located and often transported from another remote location.

Anecdotal information from observer providers has suggested that when the above circumstances occur, it is not uncommon for observer coverage costs to exceed \$500 - \$600 per day, and potentially be as high as double the \$355 per day rate used in most current analyses.<sup>22</sup> These disproportionately high daily costs are typically borne by small-scale GOA fishermen who operate in short-term openings and out of remote fishing ports. Observer providers servicing larger fleets that operate in longer-term fisheries and

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<sup>22</sup>Public review draft of BSAI FMP Amendment 86/GOA FMP Amendment 76; May 12, 2006, p. 138.

generally out of the major ports of the BSAI, such as Dutch Harbor, are typically better able to avoid the logistical and travel costs that increase costs in smaller, more remote fisheries. Note that to a large extent, these examples of disproportionately high coverage costs are inherently part of the current service delivery model, in which individual vessels with coverage requirements are required to obtain coverage for specified periods of time. The current system does not provide flexibility to observer providers and NMFS to shift coverage around in a more efficient manner, in order to achieve the greatest level of fleet-wide coverage rather than to meet specific coverage level requirements for each individual vessel.

Thus, observer costs differ greatly by sector, fishery, and year, as do the cost components that factor into the daily rate. Under Alternative 1, it is expected that NMFS would continue to use an estimated daily rate multiplied by the number of observer days incurred by vessels and processors in order to assess the baseline component of any proposed regulatory change to the observer program on the various fishery sectors. NMFS and the Council would continue to make use of the best available data in the development of FMP and regulatory analyses, recognizing the data limitations under the status quo.

## **Alternative 2**

Alternative 2. Require observer providers to report annual costs to NMFS according to the following subcategories: labor, overhead, transportation, housing, food, and insurance. This information would be reported on an annual basis, broken out by BSAI versus GOA fisheries, and by shoreside, 30 percent, 100 percent, and 200 percent covered vessel/processor categories and gear type.

Option 1: Limit the mandatory economic data collection program to three years.

Option 2: Prohibit a person/entity that receives this confidential information on behalf of NMFS from being permitted as an observer provider in the North Pacific.

A primary issue to consider when designing a data collection program is whether to collect information from all fishery participants or only specific sectors of the fishery. The preferred general approach by NMFS, as indicated under Alternatives 2, 3, and 4, is to collect observer cost information from the observer companies that provide observer services in the North Pacific groundfish fisheries. This approach is preferable to collecting observer cost information from individual vessels and processors, in part because only observer companies can provide actual cost information relevant to some of the identified categories (e.g., overhead). In addition, the information would be submitted by a small number of observer providers and aggregated consistently by category, compared to receiving information from a large number of vessels and processors. Given that there are currently only five observer providers, data would be collected from all five companies, as opposed to sampling a subset.

Alternative 2 would require observer providers to report costs to NMFS by a specified date, according to various subcategories. The proposed subcategories of cost information include labor, overhead, transportation, housing, food, and insurance. The intent is that this information would be reported on an annual basis, broken out by BSAI versus GOA fisheries, and by 30 percent, 100 percent, and 200 percent covered vessel/processor and gear type categories. The impetus for the proposed action is that more accurate estimates are necessary to adequately assess the baseline component of proposed regulatory changes to the observer program on the various fishery sectors, and mandatory cost reporting is one approach to meet this goal.

Two terms from the alternative could be defined. First, the term “labor” could be defined as the cost of observer salaries, and could include observer salaries while deployed (actively working), waiting on shore for an assignment, debriefing, and during briefing or training. Second, the term “overhead” could be

defined to include profit, non-observer staff salaries, the cost of maintaining an office (i.e. utilities, rent, etc.), the cost of maintaining permanent observer housing (i.e. rent/mortgage, utilities, maintenance and upkeep, etc.), and anything else that is incorporated into billable costs to the industry, but not reflected in one of the other five expense categories.

Additionally, several observer providers conduct business other than providing observers in the North Pacific, such as providing observer services for other observer programs. Billable costs associated with these other operations would need to be identified and removed from those costs directly attributable to providing observer services in the North Pacific groundfish fishery.

NMFS is not able to assess the various cost components of the existing groundfish observer program under the information currently required through Federal regulations. All of the observer provider contracts with fishing industry clients that are submitted to NMFS provide only the daily rate for observer services. In Alternative 2, the proposed cost categories identify specific types of information that could be collected to address common questions regarding the baseline costs of the existing program. Collecting information on variable costs would allow analysts to provide the difference in costs by vessel/processor type, gear type, coverage level, and region, as well as the fraction of the total cost associated with observer remuneration versus travel/overhead (fixed costs). This information is necessary to analyze the cost of the status quo, as well as costs under a restructured observer program. If NMFS and the Council reconsider observer program restructuring, which includes a maximum fee level to cover the cost of observer services, it is necessary to know how much observer coverage is afforded under that maximum.

The primary benefit of this alternative is that this information would allow for a more accurate assessment of costs and benefits under potential management program changes, which may benefit the groundfish observer program and the fisheries dependent upon observer data for management. Current cost reporting may under or over estimate actual observer costs, and decision makers may not have an accurate understanding of the effects of a particular program. If program cost information were accurately collected under this alternative, analysts would be better positioned to compare the costs and benefits of a particular management program or as changes to monitoring programs are needed to ensure quality data collections. The Council, NMFS, and public would benefit because they would better understand the effects of a proposed management action, and more informed decisions could be made.

A disadvantage of this type of approach for Alternatives 2 and 3 is that NMFS would rely on self reported data, and this data is not verifiable by NMFS. Observer providers may have incentives to misreport costs, and biased data could mischaracterize costs. As noted elsewhere, inaccurate costs could create funding issues for a restructured observer program if the actual costs of observer coverage are underreported, thus reducing the benefits of this alternative. In general, NMFS prefers to rely on verifiable information. While intentional misreporting by observer providers could be subject to enforcement action, NMFS does not have the authority to audit observer providers and may not be able to create enforceable actions against misreporting activities.

Another consideration when considering Alternatives 2 and 3 is the fact that NMFS will be receiving one annual report of costs, with no accompanying raw data or explanation of how cost figures within the report were calculated. Therefore, NMFS will not be able to verify cost information and cost calculation methodology, and will have to accept the reports at face value. If individual cost figures are questioned by the Industry, Council or others, NMFS will not have the information necessary to check computations and validate the cost figures given by the observer providers.

The primary cost of this alternative would be the administrative costs incurred by the observer providers. These administrative costs would be for the staff time and resources necessary to organize, maintain and



compile the requisite cost information on an annual basis. To assess the potential administrative cost, NMFS conducted an informal survey of all five observer providers in July 2007. Observer providers were asked to identify the kind of information on their current industry invoices and the general feasibility of providing the information required under both Alternatives 2 and 3. All invoices used by the observer providers contained a minimal amount of information consisting of some or all of the following:

1. Vessel, shore plant, or fishing company name
2. Observer name
3. Dates of service (sometimes includes days other than coverage days)
4. Daily rate
5. Total observer services charge (number of days multiplied by daily rate)
6. Transportation costs (usually airline and ground transportation costs)
7. Other costs (i.e. excess baggage, food, lodging, etc.)

Responses as to the feasibility of providing the information required under Alternatives 2 and 3 ranged from “none of the subcategories of information can be calculated” to “all information can be provided.” All five observer providers said calculating the information required under either action alternative would represent an additional workload to their current bookkeeping. Based on survey responses, the estimated amount of additional work varied from “significant” to “not too much.” Response differences are probably attributable to staff sizes and client diversity differences among observer provider companies.

In addition, observer providers would need to assess how best to allocate overhead to the groundfish program. This issue could be complex for providers who conduct business outside of the groundfish program. Several observer providers also provide observers to the State of Alaska crab observer program. Some providers may also have other unrelated business interests which utilize shared staff and space. NMFS could define a method of overhead allocation, or leave it to the providers to provide their best estimate. Leaving it to the providers may result in differences between them in this calculation and uncertainty about the resulting number. In contrast, a NMFS formulation, albeit consistent, may not be the best method for any given provider.

### **Alternative 3**

Alternative 3. Require observer providers to report annual costs to NMFS by GOA and BSAI subareas; shoreside, 30%, 100% and 200% covered vessel/processor categories; and gear type.

Option 1: Limit the mandatory economic data collection program to three years.

Option 2: Prohibit a person/entity that receives this confidential information on behalf of NMFS from being permitted as an observer provider in the North Pacific.

Alternative 3 would require observer providers to submit annual cost information broken out by BSAI and GOA areas, and by 30 percent, 100 percent, and 200 percent covered vessel/processor categories and gear type. Both alternatives 2 and 3 require costs to be tabulated by the same fishery subgroups, but Alternative 2 requires further division of costs into expense categories (i.e. labor, insurance, overhead, etc.). Thus, alternative 3 would require observer providers to submit less detailed cost information than Alternative 2. Because of this, it would be easier and less costly for observer providers to comply with Alternative 3 as compared with Alternative 2.

To further demonstrate this point, consider that with two subareas (GOA & BSAI), three coverage categories (30%, 100% , & 200% ), five vessel/processor types (mothership, catcher/processor, catcher vessel, shoreside processor, & floating processor) and three gear types (trawl, hook-and-line & pot), it is

possible that an observer provider working in both the BSAI and GOA and covering all vessel/process/gear/coverage types, would have to divide their yearly costs into approximately 38 fishery subcategories. Adding six expense categories to this level of sub-division, as would be required under Alternative 2, greatly increases the complexity of the task. The same hypothetical observer provider that works in both the BSAI and GOA and covers all vessel/plant/gear/coverage types would be required to divide their yearly costs into approximately 228 fishery/operating expense subcategories under Alternative 2.

This level of complexity would be difficult to achieve with any level of accuracy. The observer providers would most likely need to hire additional accounting/bookkeeping services to try and divide their annual costs into the many subcategories that would be required under Alternative 2. Depending on the staff size and client diversity of an observer provider, they may also need extra administrative staff to fulfill the requirements of Alternative 3 as well. This would place an additional financial burden on the observer providers, and they would most likely pass these additional costs onto the fishing industry in the form of increased daily rates for observer coverage. Also, as was stated earlier, some observer provider companies provide observers to fisheries other than groundfish in the North Pacific. Dividing costs into expense categories such as "overhead" would be further complicated because some expenses such as leased office space, utilities, internet and phone charges, etc. would need to be divided into North Pacific groundfish and non-North Pacific groundfish. This level of cost division would not be a simple task. Therefore, the most compelling argument against Alternative 2 is the high level of accounting/bookkeeping complexity that would be required and the associated increased costs.

As has been stated earlier, the benefits of Alternatives 2 and 3 rest in the ability of analysts to more accurately analyze the comparative costs between fishery sectors. This type of cost information would assist NMFS and the Council in making decisions concerning observer coverage requirements. For example, under both Alternatives 2 and 3, if NMFS wanted to know the total cost of placing observers on the 30% trawl fleet in the GOA during 2007, the cost could be calculated. However, if NMFS wanted to know the fixed costs (overhead) for this same fishery sector, only Alternative 2 would provide the answer. Under Alternative 1 (status quo), neither question could be answered.

#### **Alternative 4**

Alternative 4. Require observer providers to submit copies of paid invoices to NMFS on a monthly basis. Invoices must contain the following information:

1. Name of each individual vessel or shore plant
2. Name of observer who worked aboard each vessel or at each shore plant
3. Dates of service for each observer on each vessel or at each shore plant (include and identify dates billed that are not coverage days)
4. Rate charged per day for observer services
5. Total observer services charge (number of days multiplied by daily rate)
6. Specified transportation costs (i.e. airline, taxi, bus, etc.)
7. Any specified "other" costs not included above (i.e. excess baggage, lodging, etc.)

Option 1: Limit the mandatory economic data collection program to three years.

Option 2: Prohibit a person/entity that receives this confidential information on behalf of NMFS from being permitted as an observer provider in the North Pacific.

During the May 2007 OAC meeting some observer providers suggested submitting invoices to NMFS and allowing NMFS to consolidate them into reports as necessary. This suggestion is represented in this alternative. The intent of Alternative 4 is to require observer providers to submit to NMFS standardized

invoices on a monthly basis, with specified information in each invoice. NMFS could enter the raw data into a confidential data base and compile and provide this information to analysts to support future management actions.

As stated earlier in Section 2.5.5.2, an informal survey of all five observer providers was conducted in July 2007. NMFS collected information about the contents of typical invoices and found that all invoices used by the observer providers contained a minimal amount of information consisting of some or all of the following:

1. Vessel, shore plant, or fishing company name
2. Observer name
3. Dates of service (sometimes includes days other than coverage days)
4. Daily rate
5. Total observer services charge (number of days multiplied by daily rate)
6. Transportation costs (usually airline and ground transportation costs)
7. Other costs (i.e. excess baggage, food, lodging, etc.)

This information was used in developing the required information for invoices under Alternative 4. NMFS believes that the standardized invoice format will not represent a substantial burden for observer providers because invoice information requirements would be very similar to what observer providers already include on their invoices. In other words, their current invoicing system would not need to change, or would only change minimally, to meet the requirements of Alternative 4. In addition, NMFS would be able to verify if they have received all invoices because they have an independent accounting of observer deployments.

For the reasons described earlier, NMFS prefers to collect verifiable information whenever possible. Because copies of actual billing invoices would be submitted to NMFS, and each invoice would contain standardized information, opportunities for intentional misreporting under this alternative would be minimized.

Costs for observer providers associated with this alternative would be less than under Alternatives 2 and 3. Rather than collating costs by specified category, and reporting these costs to NMFS on an annual basis, observer providers would provide NMFS with copies of their billing invoices. This process would be much less burdensome for observer providers, and would reduce costs compared to Alternatives 2 and 3. On the other hand, because NMFS would enter raw data into a database for later analysis, this alternative would increase agency costs. However, the increased analytical flexibility, and reduced opportunity for intentional and unintentional misreporting would mitigate these costs.

Alternative 4 has two advantages over Alternatives 2 and 3. First, as noted above, observer provider reported information would be verifiable by NMFS. This would increase the data quality for analytical and decision-making purposes. Second, this approach to economic data collection allows increased flexibility in terms of data analysis. Rather than observer providers summarizing their cost information into required subcategories, the raw data used to calculate that information would be reported to NMFS and NMFS could analyze and report the data in various ways and combinations as needed. As an example, one could analyze the total cost of observer coverage for the 72-hour directed pollock fishery in Area 620 in 2007 by using the location and catch detail provided in the observer database, coupled with the cost information provided in the observer provider invoices. Alternative 4 is the only alternative under consideration that could answer such a question of this type.

The main disadvantage of Alternative 4 is that the cost of data analysis would be held exclusively by NMFS. However, NMFS would be able to allocate resources towards cost analysis only as needed,

whereas under Alternative 2 or 3 observer providers would be required to annually conduct extensive cost analysis to the same degree of detail to meet reporting requirements.

#### **2.5.5.5 Options under Alternatives 2, 3, and 4**

Alternatives 2, 3 and 4 all include the same two options for consideration by the Council. Originally the two options were only contained within Alternative 3. However, NMFS proposes adding them to Alternatives 2 and 4 in order to allow for a meaningful comparison between all alternatives.

Option 1 would limit the mandatory economic data collection program to three years. The intent of this provision is to reduce the administrative cost placed on observer providers. Three years was selected as a reasonable period of time in which to require this type of information to be submitted to NMFS. The benefits of Option 1 are thus in the reduced long-term cost to observer providers. As previously stated, the informal survey of the five current observer providers indicated that the amount of effort estimated to provide the information required in Alternatives 2 and 3 ranged from “significant” to “not too much.” Since NMFS does not have access to any of the observer providers’ business information, it is very difficult to estimate how much of an added financial burden would be placed on the observer providers under Alternatives 2 or 3. However, for the reasons described in Section 2.5.5.4 above, Alternative 4 would be much less of an added burden for observer providers, when compared to either Alternative 2 or 3.

The disadvantage of Option 1 is the limited term for which these data will be made available for use by analysts. While variable costs broken out by region, coverage level, and gear type for any time period would represent an improvement over the broader data that are currently available, setting a limit on the collection of these data presupposes the time period in which they would be useful. Regardless of the analytical product for which the data are used, there will continue to be future analyses that would benefit from this type of data. If a comprehensive, long-term economic data collection program is not implemented, the data may only be appropriate to use for a few years, at which point it becomes outdated and inadequate.

Note that should Option 1 not be selected as part of any of the action alternatives, the Council could always choose to initiate a subsequent regulatory amendment to terminate the economic data collection program at any time, should it no longer prove valuable or necessary. Similarly, if Option 1 is selected as part of any of the action alternatives, and the data collection program is deemed necessary to continue beyond the three-year limit, a subsequent regulatory amendment would need to be developed in order to remove the sunset date.

Option 2 would prohibit a person/entity that receives confidential economic information on behalf of NMFS from becoming permitted as an observer provider in the North Pacific. This option was recommended by the OAC at its May 2007 meeting, and approved by the Council for consideration at the June 2007 Council meeting as part of Alternative 3. However, as noted above, NMFS recommends revising the current alternatives so that this option would be available under any alternative. This particular provision stems from current observer providers who are concerned that possible contractors hired by NMFS in the future, to do analyses involving observer provider economic and business information, could subsequently use this information to start a business and become a new observer provider in the North Pacific. Current observer providers are concerned that business information acquired by a contractor prior to becoming a permitted observer provider could be used advantageously as a permitted observer provider.

As an example, in 2005, a company that had been under contract with NMFS in a previous year to audit the observer program, received information from each existing observer provider, and

subsequently applied to become an observer provider. The contractor was permitted to become a competing observer provider for the North Pacific groundfish fisheries. While this concern was made known to NMFS at the time of permit consideration, there were no regulations that prevented the company from becoming legitimately permitted. The provision provided under Option 2 would prevent this situation from recurring. NMFS assumes, unless directed otherwise, that this prohibition would only apply to a person or entity applying to become a permitted observer provider in the groundfish observer program in the North Pacific.

Currently, this option considers permanently removing an entity's ability to apply to become a permitted North Pacific groundfish observer provider if it receives financial information from current observer providers. The Council may wish to consider limiting the number of years this provision would be effective. Over time, the information acquired by the entity would become stale, and the competitive advantage it gained over current observer providers would be diminished.

### **2.5.5.6 Comparison of alternatives**

For purposes of enabling comparison among the alternatives, NMFS proposes to standardize cost information categories for Alternatives 2 and 3, and allow selection of Options 1 and 2 under each action alternative. As stated earlier, NMFS also recommends adding a fourth alternative. The following list highlights comparisons between the action alternatives under the revised language of Alternatives 2 and 3, and with the addition of Alternative 4.

1. Alternatives 2 and 3 would require observer providers to calculate costs by the following basic categories:
  - a. Fishing Area (BSAI vs. GOA),
  - b. Observer coverage level (30%, 100%, 200%),
  - c. Vessel/processor type (mothership, catcher/processor, catcher vessel, shoreside processor, floating processor), and
  - d. Gear type (trawl, hook-and-line, pot).

In addition, Alternative 2 would further require calculation of costs into six expense subcategories for each basic fishery category. These include: labor, overhead, transportation, housing, food, and insurance.

2. With the information contained in the NMFS observer database, combined with the invoices submitted by observer providers under Alternative 4, NMFS would be able to calculate costs by the same basic fishery categories as Alternatives 2 and 3 and observer providers would not be burdened with these calculations. NMFS would also be able to verify that they had received cost information for each observer coverage day by also comparing observer names, vessel names, and invoice billing dates with logistics information contained in the observer database.
3. The only alternative that would allow NMFS to gather cost information broken out by expense categories (i.e. overhead, transportation, housing, etc.) would be Alternative 2. However, NMFS could calculate some of these expense categories under Alternative 4, such as airline transportation costs.
4. Of the action alternatives, Alternatives 2 and 3 have an increased accounting burden for observer providers compared to Alternative 4. In addition, not all observer providers may be able to subdivide costs by the categories required under each alternative. Also, NMFS would not be able to verify the accuracy of the annual cost information provided by observer providers. Verification could only be accomplished by conducting a professional audit of each observer

provider's accounts. This would be a costly and invasive process and is not part of any of the proposed regulatory changes described in the alternatives.

Table 13 below provides another way to compare and contrast the alternatives. For each of the alternatives, the table answers common analytical questions that could be raised in future analyses involving observer program restructuring or in the development of new fishery specific observer coverage requirements. These questions are examples only, and are intended to illustrate the value of economic data collections under each of the alternatives. However, these questions are representative of the types of analytical questions likely to be asked of a future analysis.

Question 1: What was the total cost of observer coverage in 2007 for the 30% hook-and-line fleet in the GOA?

Question 2: What was the cost of observer coverage during the first quarter of 2007 for the 30% trawl fleet in the BSAI?

Question 3: What were the transportation costs in 2007 for observers on 30% pot vessels in the GOA?

Question 4: What were the housing and food costs for observers working at GOA shoreside processors in 2007?

Question 5: What was the total cost of observer coverage for the 72 hour directed pollock fishery in Area 620 in 2007?

**Table 13 Representative analytical questions that could be answered by each alternative.**

	Question 1 answered?	Question 2 answered?	Question 3 answered?	Question 4 answered?	Question 5 answered?
Alternative 1 (Status Quo)	No	No	No	No	No
Alternative 2 (Observer contractor provides annual costs broken out by expense categories and fishing subcategories)	Yes	No (only annual costs provided)	Yes	Yes	No (cost information not provided in small enough temporal and special detail)
Alternative 3 (Observer contractor provides annual costs broken out by fishing subcategories only.)	Yes	No (only annual costs provided)	No (transportation costs aren't provided)	No (housing and food costs aren't provided)	No (cost information not provided in small enough temporal and special detail)
Alternative 4 (Observer contractor provides invoices and NMFS completes analysis in finer detail as needed, but without expense categories.)	Yes	Yes	Yes	No (housing and food costs aren't provided)	Yes

The table indicates that none of the alternatives answered all five questions. Under Alternative 1 (status quo), none of the questions could be answered. Under Alternative 2, three of the five questions could be answered, primarily because Alternative 2 is the only alternative that provided costs in all expense categories. Alternative 3 provided sufficient cost information to answer only one of the questions. Alternative 3 provides the least amount of cost information other than the status quo (Alternative 1). Alternative 4 was preferable for answering most of the questions; however, because of the limited expense category information contained in the observer provider invoices, question number 4 could not be answered. In fact, question 4 was the only question that could be answered by only one of the alternatives (Alternative 2). Also, Alternative 4 was the only alternative that could answer question 5. This is because the observer database, which could be used in alternative 4 alone, is the only source of information that could provide the temporal and spatial detail necessary to answer question 5.

### 2.5.6 Issue 6: Completion of the fishing year

NMFS staff completes quality control checks and editing to finalize all observer data as soon as possible after the close of each fishing year. Once completed, data users can commence work using the full annual data set. Completion of the observer data set is dependent on observers returning from sea and completing debriefing for all cruises that have data for a given year. Current regulations allow observer cruises to span two fishing years and cruises may last up to 90 days. Thus, observers deployed late in one fishing year can delay completion of the data set and its availability for analytical work until they return, possibly in the following fishing year. Under this issue, NMFS proposed revising Federal regulations to establish a calendar date cutoff whereby observers who collect fishing data in one year would be required to return from sea and be available for debriefing.

Note that in July 2007, NMFS further consulted with the primary internal agency users of observer information to determine if their needs warrant consideration of this action. This is specifically in light of preliminary discussions with both the OAC and the Council that the proposed action (Alternative 2) would potentially increase indirect costs to industry (by shortening trips) with limited direct benefits. Upon review, while there is interest in obtaining a final observer dataset earlier in the year, there are no compelling analytical requirements that warrant a change to the status quo. **Thus, NMFS recommends that this issue be removed from the analysis, as the change is not considered necessary and any cost increase or imposition upon the industry, observer providers, or observers is not warranted.**<sup>23</sup>

#### Alternative 1

Alternative 1. No action. No change would be made to existing Federal regulations allowing observer deployments to span two different fishing years and last for up to 90 days.

Currently, data users depend upon completion of the full data set for a given year before they can begin their analyses. Completion of the observer data set is dependent on observers returning from sea and completing debriefing for all cruises that have data for a given year. The debriefing process is thorough, but time consuming. The complete debriefing process is summarized below:

1. *Completion of an electronic survey.* The survey is completed for each vessel or processor, and is the most detailed and accurate description of the cruise. Information documented in the survey includes, among other things, sampling methodologies, difficulties encountered during the cruise, potential violations that were witnessed, protected species interactions during the cruise, etc. Data collected by the survey are used by debriefers, future observers, fishery managers, the

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<sup>23</sup> Alternatively, NMFS would recommend the Council select Alternative 1 (no action) as the preferred alternative under Issue 6.

United States Coast Guard, NMFS enforcement, and other NMFS staff. The survey is built in multiple question format, and requires detailed explanations for some answers. Survey completion typically takes a day, but can be extended depending on the number of vessels.

2. *Data submission.* Upon completion of the vessel survey, the observer submits his or her data, printed vessel surveys, and logbook to NMFS staff. Data which has not been keypunched into the electronic database is done so at this point. Biological samples must be prepared, including scanning otolith information into a database, and mounting salmon scales for the debriefer to examine.
3. *Data and survey review.* Prior to the debriefing interview, the debriefer reviews the observer's data by visually reviewing the paper forms for obvious errors and formatting problems. The debriefer will read the survey, noting where questions should be asked during the interview. The database conducts a series of data checks designed to flag potential errors. The debriefer will review these errors. The debriefer will ensure that all data was keypunched correctly by comparing the paper forms with the electronic database. Finally, the debriefer will ensure biological samples are in order, and properly labeled. Scales from any salmon collected during the cruise are read to ensure proper species identification by the observer. This process could take anywhere from a few hours to an entire day, depending on the completeness of the vessel survey, the amount of data, and the number of vessels the observer was deployed on.
4. *Debriefing interview.* Debriefing interviews are scheduled as soon as a debriefer is available. During certain times of the year, observers may not be scheduled immediately for a debriefing due to large numbers of observers coming back at the same time. During the interview, the debriefer will ask the observer to clarify or elaborate on any issues not fully addressed in the survey. The goals are to ensure a complete record of the cruise, and to ensure the data was collected according to approved protocols. The debriefer and observer will resolve all errors flagged by the database. In some circumstances, this part of the process is the most time consuming. Some errors may never be resolved, and that data must be removed from the database.
5. *Evaluation.* An observer's work and performance are evaluated at the completion of each cruise. The evaluation serves two purposes. First, it provides a summary of the work performed, the observer's effort, and the quality of the data. Second, it serves as a tool for future deployments by giving recommendations, suggestions, and identifying areas of needed improvement.
6. *Gear Return.* An observer's gear must be cleaned by the observer and an appointment is made for gear check-in. At the time of gear return, each item is accounted for and any lost or damaged items of high value are documented. The observer's contractor is informed of the high value gear loss and they are held responsible for the replacement of this gear.

Existing Federal regulations allow observer cruises to span two fishing years and cruises may last up to 90 days (see 50 CFR 679.50(i)(2)(vii)(B)). Thus, observers deployed late in one fishing year can delay completion of the final data set and its availability for analytical work until a maximum of almost three months into the following year. Alternative 1 would continue to allow for a delayed completion of the annual observer data set until all observers returned and debriefed. This means that the completed data would not be available to end users working on a variety of analytical documents until all observers that were deployed over the change in the calendar year have returned.

Since 2002, the number of observers whose deployments spanned two fishing years ranged from 7 to 17 (see Table 14). Fewer than half of those cruises continued into March each year. Note that the proposed



action only applies to cruises during which the observer collected fishing data in the first fishing year. Cruises where only noon positions were collected in the first fishing year are not included in the data presented and are not affected under this issue.

**Table 14 Number of observer cruises which spanned two fishing years and the number of cruises on which fishing continued into March, 2002 - 2007**

Fishing years	Number of cruises spanning the fishing year	Number of spanned cruises on which fishing continued into March
2002 – 2003	7	3
2003 – 2004	11	5
2004 – 2005	10	3
2005 – 2006	17	3
2006 – 2007	17	7

Source: NMFS, observer database, 2002 – 2007.

Note: The data only include cruises in which the observer collected fishing data in the first fishing year. Cruises where only noon positions were collected are not included and are not affected by the proposed action under Issue 6.

Table 15 below provides more detailed information on the observer cruises that are provided in Table 14. This table shows that in 2002 – 2003, the latest two cruises ended on March 13. In 2003 – 2004, the latest cruise ended on March 24, and in 2004 – 2005, the latest cruise ended March 10. In 2005 – 2006, three cruises extended into March, the latest of which also ended March 10. Finally, in 2006, 7 of the 17 cruises that spanned the two years extended into March, the latest of which ended March 24.

**Table 15 List of cruises which had catch data spanning two calendar years, 2002 - 2007**

<b>2002 - 2003</b>	9500	12/31/04 – 2/25/05	<b>2006 - 2007</b>
8047	11/2/02 – 1/17/03	9503	12/31/04 – 1/13/05
8064	12/17/02 – 2/24/03	9504	12/31/04 – 3/5/05
8066	12/20/02 – 1/27/03	9510	12/31/04 – 3/6/05
8074	12/31/02 – 3/8/03	9515	12/31/04 – 2/22/05
8079	12/30/02 – 3/13/03		
8080	12/28/02 – 3/13/03	<b>2005 - 2006</b>	
8087	12/30/02 – 1/31/03	10169	11/6/05 – 1/25/06
		10172	11/13/05 – 2/3/06
<b>2003 - 2004</b>		10174	11/16/05 – 2/5/06
8735	11/23/03 – 1/10/04	10178	12/3/05 – 1/25/06
8738	11/24/03 – 2/13/04	10179	12/30/05 – 1/27/06
8745	12/1/03 – 2/16/04	10193	12/29/05 – 3/5/06
8751	12/19/03 – 1/20/04	10196	12/31/05 – 2/18/06
8764	12/3/03 – 2/16/04	10202	12/30/05 – 3/1/06
8767	12/29/03 – 2/29/04	10203	12/30/05 – 3/10/06
8768	12/31/03 – 3/4/04	10204	12/28/05 – 2/25/06
8772	12/31/03 – 3/20/04	10211	12/31/05 – 2/18/06
8774	12/31/03 – 3/13/04	10212	12/28/05 – 2/18/06
8780	12/27/03 – 3/13/04	10213	12/31/05 – 2/19/06
8785	12/29/03 – 3/13/04	10216	12/31/05 – 2/21/06
		10217	12/30/05 – 2/19/06
<b>2004 - 2005</b>		10221	12/30/05 – 2/18/06
9471	11/29/04 – 2/13/05	10233	12/29/05 – 1/15/06
9472	11/24/04 – 2/12/05		
9495	12/30/04 – 2/15/05		
9496	12/29/04 – 2/22/05		
9498	12/30/04 – 3/10/05		

The observer cruises that start late in December and extend into the following fishing year are typically CDQ and non-CDQ hook-and-line catcher processors fishing BSAI Pacific cod. This is because the BSAI Pacific cod season can potentially remain open until December 31 of one year, and it starts again January 1 of the following year.

Alternative 1 does not have any direct impacts on NMFS, the fishing industry, observer providers, or observers. Alternative 1 does have an indirect negative impact on NMFS and the fishing industry, in that it allows for the continued delay of the final data set and prevents agency analyses from being completed earlier in the year.

## Alternative 2

Alternative 2. Revise Federal regulations to require that observers who collect fishing data in one fishing year during a deployment that extends into a second fishing year return from sea and be available for debriefing by February 28 of the second fishing year.

Alternative 2 would establish a cutoff date of February 28, whereby observers who collected fishing data over a span of two different years would be required to return from sea and be available for debriefing. NMFS has proposed February 28 as the cut-off date. This would allow the final data set to be compiled up to a maximum of one month earlier than under the status quo (Alternative 1). Note that the general discussion of impacts which follows is based on the February 28 date and may change if a different date is established.

Alternative 2 would likely increase observer provider costs because the efficiency of each deployment that spans two different years would be reduced. Using the last fishing day as the cut-off, a range of 3 - 7 observer deployments would have been truncated in 2002 - 2007 had this regulation been implemented. As the observer providers do not control the deployments, they would have to increase planning and communication with vessels such that they would not deploy an observer on a trip if the trip had the potential to extend beyond February 28.

Observers would also be affected by Alternative 2, although the level of impact is difficult to predict given that it depends on the composition of the providers' clients and the duration of the trips they take in any given year. For example, a provider could optimize the observer's deployment if they had some clients who took short, predictable trips.

**Recall that the impact of this action is limited to those observers whose cruises span two different fishing years and the cruise extends beyond February 28.** As provided in Table 14, a low of 7 observers (2002 - 2003) and a high of 17 observers (2005 - 2006 and 2006 - 2007) had cruises which spanned two fishing years in the recent past. As shown in Table 15, a range of 3 - 7 of those continued fishing into March. Thus, had Alternative 2 been in place, the effect would have been to shorten the duration of 3 - 7 observer cruises during this time period. As an example, for the 2006-2007 time period one cruise extended to March 24 and would be shortened by 24 days under Alternative 2. The average beginning daily pay rate for all five observer providers in 2006 was \$130. An individual observer would forgo \$3,120 in gross wages in this example. This amount could be higher if the observer was more experienced and earned a higher daily wage. However, this observer could be reassigned, reducing the estimate of forgone wages.

Fishing industry costs could also increase under Alternative 2 to the extent observer provider costs are incorporated into billable costs. The industry would benefit from Alternative 2 to the extent they are dependent on receiving finalized observer information or completion of analyses using observer data

generated from recent years to manage the fisheries. A quantitative assessment of these costs and benefits is not feasible.

The proposed change under Alternative 2 would likely benefit NMFS and the various clients it serves with observer information. It would provide a date certain whereby observers would need to return from sea for debriefing, allowing consistency in the completion of the year's final data set. The data set would be available to end users earlier in the year, allowing work on a range of analyses which use the recent years' data.

An additional benefit is that these observers would debrief earlier than other observers deployed in the new year, potentially reducing the number of observers who need to debrief at the same time. Although this represents an indirect benefit of the proposed action, the backlog in the debriefing process has been of increasing concern to NMFS, the fishing industry, observer providers, and observers in recent years. Alternative 2 could slightly increase efficiencies in the debriefing process, potentially benefiting these entities.

As stated previously, even though some potential benefits could be expected under Alternative 2, NMFS further consulted with the primary internal agency users of observer information to determine if their needs warrant consideration of this action. Given that the proposed action would potentially increase direct or indirect costs to industry, observers, and observer providers with limited direct benefits, **NMFS recommends removing this issue from the analysis.** Note that should the Council desire to retain this issue for consideration, the option clearly remains to select Alternative 1 (no action) as its preferred alternative. However, retaining this issue in the analysis signals to the public that it is under serious consideration by the Council. Thus, if the Council agrees that due to preliminary analysis this issue is not warranted, it may provide a clear signal to the public by removing the issue from the analysis prior to final action.

### 2.5.7 Issue 7: Miscellaneous modifications

Several minor changes are necessary in order to correct inaccuracies or make clarifications in existing Federal regulations that govern observer program operational issues. These are simple changes, primarily housekeeping issues, which have negligible impacts and do not warrant extensive analysis.

#### Alternative 1

Alternative 1. No action. Do not revise existing Federal regulations to address inaccuracies or housekeeping issues.

Alternative 1 would not make any changes to existing Federal regulations, including those necessary to correct or clarify existing regulations. Specifically, regulations at 50 CFR 679.50(c)(5)(i)(A) incorrectly reference a workload restriction at (c)(5)(iii). The Observer Program has identified that the correct reference is (c)(5)(ii). While there are no direct and significant impacts to any sector under Alternative 1, maintaining an incorrect regulation may confuse the public. Similarly, the NMFS Alaska Fisheries Science Center, Fisheries Monitoring and Analysis Division website address is referenced in 50 CFR 679.50. Specifically, the website is cited in a provision that requires observer providers to provide to observer candidates copies of NMFS-provided pamphlets and other literature describing observer duties.<sup>24</sup>

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<sup>24</sup>See 50 CFR 679.50(i)(2)(i)(B)(1) and (2).

The NMFS website address has changed and Federal regulations have not yet updated this information.<sup>25</sup> Alternative 1 would maintain the old website address, serving only to confuse the public should they desire to contact the Fisheries Monitoring and Analysis Division of NMFS or find the observer job pamphlets mentioned above.

In addition, Federal regulations at 50 CFR 679.50(i)(2)(x)(G) currently require observer providers to submit to NMFS a completed and unaltered copy of each type of contract they have entered into with observers or industry. The regulations do not currently include a deadline for submission of this particular information, although most observer providers currently operate as if there is an annual deadline for all required information. In addition, current regulations require that each observer provider submit copies of “certificates of insurance” by February 1 of each year. Alternative 1 would not change Federal regulations; thus, there would be no established deadline associated with the requirement for observer providers to submit a copy of each type of contract they have entered into with observers or industry. While the impact of Alternative 1 is minimal, it does not provide consistency for submittal of information, nor does it make clear Federal requirements for observer providers.

## Alternative 2

Alternative 2. Revise existing Federal regulations related to observer program operational issues as follows:

- a. Regulations at § 679.50(c)(5)(i)(A) incorrectly reference a workload restriction at (c)(5)(iii). Replace (c)(5)(iii) with the correct reference at (c)(5)(ii).
- b. Regulations at § 679.50 currently require observer providers to submit to NMFS each type of contract they have entered into with observers or industry. There is no deadline for submission of this information, although most providers currently operate as if there is an annual deadline for all submitted information. Establish a February 1 deadline for annual submissions of this information, which is consistent with the deadline for copies of ‘certificates of insurance.’
- c. Update the NMFS Alaska Fisheries Science Center, Fisheries Monitoring and Analysis Division website address throughout 50 CFR 679.50.

Alternative 2 includes three separate actions, none of which result in significant impacts. The proposed changes are housekeeping in nature and are intended to correct technical inaccuracies or provide necessary clarifications in the current regulations.

Alternative 2a would correct regulations at 50 CFR 679.50(c)(5)(i)(A) which incorrectly reference a workload restriction at (c)(5)(iii). Alternative 2a would correct this reference to (c)(5)(ii). While there are no direct and significant impacts to any sector under Alternative 2, correcting the reference will serve to clarify regulations for the public. In addition, this regulatory amendment package is an appropriate vehicle by which to make these types of housekeeping changes.

Alternative 2b proposes to establish a deadline of February 1 for observer providers to submit contract information that they are currently required to provide under Federal regulations at 50 CFR 679.50(i)(2)(x)(G). Currently, each observer provider must submit to NMFS a completed and unaltered copy of each type of contract they have entered into with observers or industry, but there is no deadline

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<sup>25</sup>The current website is: <http://www.afsc.noaa.gov/FMA/default.htm>

for submission. Most observer providers currently operate as if there is an annual deadline for all required information. Alternative 2b would establish a deadline of February 1, which mirrors the deadline in existing regulations for observer providers to submit other types of information, specifically, their certificates of insurance. Alternative 2b would provide consistency in the submittal of observer provider information, as well as make clear the requirements for the five observer providers. As most observer providers submit contract information at the beginning of the calendar year under the status quo, Alternative 2b is not expected to have any substantial effects.

Alternative 2c would update the NMFS Alaska Fisheries Science Center, Fisheries Monitoring and Analysis Division website address as referenced in 50 CFR 679.50 to the correct address: <http://www.afsc.noaa.gov/FMA/default.htm>. Currently, the website is cited in a provision that requires observer providers to provide to observer candidates copies of NMFS-provided pamphlets and other literature describing observer duties. The NMFS website address has changed and Federal regulations have not yet updated this information. Alternative 2 would update Federal regulations with the new website address. While the impact is likely minimal, Alternative 2 would serve to clarify contact information for the public should they desire to contact the Fisheries Monitoring and Analysis Division of the Alaska Fisheries Science Center or find the observer job pamphlets mentioned in regulations.

## 2.6 Implementation and enforcement issues

The following describes the implementation and enforcement issues associated with each of the action alternatives. For each issue, Alternative 1 is the no action alternative, and would present no implementation or enforcement issues aside from enforcement issues resulting from the status quo. Where possible, agency costs are quantitatively described. In most cases, quantitative information associated with these costs is unavailable, and costs are described qualitatively.

**Issue 1 – Observer certification and observer provider permitting appeals processes.** Alternative 2 would remove the appeals process associated with initial denial of an observer certification and observer provider permit. These actions would better reflect the discretionary decisions of the agency. Because appeals of certification or permit denials can draw significant staff resources, removing the appeals process would reduce the burden associated with the time required to prepare, submit, and defend an appeal. This burden is primarily borne by Observer Program and NOAA GC staffs. These resources could be reallocated, and used to provide better or additional services to observers, industry, and NMFS clients. Therefore, no cost savings are expected to result from this alternative. There are no enforcement issues identified with Alternative 2.

**Issue 2 – Observer conduct.** Alternative 2 would remove regulations governing observer behavior, but require observer providers to submit a drug and alcohol policy to NMFS. In effect, the burden of enforcing observer behavior is removed from NMFS, and placed on observer providers. Because agency staff would not be conducting investigations and potential decertifications based on observer behavioral issues, this alternative would reduce the overall burden for the Observer Program, NOAA GC, and NMFS Enforcement. However, an option to require reporting of any breach of a drug and alcohol policy would require NMFS to continue to track these occurrences. To the extent that continued observer conduct behavioral issues result in decreased observer performance, NMFS may be able to decertify an observer. Although Alternative 2 would result in significant time savings relative to decertifications and appeals, these resources could be reallocated, and used to provide better or additional services to observers, industry, and NMFS clients. Therefore, no cost savings are expected to result from this alternative.

**Issue 3 – Observer providers' conflict of interest limitations regarding research and experimental permits.** Alternative 2 would revise regulations to clarify that observer providers may provide scientific data collectors to aid in research activities. To the extent that NMFS Enforcement would investigate

whether an observer provider is in violation of current (status quo) conflict of interest regulations, clarifying regulations under Alternative 2 would reduce this burden. However, because these practices are currently not investigated as violations, there would be no effect relative to the status quo. No additional costs would be associated with this alternative.

**Issue 4 – Fishing day definition.** Alternative 2 would revise the current definition of “fishing day” relative to observer coverage such that all hauls within a 24-hour period must have an observer present to count towards a coverage day. Because this revision only would result in a change in the accounting period for purposes of law enforcement investigations, there would likely be no additional implementation or enforcement issues under this alternative. No additional costs would be associated with this alternative.

Alternative 3 would prohibit certain fishing behaviors that result in non-representative fishing. In addition to investigation whether vessels obtained minimum observer coverage levels, NMFS Enforcement would also be investigating whether vessels engaged in prohibited behaviors. For this reason, Alternative 3 would represent an increase in the burden to NMFS Enforcement. However, as noted above, NMFS considers this alternative to be unenforceable, and does not recommend selection of this alternative.

**Issue 5 – Observer program cost information.** Alternative 2 would require observer providers to report annual costs to NMFS. NMFS would develop a cost reporting system and database to store this information electronically. Therefore, this alternative would result in an initial and ongoing burden associated with development and maintenance of this system. It is expected that development and maintenance of this system would be minimal.

Alternative 3 would require similar cost information from observer providers. While Alternative 3 is intended to reduce the reporting burden for observer providers, the resources and costs necessary to develop and maintain a reporting system and database under this alternative would be the same. An option to limit mandatory cost reporting would reduce this burden after 3 years, as the database would likely still require ongoing maintenance.

Alternative 4 would require observer providers to submit to NMFS standardized invoices with certain information in each invoice. Invoices would be submitted to NMFS on a monthly basis. NMFS could enter the raw data into a confidential data base and provide this information to analysts to support future management actions. This alternative would shift the burden of collecting and entering cost information from observer providers to NMFS. The Observer Program would dedicate one half-time ZP-II staff member to these tasks, at a total cost of approximately \$31,250 in salary and fringe benefits per year.

**Issue 6 – Completion of the fishing year.** Alternative 2 would require observers whose cruises span two years to be available for debriefing by February 28 of the second year. The intent of this alternative is to make data available to end users sooner. However, Alternative 2 would not result in any implementation or enforcement issues. No additional costs would be associated with this alternative.

**Issue 7 – Miscellaneous modifications.** Alternative 2 would clarify regulations, implement an observer provider reporting deadline, and revise a website address in regulation. NMFS Enforcement burden could be increased if an observer provider did not meet the reporting deadline. However, all observer providers are currently reporting this information in a manner that would not result in enforcement action. Therefore, Alternative 2 is not expected to result in any implementation or enforcement issues. No additional costs would be associated with this alternative.

## 2.6.1 Summary of implementation and enforcement issues

In summary, the following enforcement and monitoring issues should be considered when selecting a final preferred alternative:

- Removing the appeals process associated with initial observer certification and observer provider permitting would result in significant resource reallocations towards necessary program functions (Issue 1, Alternative 2)
- Placing the burden associated with regulating observer conduct on observer providers, rather than NMFS, would result in significant agency resource reallocations towards necessary program functions (Issue 2, Alternative 2).
- Prohibiting non-representative fishing behavior would likely result in additional NMFS enforcement costs (Issue 4, Alternative 3).
- Requiring observer providers to report cost information would require development and maintenance of a reporting and database system (Issue 5, Alternatives 2, 3, and 4).
- Issue 3 (Alternative 2), Issue 4 (Alternative 2), Issue 6 (Alternative 2), and Issue 7 (Alternative 2) would not result in any implementation issues, and cost would be minimal. To the extent that there could be non-compliance with reporting regulations, enforcement burdens could be increased.

## 2.7 Summary of expected effects

**Issue 1, Alternative 1** (no action) would not change Federal regulations related to the observer certification and observer provider permitting appeals processes; thus, regulations would continue to provide an appeal opportunity to initial observer candidates and observer provider applicants. Alternative 1 would continue to require that NMFS provide staff resources to the appeals process for both observer candidates that fail training and are not allowed to retake training and applicants that are denied observer provider permits.

Allowing unsuccessful observer provider applicants to appeal an agency denial may increase the chance of a lower quality applicant entering the pool of certified observer providers. This is expected to have negative effects on NMFS, the fishing industry, current certified observer providers, and observers. However, future observer provider applicants trying to gain an observer provider permit may benefit from Alternative 1, as it would retain their ability to appeal any agency denials, thus increasing their chances of receiving a permit upon final resolution of the appeal.

The fishing industry that relies on high quality observer data would be negatively affected if a lower quality observer candidate is certified or a lower quality observer provider applicant is permitted. Alternative 1 would continue to limit NMFS' discretion as to whether to grant or deny an initial observer certification or observer provider permit, by requiring that an appeals process be provided in the case of denials.

**Issue 1, Alternative 2** would change Federal regulations to expand NMFS' discretion in whether to grant or deny an initial observer certification or observer provider permit. There is no statutory entitlement to receiving observer certification or an observer provider permit; thus, the granting or denial of observer certifications and observer provider permits are discretionary agency actions. NMFS discretion would be expanded two ways: 1) by revising regulations such that NMFS "may" grant a permit or certification rather than "will" grant a permit or certification; and 2) by establishing final agency action on the permit application as the point at which the observer program official issues a notice stating that the observer provider permit application is denied or that the observer candidate would not be permitted to re-enter the initial groundfish training course. Note that this alternative does not affect the ability of observers and

observer providers to appeal any decision to revoke or sanction a certification or permit that is already issued. An observer candidate that is denied certification or an observer provider permit applicant who is denied a permit (although not entitled to a further NMFS review) could initiate an action against NMFS in a United States District Court.

Under Alternative 2, NMFS' role in granting observer certifications and observer provider permits would more clearly reflect the discretionary nature of these processes. NMFS would have more control over applying limited staff resources to the process of appeals when denying certifications and permits. The change in observer certification processes would better serve NMFS' interest in having well-qualified observers monitoring the North Pacific groundfish fisheries.

**Issue 2, Alternative 1** (no action) would make no changes to the existing Federal regulations which govern observer conduct related to drugs, alcohol, and physical sexual contact. NOAA GC has advised that these regulations are unenforceable, and/or outside the authority of NMFS. In effect, there may not be a sufficient direct connection between the sanctioned behavior and the activity that NMFS has the statutory authority to regulate (i.e., the collection of statistically reliable fisheries data).

**Issue 2, Alternative 2** would remove current Federal regulations that attempt to control observer behavior related to activities involving drugs, alcohol, and physical sexual conduct and regulations that prohibit observers from engaging in any behavior that adversely affects the public's confidence in the integrity of the observer program or of the government. Further, regulations would be removed that prohibit observer from engaging in any illegal actions or other activities that would reflect negatively on their image as professional scientists, other observers, or the observer program as a whole. NMFS would discontinue the Observer Program's existing drug and alcohol policy, as a drug and alcohol policy would instead be the purview of each observer provider. Thus, references to the Observer Program's existing drug and alcohol policy would be removed from Federal regulations.

In effect, Alternative 2 would require each observer provider to have a policy addressing observer conduct and behavior, and current copies of each provider's policy would be required to be submitted to NMFS. However, NMFS would not formally evaluate and approve the submitted policies; the agency's role would be limited to ensuring that the observer providers had developed a policy. All of the existing permitted observer providers currently have standards of professional conduct in their contracts with observers, so expanding or maintaining these standards may involve a minimal amount of time and resources to implement. Alternative 2 would also require that observer providers submit information to NMFS on any allegations or reports of an observer's noncompliance with the observer provider's policy on observer conduct. Three options are provided to establish this notification period (24 hours, 48 hours, or 72 hours). Alternative 2 is intended to clarify the responsibilities between NMFS and observer providers, which may result in less confusion for observers if and when behavior issues arise. Submitting this information to NMFS would provide enforcement officials with additional information about potential MSA violations. It would also provide decertification officials information helpful in decertification proceedings. For example, if an observer had a drug or alcohol abuse issue, that information would be useful in determining whether an observer has a strong chance of rehabilitation, which would mitigate against a full decertification or loss of employment as an observer.

**Issue 3, Alternative 1** (no action) would maintain the current regulations, which do not clarify whether observer providers are allowed to provide observers or scientific data collectors for research activities in Federal regulations. NMFS would likely continue to allow these activities without pursuing enforcement action. However, it is possible that NMFS Enforcement and NOAA GC could determine that observer providers are in violation of Federal regulations. If this occurs, researchers would likely have to obtain scientific data collectors from a different source. In addition, NMFS may not be able to require observers



as a condition of a permit, and research may not be able to be conducted within the context of the normal groundfish fishery.

**Issue 3, Alternative 2** would clarify that, in addition to the provision of observer services for purposes of groundfish fisheries managed under the FMPs, observer providers could provide scientific staff for purposes of EFPs, SRPs, and other research activities. There would likely be minimal impacts resulting from Alternative 2, as current practice is to allow these activities, but all parties involved would understand an observer provider's role. Additionally, there would be no chance of enforcement actions as a result of these activities.

**Issue 4, Alternative 1** (no action) would not clarify 30 percent observer coverage requirements, which pertain to all catcher/processors and catcher vessels equal to or greater than 60 ft length overall (LOA), but less than 125 ft LOA. NOAA Enforcement has documented instances in which vessel operators intentionally structure fishing activities only for purposes of obtaining observer coverage. For example, a vessel may fish unobserved until late in the day, pick up an observer and make a short tow prior to midnight, make one more short tow immediately after midnight, and then return the observer to port. Under current regulations, this is interpreted as two "observer coverage" days. Under Alternative 1, vessels would likely continue to conduct non-representative fishing, specifically with the intent of meeting observer coverage requirements. Observers would continue to collect information on total catch, and that information likely would be used by NMFS to manage the groundfish fisheries.

**Issue 4, Alternative 2** would revise Federal regulations to require that affected vessels carry an observer for all fishing activities that occur during a 24-hour period for that fishing day to count as an observer coverage day. This would affect all catcher/processors and catcher vessels greater than or equal to 60 ft LOA, but less than 125 ft LOA that are subject to 30% observer coverage requirements. Alternative 2 would likely reduce instances in which vessels conduct fishing operations specifically to meet coverage requirements, and likely increase data quality for this sector. Alternative 2 would also likely increase costs for vessels in some cases, requiring them to carry observers longer than they would be required to under Alternative 1 (status quo). Alternatively, vessels could choose to postpone fishing (in the example described above) such that they do not retrieve hauls without an observer during a 24-hour period in which they also retrieved hauls with an observer, thus increasing trip length and costs. For these reasons, Alternative 2 may have some significant cost implications for industry.

**Issue 4, Alternative 3** would establish regulations that would prohibit activities that result in non-representative fishing behavior from counting toward an observer coverage day. NMFS' intent for Alternative 3 is to identify through analysis specific activities or behaviors that are specific to vessels exhibiting strategic behavior only to obtain observer coverage, and prohibit those activities. Staff identified several candidate behaviors that could be prohibited in regulation. However, two problems with this methodology were identified. First, differentiating between strategic behavior and the same activity resulting from normal fishing behavior is difficult. Of the candidate fishing behaviors that could be used to regulate strategic behavior, all could be explained by typical fishing operations. Second, for each candidate behavior that could be prohibited, staff determined that the regulatory fix could be circumvented, and potentially exacerbate the problem.

**For these reasons, NMFS has determined that Alternative 3 would not be enforceable, and would not decrease instances of vessel captains fishing only to obtain required observer coverage. Therefore, NMF does not recommend selection of Alternative 3.**

**Issue 5, Alternative 1** (no action) means that observer providers would not be required to report cost information to NMFS. As a result, NMFS would continue to lack sufficiently detailed information on the costs of observer services in order to inform baseline analyses of the industry-funded portion of the

groundfish observer program. Analyses to support proposed regulatory changes would continue to rely on an average daily rate, multiplied by the number of observer days incurred by vessels and processors. Thus, NMFS and the Council would continue to make use of the best available data in the development of these analyses, recognizing the data limitations discussed below.

**Issue 5, Alternative 2** would require observer providers to report costs and other economic and socioeconomic information to NMFS by a specified date, according to various subcategories. The proposed subcategories of cost information include labor, overhead, transportation, housing, food, and insurance. The intent is that this information would be reported on an annual basis, broken out by BSAI versus GOA fisheries, and by 30 percent, 100 percent, and 200 percent covered vessel/processor categories and gear types. NMFS is not able to assess the various cost components of the existing groundfish observer program under the information currently required; most if not all of the observer provider/vessel contracts submitted to NMFS provide only the daily rate for observer services (e.g., \$355/day). The proposed cost categories identify the specific types of information that could be collected to address common questions regarding the baseline costs of the existing program.

The primary benefit of this action is that this information would allow for a more accurate assessment of costs and benefits under potential program changes, which may benefit the groundfish observer program and the fisheries dependent upon observer data for management. The primary cost of this action would be the administrative costs incurred by the observer providers, in effect, the staff time and resources necessary to provide cost information on an annual basis. It is uncertain at this time whether the incremental cost of providing this additional information would represent a substantial cost to the observer providers.

This alternative includes two options. First, the alternative would include an option to limit the economic data collection program to three years. Second, it would include an alternative to prohibit a person or entity that receives confidential financial or business information from observer providers on behalf of NMFS from being permitted as an observer provider in the North Pacific. This second option is intended to address a situation where a person or entity could use confidential information to compete with current observer providers.

**Issue 5, Alternative 3** would require observer providers to provide the total costs to NMFS split out by GOA and BSAI subareas; vessel/processor coverage categories; and gear type on an annual basis. Compared to Alternative 2, Alternative 3 provides more generalized information. Alternative 3 would be less burdensome on observer providers than Alternative 2 and, therefore, would be less costly.

This alternative includes two options. First, the alternative would include an option to limit the economic data collection program to three years. Second, it would include an alternative to prohibit a person or entity that receives confidential financial/business information from observer providers on behalf of NMFS from being permitted as an observer provider in the North Pacific. This second option is intended to address a situation where a person or entity could use confidential information to compete with current observer providers.

**Issue 5, Alternative 4** would require observer providers to submit to NMFS on a monthly basis copies of paid, standardized invoices with certain information in each invoice. The intent of this alternative is to reduce the administrative burden and costs to observer providers associated with calculating and reporting the costs required under Alternatives 2 and 3. Under Alternative 4, observer providers would submit copies of their paid, standardized billing invoices to NMFS, and NMFS would enter the raw information into a database for analytical use when needed. In addition to the benefits described for Alternatives 2 and 3, Alternative 4 has two main advantages. First, observer provider cost information could be

verifiable by NMFS, increasing the overall data quality. Second, this approach to economic data collection allows increased flexibility in terms of data analysis.

This alternative includes two options. First, the alternative would include an option to limit the economic data collection program to three years. Second, it would include an alternative to prohibit a person or entity that receives confidential financial or business information from observer providers on behalf of NMFS from being permitted as an observer provider in the North Pacific. This second option is intended to address a situation where a person or entity could use confidential information to compete with current observer providers.

**Issue 6, Alternative 1** (no action) would not change existing regulations to require observers who collected fishing data over a span of two different years to return from sea and be available for debriefing by a specified date. In effect, this alternative allows for the potential to delay completion of the full, annual observer data set for the first year until all observers have returned and debriefed. Under current regulations, an observer can be deployed for up to 90 days, meaning the maximum deployment could last through late March of the second year. This means that the completed data would not be available to end users working on a variety of analytical documents until the observer returns.

**Issue 6, Alternative 2** would require that observers who collected fishing data over a span of two different years would be required to return from sea and be available for debriefing by February 28 of the second year. Those observers whose cruises span two different years would be impacted by this action. Alternative 2 would likely increase observer provider costs because the efficiency of each deployment that spans two different years would be reduced; fishing industry costs could increase to the extent observer provider costs are incorporated into billable costs. Using the last fishing day as the cut-off, 7 observer deployments would have needed to be truncated in 2006. The actual impact is difficult to predict because it would depend on the composition of the observer providers' clients and the duration of the trips they take.

This action was proposed due to the potential benefit to NMFS and the clients it serves as it would provide a date certain whereby observers would need to return from sea for debriefing, allowing consistency in the completion of the final annual observer data set. However, in July 2007, NMFS further consulted with the primary internal agency users of observer information to determine if their needs warrant consideration of this action. These consultations were conducted due to preliminary discussions with both the OAC and the Council that the proposed action (Alternative 2) would potentially increase indirect costs to industry (shorten trips) with limited direct benefits. Upon review, while there is interest in obtaining a final observer dataset earlier in the year, there are no compelling analytical requirements that warrant a change to the status quo. **Thus, NMFS recommends that this issue be removed from the analysis, as the cost increase or imposition upon the industry, observer providers, and observers is not warranted.**

**Issue 7, Alternative 1** would not revise existing Federal regulations to address inaccuracies or housekeeping issues.

**Issue 7, Alternative 2** would revise existing Federal regulations related to observer program operational issues. Three changes are proposed, which would serve to correct technical inaccuracies or clarify current regulations. Effects are expected to be none to minimal.

## 3.0 INITIAL REGULATORY FLEXIBILITY ANALYSIS

### 3.1 Introduction

This Initial Regulatory Flexibility Analysis (IRFA) addresses the statutory requirements of the Regulatory Flexibility Act (RFA) of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C. 601-612). This IRFA evaluates the adverse economic impacts on small entities directly regulated by the proposed actions.

The proposed actions are organized under seven issues. The specific need for action associated with each issue is described in Section 2.5 under the expected effects of the alternatives. Generally, however, these actions are proposed to remove Federal regulations that are either unnecessary, unenforceable, or outside the authority of NMFS; or to clarify existing regulations with regard to allowing observer providers to provide observers for exempted fishing permits and scientific research permits/activities. Other issues included in this action would establish new regulations to: prohibit activities that result in non-representative fishing behavior from counting toward an observer coverage day; require observer providers to report more detailed annual billing information to NMFS; and specify a date by which observers who have collected data in the previous fishing year would be required to be available for debriefing. In sum, the proposed actions are intended to improve the operational efficiency of the Observer Program, as well as improve the catch, bycatch, and biological data provided by observers for conservation and management of the North Pacific groundfish fisheries, including that provided through scientific research activities.

#### 3.1.1 The purpose of an IRFA

The RFA, first enacted in 1980, was designed to place the burden on the government to review all regulations to ensure that, while accomplishing their intended purposes, they do not unduly inhibit the ability of small entities to compete. The RFA recognizes that the size of a business, unit of government, or nonprofit organization frequently has a bearing on its ability to comply with a Federal regulation. Major goals of the RFA are: (1) to increase agency awareness and understanding of the impact of their regulations on small business, (2) to require that agencies communicate and explain their findings to the public, and (3) to encourage agencies to use flexibility and to provide regulatory relief to small entities. The RFA emphasizes predicting impacts on small entities as a group distinct from other entities, and on the consideration of alternatives that may minimize adverse economic impacts, while still achieving the stated objective of the action.

On March 29, 1996, President Clinton signed the SBREFA. Among other things, the new law amended the RFA to allow judicial review of an agency's compliance with the RFA. The 1996 amendments also updated the requirements for a final regulatory flexibility analysis, including a description of the steps an agency must take to minimize the significant economic impact on small entities. Finally, the 1996 amendments expanded the authority of the Chief Counsel for Advocacy of the Small Business Administration (SBA) to file *amicus* briefs in court proceedings involving an agency's alleged violation of the RFA.

In determining the scope, or 'universe', of the entities to be considered in an IRFA, NMFS generally includes only those entities that can reasonably be expected to be directly regulated by the proposed action. If the effects of the rule fall primarily on a distinct segment, or portion thereof, of the industry (e.g., user group, gear type, geographic area), that segment would be considered the universe for the purpose of this analysis.

Since the RFA is applicable to businesses, non-profit organizations, and governments, observers fall outside of the scope of the RFA. Therefore, they will not be discussed in the RFA context. The focus of the RFA section will be the observer companies, vessels, and processors that may be directly regulated under one or more of the proposed actions.

### 3.1.2 IRFA requirements

Until the Council makes a final decision on a preferred alternative(s), a definitive assessment of the proposed management alternatives cannot be conducted. In order to allow the agency to make a certification decision, or to satisfy the requirements of an IRFA of the preferred alternative, this section addresses the requirements for an IRFA. Under 5 U.S.C., Section 603(b) of the RFA, each IRFA is required to contain:

- A description of the reasons why action by the agency is being considered;
- A succinct statement of the objectives of, and the legal basis for, the proposed rule;
- A description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply (including a profile of the industry divided into industry segments, if appropriate);
- A description of the projected reporting, record keeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
- An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule;
- A description of any significant alternatives to the proposed rule that accomplish the stated objectives of the proposed action, consistent with applicable statutes, and that would minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives, such as:
  1. The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
  2. The clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;
  3. The use of performance rather than design standards;
  4. An exemption from coverage of the rule, or any part thereof, for such small entities.

### 3.1.3 Definition of a small entity

The RFA recognizes and defines three kinds of small entities: (1) small businesses, (2) small non-profit organizations, and (3) small government jurisdictions.

**Small businesses.** Section 601(3) of the RFA defines a ‘small business’ as having the same meaning as ‘small business concern’, which is defined under Section 3 of the Small Business Act. ‘Small business’ or ‘small business concern’ includes any firm that is independently owned and operated and not dominant in its field of operation. The SBA has further defined a “small business concern” as one “organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor...A small business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association,

trust or cooperative, except that where the firm is a joint venture there can be no more than 49 percent participation by foreign business entities in the joint venture.”

The SBA has established size criteria for all major industry sectors in the United States, including fish harvesting and fish processing businesses. Effective January 5, 2006, a business involved in fish harvesting is a small business if it is independently owned and operated, not dominant in its field of operation (including its affiliates), and if it has combined annual gross receipts not in excess of \$4.0 million for all its affiliated operations worldwide.<sup>26</sup> A seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation, and employs 500 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide. A business involved in both the harvesting and processing of seafood products is a small business if it meets the \$4.0 million criterion for fish harvesting operations. Finally, a wholesale business servicing the fishing industry is a small business if it employs 100 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide.

The SBA has established “principles of affiliation” to determine whether a business concern is “independently owned and operated.” In general, business concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party controls or has the power to control both. The SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists. Individuals or firms that have identical or substantially identical business or economic interests, such as family members, persons with common investments, or firms that are economically dependent through contractual or other relationships, are treated as one party with such interests aggregated when measuring the size of the concern in question. The SBA counts the receipts or employees of the concern whose size is at issue and those of all its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit, in determining the concern’s size. However, business concerns owned and controlled by Indian Tribes, Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601), Native Hawaiian Organizations, or Community Development Corporations authorized by 42 U.S.C. 9805 are not considered affiliates of such entities, or with other concerns owned by these entities solely because of their common ownership.

Affiliation may be based on stock ownership when: (1) a person is an affiliate of a concern if the person owns or controls, or has the power to control 50 percent or more of its voting stock, or a block of stock which affords control because it is large compared to other outstanding blocks of stock, or (2) if two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, with minority holdings that are equal or approximately equal in size, but the aggregate of these minority holdings is large as compared with any other stock holding, each such person is presumed to be an affiliate of the concern.

Affiliation may be based on common management or joint venture arrangements. Affiliation arises where one or more officers, directors, or general partners, controls the board of directors and/or the management of another concern. Parties to a joint venture also may be affiliates. A contractor and subcontractor are treated as joint venturers if the ostensible subcontractor will perform primary and vital requirements of a contract or if the prime contractor is unusually reliant upon the ostensible subcontractor. All requirements

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<sup>26</sup>Effective January 6, 2006, SBA updated the Gross Annual Receipts thresholds for determining “small entity” status under the RFA. This is a periodic action to account for the impact of economic inflation. The revised threshold for “commercial fishing” operations (which, at present, has been determined by NMFS HQ to include catcher-processors, as well as catcher vessels) changed from \$3.5 million to \$4.0 million in annual gross receipts, from all its economic activities and affiliated operations, worldwide.

of the contract are considered in reviewing such relationship, including contract management, technical responsibilities, and the percentage of subcontracted work.

Small organizations. The RFA defines “small organizations” as any not-for-profit enterprise that is independently owned and operated, and is not dominant in its field.

Small governmental jurisdictions. The RFA defines small governmental jurisdictions as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of fewer than 50,000.

### **3.2 A description of the reasons this action is being considered**

The North Pacific Groundfish Observer Program is the largest observer program in the United States and plays a critical role in the conservation and management of groundfish, other living marine resources, and their habitat. The indispensable nature of this program, and its role in the successful and sustainable management of the living marine resources of the North Pacific and Bering Sea, are treated in detail in the RIR above. Data collected by the Observer Program are used for a wide variety of purposes including: (1) stock assessment; (2) monitoring groundfish quotas; (3) monitoring the bycatch of groundfish and non-groundfish species; (4) assessing the effects of the groundfish fishery on other living marine resources and their habitat; and (5) assessing methods intended to improve the conservation and management of groundfish and other living marine resources.

However, NMFS has identified several technical and operational issues which may be addressed through regulatory amendments, in order to make improvements to the existing Observer Program. Several proposed actions are intended to clarify authority, either of NMFS or the observer providers. Under Issue 1, NMFS would clarify its discretionary authority to either grant or deny an initial observer certification or observer provider permit, as there is no statutory entitlement to receiving these designations. Because there would be no appeal at this stage of the process, NMFS would have increased control over applying limited staff resources to the process of granting or denying certifications and permits. The proposed action under Issue 2 would, in general, clarify responsibilities between NMFS and observer providers, and focus NMFS’ responsibility on maintaining data quality and integrity without the responsibility of attempting to enforce observer standards of behavior, regulations for which are either unenforceable and/or outside the authority of NMFS. Under Issue 3, the proposed action would clarify regulations to allow observer providers to provide an observer for the purpose of research and experimental or scientific permits.

Several other issues are focused primarily on improving the quality and utility of observer data. Issue 4 is being considered in order to close a regulatory loophole that currently allows vessels to alter their fishing behavior to conduct fishing that is unrepresentative of normal operations, in order to meet observer coverage requirements. The proposed action would tighten regulations to mitigate some of these behaviors, and thus increase observer data quality for the fishing sectors to which these regulations apply.

Issue 5 is being considered in order to receive cost data from observer providers that is similar to that identified for the rest of the fishing industry. NMFS currently lacks sufficiently detailed information on the costs incurred by observer providers in order to inform FMP and regulatory analyses as to the costs of the portion of the groundfish observer program funded by industry that is required to meet specific coverage levels. Because costs vary substantially across different fishery sectors, it is very difficult to estimate the differing effects of both the existing program and changes to the program on various sectors. Issue 6 is being considered in order to make a full year of observer data available to analysts earlier in the year, allowing for increased consistency in the completion of the final data set. Finally, the actions

proposed under Issue 7 would revise minor inaccuracies in the existing regulations related to observer program operational issues.

### **3.3 Objective statement of proposed action and its legal basis**

Under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the Secretary of Commerce and in the Alaska region, the North Pacific Fishery Management Council, have the responsibility to prepare fishery management plans and associated regulations for the marine resources found to require conservation and management. NMFS is charged with carrying out the Federal mandates of the Department of Commerce with regard to marine fish, including the publication of Federal regulations. The Alaska Regional Office of NMFS, and Alaska Fisheries Science Center, research, draft, and support the management actions recommended by the Council.

National Standard 2 of the Magnuson-Stevens Act requires that conservation and management measures shall be based upon the best scientific information available. Data collected by observers and an effective and responsive Observer Program are essential for the Council and NMFS to meet this requirement. The overall objective of the proposed actions is to improve the operations of the existing Observer Program and its data collection mechanisms.

### **3.4 Description of the alternatives considered**

The action under consideration includes seven separate issues, all of which are related to the operations of the North Pacific Groundfish Observer Program, with alternatives proposed under each issue. Each of the seven issues is described and analyzed separately, and they represent mutually exclusive decision points. As structured, it is necessary to select a preferred alternative under each of the seven issues. The list of issues, alternatives, and options under consideration is provided in Section 2.4.

### **3.5 Description and estimate of the number of small entities directly regulated by the proposed action(s)**

The following sections describe the entities directly regulated by the proposed action alternatives under each issue. Note that under **Issue 1** (Alternative 2), observers are not mentioned as observers would not be considered small entities as defined under the RFA. In that case, Issue 1 is limited to removing the regulations that establish an appeals process for new observer candidates that fail observer training. As stated previously, since the RFA is applicable to businesses, non-profit organizations, and governments, observers fall outside of the scope of the RFA. Issue 1 relative to observer providers is discussed below. The actions under **Issue 7(a) and (c)** are limited to correcting citations in the existing regulations; thus, these issues also do not represent actions which directly regulate small entities.

#### **Observer providers**

Five observer provider companies are currently permitted and active in the North Pacific, reduced from six in 2000. These entities would be directly regulated by the proposed action alternatives under **Issues 2, 3, 5, and 7(b)**. These companies are: Alaskan Observers, Inc. (AOI); NWO, Inc. (NWO); Saltwater, Inc. (SWI); TechSea International (TSI); and MRAG Americas, Inc. (MRAG). Of these, three are based in the Seattle area, one is based in Anchorage, and one is based in Florida, with a satellite office in Anchorage. The principal activity of most of these companies is providing observers for the North Pacific Groundfish Observer Program, and most of them also provide observers for other observer programs within or outside of Alaska, or are involved in other business activities. There are substantial



differences among the observer providers in terms of both the proportion of their income generated by providing observers for the groundfish fishery and the proportion of the total groundfish observer deployment days they provide. All of the current observer provider companies are considered small entities under the Regulatory Flexibility Act.

Additionally, future firms interested in obtaining a permit to provide observer services under the Observer Program would be regulated under **Issue 1**. However, the universe of potential observer provider firms is large, and not possible to define. Therefore, the number of potential small observer provider firms is not known.

### Vessels subject to 30% observer coverage requirements

Catcher vessels and catcher processors subject to 30% observer coverage requirements would be directly regulated by the proposed action in **Issue 4** (Alternative 2 or 3). Generally, these include pot vessels  $\geq 60'$  LOA, trawl and hook-and-line catcher vessels between  $60' - 125'$  LOA (including CDQ and AFA), and hook-and-line catcher processors between  $60' - 125'$  LOA; in the BSAI and GOA, with several exceptions for vessels participating in specific programs.<sup>27</sup>

Table 16 below provides data on the number of individual vessels that participated in the GOA and/or BSAI groundfish fisheries by sector in 2006 and 2007 (through July). For purposes of this IRFA, the information in Table 16 represents the number of affected small entities directly regulated by small Issue 4.

**Table 16 Number of individual vessels participating in the GOA and/or BSAI groundfish fisheries by 30% sector, 2006 – 2007**

Sector	2006	2007
Pot CP	5	4
Pot CV	78	78
Trawl CV $>60'$ but $\leq 125'$	95	90
Trawl CP $>60'$ but $\leq 125'$	12	10
H&L CV $>60'$ but $\leq 125'$	97	74
H&L CP $>60'$ but $\leq 125'$	11	11

Source: NMFS catch accounting database, 2006 - July 2007.

Note: Vessel counts among sectors are not unique.

The IRFA likely overestimates the number of small entities for three reasons. First, some portion of the vessels subject to 30% observer coverage requirements do not meet the criteria for a small entity (i.e., fish harvesting is a small business if it is independently owned and operated, not dominant in its field of operation, including its affiliates, and if it has combined annual gross receipts not in excess of \$4.0 million for all its affiliated operations worldwide).

Second, the RFA requires a consideration of affiliations between entities, for the purpose of assessing if an entity is small. The estimates in Table 16 do not take account of affiliations between entities. There is not a strict one-to-one correlation between vessels and entities; many persons and firms are known to have ownership interests in more than one vessel, and many of these vessels with different ownership, are otherwise affiliated with each other. The AFA pollock cooperatives in the BSAI are an important type of

<sup>27</sup>For example, BSAI Am. 80 will require that non-AFA trawl CPs  $<125'$  in the BSAI have 200% observer coverage. The proposed rule is 72 FR 30052 (5/30/07); the final rule has not yet been published. Expected implementation is January 2008. The Central Gulf rockfish pilot program will also require 200% and 100% coverage on participating CPs and CVs, respectively.

affiliation. One hundred and eleven of the BSAI catcher vessels (CVs), and 21 catcher processors (CPs), were members of AFA co-ops in 2007, and therefore, “affiliated” for RFA purposes with the other operations in their respective cooperative fleets (lists of American Fisheries Act catcher vessel and catcher processor permits in 2004, accessed at <http://www.fakr.noaa.gov/ram/afa.htm> on November 5, 2004).

Finally, the vessel counts among sectors in Table 16 are not unique; thus, some vessels may participate in two or more sectors.

The remainder of this section briefly describes the affected sectors:

*Pot catcher processors* have been used primarily in the crab fisheries of the North Pacific, but also have had substantial participation in the Pacific cod fisheries. Vessels in the pot CP sector use pot gear to harvest BSAI and GOA groundfish resources; five vessels participated in 2006 and four in 2007. They produce whole or headed and gutted groundfish products, some of which may be frozen in brine, rather than blast frozen. Vessels average about 135' LOA and are equipped with deck cranes for moving pots. Some vessel owners also change gear and participate in hook-and-line fisheries, and there is some crossover between gear categories. Pot CPs  $\geq 125'$  are subject to different observer requirements than other large CPs; all pot vessels  $\geq 60'$  are only required to have coverage on 30% of their pots pulled for that calendar quarter, as opposed to the 100% of the fishing days coverage required on other vessels over 125'.

*Hook-and-line catcher processors <125' LOA*, also known as freezer longliners, use hook-and-line gear to harvest groundfish. Most hook-and-line catcher processors are limited to headed and gutted products. Hook-and-line catcher processors <125' operate primarily in the BSAI Pacific cod fishery, and to a lesser extent in the halibut/sablefish IFQ fishery and GOA Pacific cod fisheries. The hook-and-line catcher processor fleet in the BSAI is divided between vessels under and over 125' that currently face 30% and 100% coverage requirements, respectively. In 2006 and 2007, 11 hook-and-line catcher processors <125' (and 29 and 26 hook-and-line catcher processors  $\geq 125'$ , respectively) operated in the BSAI Pacific cod fishery. However, despite the length difference, these two groups of hook-and-line catcher processors generally operate in an identical manner, and often harvest similar volumes of groundfish.

*Pot catcher vessels  $\geq 60'$*  use pot gear for participation in both crab and groundfish fisheries, although some of these vessels use hook-and-line gear in the groundfish fisheries. Vessels in this class are typically equipped with one or two large deck cranes for moving and stacking crab pots, and a steel-framed pot launcher. These vessels have an average length of about 100', an average rating of about 175 gross tons, and an average horsepower rating of about 800. Historically, the pot fishery in Alaska waters produced crab. Several factors, including diminished king and Tanner crab stocks, led crabbers to begin to harvest Pacific cod with pots in the 1990s. The feasibility of fishing BSAI Pacific cod with pots was also greatly enhanced with the implementation of Amendment 24 to the BSAI FMP, which allocated the target fishery between trawl and fixed gear vessels.<sup>28</sup> In 2006 and 2007, 78 pot CVs  $\geq 60'$  participated in the groundfish fisheries in the BSAI and/or GOA.

*Hook-and-line catcher vessels  $\geq 60'$  and <125'*. A large majority of the hook-and-line CVs in this class operate solely with hook-and-line fixed gear, focusing on halibut and relatively high-value groundfish

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<sup>28</sup>Amendment 64 (Sept. 2000) and Amendment 77 (Jan. 2004) to the BSAI FMP further allocated the fixed gear BSAI Pacific cod fishery between the hook-and-line and pot sectors of the fixed gear fleets. Am. 77, among other actions, establishes separate BSAI Pacific cod allocations for the pot CP and pot CV sectors. Most recently, the Council approved Am. 85 in April 2006, to revise the BSAI Pacific cod allocations to the trawl, fixed, and jig gear sectors. The final rule is expected to be effective in January 2008.

such as sablefish and rockfish. Both fisheries generate high revenue per ton, and these vessels often enter other high-value fisheries, such as the albacore fisheries on the high seas. The reliance of these vessels on groundfish fisheries sets them apart from smaller fixed gear CVs permitted to operate in Alaska salmon fisheries with multiple gear types. Overall, this fleet is quite diverse. Excluding vessels that principally participate in the halibut or salmon fishery, most vessels are between 60' and 80' long with an average length of about 70'. The larger vessels in this class can operate in the Bering Sea during most weather conditions, while smaller vessels can have trouble operating during adverse weather. In 2006 and 2007, 97 and 74 hook-and-line CVs  $\geq 60'$  and  $< 125'$  LOA participated in the BSAI and/or GOA groundfish fisheries.

*Non-AFA trawl catcher vessels  $\geq 60'$  and  $< 125'$ .* Includes all CVs greater than or equal to 60' LOA that use trawl gear for the majority of their catch, but are not qualified to fish for pollock under the AFA. They are ineligible to participate in Alaska commercial salmon fisheries with seine gear, because they are longer than 58'. Vessels must have harvested a minimum of 5 mt of groundfish in a year to be considered part of this class. Non-AFA trawl CVs greater than or equal to 60' also tend to concentrate their efforts on groundfish, obtaining more than 80% of ex-vessel revenue from groundfish harvests. All non-AFA CVs fishing in recent years are  $< 125'$  LOA, and most concentrate their fishing in the GOA. Only three non-AFA trawl CVs over 60' LOA fish for groundfish in the BSAI on a regular basis. The number of non-AFA trawl catcher vessels  $\geq 60'$  and  $< 125'$  LOA that participated in the BSAI and GOA groundfish fisheries was 39 in 2006 and 23 in 2007 (NMFS catch accounting database).

### **Vessels that carry an observer whose deployment spans two years**

Note that **Issue 6** (Alternative 2) would directly regulate any vessel that decided to carry an observer for a deployment that spanned two calendar years, by requiring that the observer return from sea by February 28 of the second year and be available for debriefing. Under the status quo, an observer deployment can span two fishing years and last up to 90 days, resulting in a return from sea as late as the end of March. The RIR provided information that showed only 7 observer cruises extended from the end of 2006 into March 2007 (see Table 15). The data show that all of these were hook-and-line catcher processors, and because of the timing of fishery openings and closures, that is likely to be the case in the future. The hook-and-line catcher processor sector is typically the only sector with reasonable potential to fish late into December, during the BSAI Pacific cod B season (June 10 – December 31). Thus, it is this sector that is highlighted as the likely sector to be directly regulated under the proposed action in Issue 6.

Section 0 above describes this sector, specifically noting that in 2006, 11 hook-and-line catcher processors  $< 125'$  and 29 hook-and-line catcher processors  $\geq 125'$  operated in the BSAI Pacific cod fishery. As of July 2007, 11 hook-and-line catcher processors  $< 125'$  and 26 hook-and-line catcher processors  $\geq 125'$  participated. While these may represent reasonable estimates of the maximum number of directly affected entities under Issue 6, far fewer vessels appear to operate in such a way that would necessitate changing their operations to comply with Issue 6, Alternative 2 (e.g., 7 observer cruises in 2006 – 2007). In addition, while for the purposes of this IRFA, all vessels in the sector are considered small entities, some may exceed the SBA criteria. Thus, the IRFA likely overestimates the number of small entities.

### **Summary**

The following table summarizes all of the potentially directly regulated small entities, by sector, under the proposed action alternatives. Note again that the IRFA likely overestimates the number of small entities potentially affected for two reasons. First, some of the entities listed in the table likely exceed the SBA definition of a small entity. However, due to lack of information surrounding the combined annual gross receipts for each entity by size (including all of its affiliated operations worldwide), all will be considered

small entities for the purpose of this analysis. Second, the information in Table 17 does not consider affiliations, thereby making some entities large. Third, the vessel counts among sectors in Table 17 are not unique; thus, some vessels may participate in two or more sectors.

**Table 17 Estimate of the number of small entities potentially directly regulated by the proposed action(s)**

Sector	2006	2007
Observer Providers	5	5
Pot CP	5	4
Pot CV	78	78
Trawl CV >60' but ≤125'	95	90
Trawl CV >125'	30	30
Trawl CP >60' but ≤125'	12	10
Trawl CP >125'	33	33
H&L CV >60' but ≤125'	97	74
H&L CV >125'	2*	1
H&L CP >60' but ≤125'	11	11
H&L CP >125'	29	26**

Source: NMFS catch accounting database, 2006 - July 2007.

Note: Vessel counts are not unique; thus, the number of small entities may be overestimated.

\*In 2006, one of these vessels only fished halibut.

\*\*In 2007, three hook and line catcher/processors did not fish due to a Federal buyout program.

### 3.5.1 Recordkeeping and reporting requirements

Proposed actions under Issue 2 and Issue 5 would require additional recordkeeping or reporting requirements for the five observer providers currently providing services to the North Pacific Groundfish Observer Program. Issue 7(b) would require a deadline for submission of information that is already required of observer providers under existing regulations.

**Issue 2, Alternative 2** is intended to clarify the responsibilities between NMFS and observer providers with regard to observer conduct (e.g. drugs, alcohol, and physical sexual contact). While Alternative 2 would revise regulations to clarify that the responsibility for developing standards for observer conduct and the enforcement of those standards lies with the observers' employers (i.e., observer providers), Option 1 under Alternative 2 requires that NMFS continue to be informed of these behaviors if they occur. This is primarily due to the possibility that specific negative behaviors have the potential to affect data quality and integrity. Alternative 2 would continue to allow NMFS to consider such behaviors in the decertification process of an observer. In effect, violation of an observer provider's drug and alcohol policy could be a mitigating factor in a future decertification of the observer involved.

Current regulations at 50 CFR 679.50(i)(2)(x)(I) require observer providers to notify the Observer Program via fax or email, within 24 hours after the observer provider becomes aware of certain behaviors. Issue 2, Alternative 2, Option 1 proposes to revise these regulations to include the requirement that observer providers must also submit information to NMFS concerning a breach of the observer provider's policy on observer conduct, which includes issues related to drugs, alcohol, or sexual physical contact. Option 1 also provides a choice regarding the time period within which the notification must occur – either within 24 hours, 48 hours, or 72 hours after the provider becomes aware of the information.

The RIR (Section 2.0) discusses an informal survey of observer providers, conducted in July 2007 by NMFS Observer Program staff, which shows that observer providers do not have difficulty complying

with the existing notification regulations above. Given that the notification requirement does not appear to be unduly burdensome to observer providers, and because a violation of an observer provider's drug and alcohol policy could represent a mitigating factor in a future decertification of an observer, NMFS contends that it is necessary to remain informed of any violations of an observer provider's drug and alcohol policy. Because of potential safety implications, NMFS contends that the 24-hour notification period is important to maintain if it is extended to behaviors related to a breach of the observer provider's policy on observer conduct under Alternative 2. Note that the 24-hour period begins when the observer provider becomes aware of a problem and not when the problem actually occurs. The provision also does not require that an observer provider speak with Observer Program staff personally or by phone, as fax or email is allowed.

**Issue 5, Alternative 2** would require observer providers to report costs and other economic and socioeconomic information to NMFS by a specified date, according to various subcategories. The proposed subcategories of cost information include labor, overhead, transportation, housing, food, and insurance. The intent is that this information would be reported on an annual basis, broken out by BSAI versus GOA fisheries, and by 30 percent, 100 percent, and 200 percent covered vessel/processor categories and gear types. NMFS is not able to assess the various cost components of the existing groundfish observer program under the information currently required; most if not all of the observer provider/vessel contracts submitted to NMFS provide only the daily rate for observer services (e.g., \$355/day). The proposed cost categories identify the specific types of information that could be collected to address common questions regarding the baseline costs of the existing program.

The primary benefit of this action is that this information would allow for a more accurate assessment of costs and benefits under potential program changes, which may benefit the groundfish observer program and the fisheries dependent upon observer data for management. The primary cost of this action would be the administrative costs incurred by the observer providers, in effect, the staff time and resources necessary to provide cost information on an annual basis. It is uncertain at this time whether the incremental cost of providing this additional information would represent a substantial cost to the observer providers.

This alternative includes two options. First, the alternative would include an option to limit the economic data collection program to three years. Second, it would include an alternative to prohibit a person or entity that receives confidential financial or business information from observer providers on behalf of NMFS from being permitted as an observer provider in the North Pacific. This second option is intended to address a situation where a person or entity could use confidential information to compete with current observer providers.

**Issue 5, Alternative 3** would require observer providers to provide the total costs to NMFS split out by GOA and BSAI subareas; vessel/processor coverage categories; and gear type on an annual basis. Compared to Alternative 2, Alternative 3 provides more generalized information, tabulated from industry invoices. Alternative 3 would be less burdensome on observer providers than Alternative 2 and, therefore, would be less costly.

**Issue 5, Alternative 4** would require observer providers to submit to NMFS standardized, paid invoices with certain information in each invoice on a monthly basis. The intent of this alternative is to reduce the administrative burden and costs associated with calculating and reporting the costs associated with Alternatives 2 and 3. Under Alternative 4, observer providers would submit their standardized, paid billing invoices to NMFS, and NMFS would enter the raw information into a database for analytical use when needed. In addition to the benefits described for Alternatives 2 and 3, Alternative 4 has two main advantages. First, observer provider cost information could be verifiable by NMFS, increasing the overall

data quality. Second, this approach to economic data collection allows increased flexibility in terms of data analysis.

**Issue 7, Alternative 2** would require housekeeping changes to Federal regulations at 50 CFR 679.50(i)(2)(x)(G). These regulations currently require observer providers to submit to NMFS each type of contract they have entered into with observers or industry. There is currently no deadline for submission of this information, although most providers currently operate as if there is an annual deadline for all submitted information. Issue 7, Alternative 2 would establish a February 1 deadline for annual submissions of this information, which is consistent with the current deadline for copies of ‘certificates of insurance.’ In sum, NMFS is not requiring additional reporting under this alternative; the alternative is limited to establishing a deadline for information that is already required under existing regulations.

In and of itself, the proposed recordkeeping and reporting requirements would not likely represent a significant economic burden on the five observer providers (small entities) certified in the North Pacific Groundfish Observer Program.

### **3.5.2 Relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule**

No relevant Federal rules have been identified that would duplicate, overlap, or conflict with the proposed actions under Issues 1 – 7.

### **3.5.3 Description of any significant alternatives to the proposed rule that accomplish the stated objectives of the proposed action**

An IRFA also requires a description of any significant alternatives to the proposed action(s) that accomplish the stated objectives, are consistent with applicable statutes, and that would minimize any significant economic impact of the proposed rule on small entities.

*[This section will be completed upon selection of a preferred alternative.]*

## 4.0 CONSISTENCY WITH OTHER APPLICABLE LAWS

### 4.1 Consistency with National Standards

Below are the ten National Standards as contained in the Magnuson-Stevens Act (Act), and a brief discussion of the consistency of the proposed alternatives with those National Standards, where applicable.

**National Standard 1** - Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery

None of the alternatives under any of the issues would result in changes to management of the groundfish fisheries as they are administrative in nature (with the exception of Alternatives 2 and 3 under Issue 4 which could result in increased data quality). Additionally, groundfish fisheries managed by the Council and NMFS off the coast of Alaska are not in danger of overfishing.

**National Standard 2** - Conservation and management measures shall be based upon the best scientific information available.

Information in this analysis represents the most current, comprehensive set of information available to the Council, recognizing that some information is unavailable.

**National Standard 3** - To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

Nothing in this action would change the manner in which individual stocks are managed as a unit throughout their range. With the exception of Alternatives 2 and 3 under Issue 4 (which could result in increased data quality), all of the alternatives under consideration are administrative in nature.

**National Standard 4** - Conservation and management measures shall not discriminate between residents of different states. If it becomes necessary to allocate or assign fishing privileges among various U.S. fishermen, such allocation shall be (A) fair and equitable to all such fishermen, (B) reasonably calculated to promote conservation, and (C) carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

Observer requirements are based on the specific information and monitoring needs of specific fisheries and vessel types. Nothing in the alternatives considers residency as a criteria for the Council's decision. Residents of various states, including Alaska and the Pacific Northwest, participate in each of the major sectors affected by these allocations. Nothing in any alternative involves the allocation or assignment of fishing privileges among various U.S. fishermen.

**National Standard 5** - Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources, except that no such measure shall have economic allocation as its sole purpose.

National Standard 5 recognizes the importance of various other issues in addition to economic efficiency.

The wording of this standard was changed in 1996, to 'consider' rather than 'promote' efficiency. Efficiency in the context of this change refers to economic efficiency, and the reason for the change, essentially, is to de-emphasize to some degree the importance of economics relative to other considerations (Senate Report of the Committee on Commerce, Science, and Transportation on S. 39, the Sustainable Fisheries Act, 1996). The analysis presents information relative to these perspectives, but does not highlight any one alternative in terms of this standard. National Standard 5 recognizes the importance of various other issues in addition to economic efficiency. There are no expected changes to the overall efficiency in the utilization of fishery resources as a result of any of the alternatives under consideration.

**National Standard 6** - Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.

No changes to the current fishery management regime would be expected any of the alternatives considered.

**National Standard 7** - Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

All of the alternatives under consideration appear to be consistent with this standard.

**National Standard 8** - Conservation and management measures shall, consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.

The management of the groundfish and halibut fisheries would not change under the action alternatives in any material way that would affect fishing communities.

**National Standard 9** - Conservation and management measures shall, to the extent practicable, (A) minimize bycatch, and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.

Because the management of the groundfish fishery would not change under any of the action alternatives, this action would not be expected to have any material affect on actual bycatch rates in the groundfish fleet.

**National Standard 10** - Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea.

None of the alternatives considered would change how the fishery is prosecuted. Therefore, the alternatives under consideration appear to be consistent with this standard.

## 4.2 Fisheries Impact Statement (Spillover Impacts)

Section 303(a)(9) of the Magnuson-Stevens Act requires that any management measure submitted by the Council take into account potential impacts on the participants in the fisheries, as well as participants in adjacent fisheries. Impacts to participants in the groundfish fishery are the subject of Section 2.5. Changes to the existing program are largely administrative in nature; thus, no impacts are expected



beyond those analyzed in previous documents, including the Final Programmatic SEIS (NMFS 2004) and EA/RIR/FRFA to extend the program beyond 2007 (NMFS 2007). Potential impacts to fisheries other than the groundfish fishery are not anticipated as a result of this action.

## 5.0 REFERENCES

National Marine Fisheries Service (NMFS). 2004. "Alaska Groundfish Fisheries Final Programmatic Supplemental Environmental Impact Statement." U.S. DOC, NOAA, NMFS, Alaska Region, P.O. Box 21668, Juneau, AK 99802-1668.

NMFS. (2007). "Final Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis for a Regulatory Amendment to Extend the Program for Observer Procurement and Deployment in the North Pacific." U.S. DOC, NOAA, NMFS, Alaska Region, P.O. Box 21668, Juneau, AK 99802-1668.

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## APPENDIX 1

### Groundfish Observer Letter of Understanding



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
Alaska Fisheries Science Center  
Fisheries Monitoring and Analysis Division  
Alaska Groundfish Observer Program  
7600 Sand Point Way N.E.  
Seattle, WA 98115-6349

#### Groundfish Observer Letter of Understanding

As a certified observer in the NMFS North Pacific Groundfish Observer Program, I have successfully completed an observer certification training course or required briefing. During the course of this training or briefing, I was presented with the North Pacific Groundfish Observer Manual which contains Observer Program guidelines. This statement acknowledges that I fully understand the Observer Program guidelines and agree to abide by the observer duties and responsibilities, groundfish observer standards of conduct, conflict of interest standards and confidentiality standards.

In my acceptance of this position I agree to:

1. perform the assigned duties to the best of my ability,
2. accurately record sampling data and to be honest and forthright when providing information for observer reports and in reporting suspected violations.
3. keep all collected data and observations according to confidentiality guidelines presented in the North Pacific Groundfish Observer Manual
4. refrain from engaging in any illegal actions or activities while under contract as an observer, and
5. refrain from entering into a situation that is contrary to the Observer Program's conflict of interest standards.

I understand that if I do not abide by the standards set forth by the Observer Program, my certification may be revoked. I further understand that as a result of my participation in any illegal activity, including the false reporting of information to the federal government, I may be subject to civil or criminal penalties.

\_\_\_\_\_  
(Print full name)

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Date)



## APPENDIX 2

## Memo from NOAA OLE to NMFS Alaska Region, January 3, 2005



NOAA FISHERIES OFFICE FOR LAW ENFORCEMENT

Mail to: P.O. Box 21767

Location: 709 W. 9<sup>th</sup> St., Room M09C

Juneau, Alaska 99802-1767

**DATE:** January 3, 2005

**MEMORANDUM FOR:** Jim Balsiger, Regional Administrator

**FROM:** Jeff Passer, Special Agent-in-Charge *J. Passer*

**SUBJECT:** Request for Regulation Change - Clarification of definition of "fishing day" for clear and consistent enforcement of vessel observer coverage requirements.

The current definition of "Fishing Day" (for purposes of enforcing observer coverage requirements) does not clearly address situations where a vessel carries an observer for only a portion of the fishing activities occurring on a particular day. This is a frequent practice in the 30% CV fleet.

Regulations at 50 C.F.R. 679.50(c) (1)(v) state:

"(v) A catcher/processor or catcher vessel equal to or greater than 60 ft (18.3 m) LOA, but less than 125 ft (38.1 m) LOA, that participates for more than 3 fishing days in a directed fishery for groundfish in a calendar quarter must carry an observer during at least 30 percent of its fishing days in that calendar quarter and at all times during at least one fishing trip in that calendar quarter for each of the groundfish fishery categories defined under paragraph (c)(2) of this section in which the vessel participates."

Recently, field enforcement staff have been unclear if a less than fully observed day counted as an "observer day". A recent enforcement action brought by GCAK was based upon their interpretation of the regulation as requiring an observer to be onboard for all gear retrievals during a 24-hour period if it is to be counted as an "observer day".

Enforcement fully supports GCAK's position, from the "enforceability" position, and recommends the definition be amended to clearly address current ambiguity regarding this application of the regulation.

**Enforcement recommends the following change (strikeout and italics) to the definition of Fishing Day, at 50 CFR 679.2:**

Fishing day means ~~to~~ (for purposes of subpart E) a 24-hour period , from 0001 hours ALT, through 2400 hours ALT, in which fishing gear is retrieved and groundfish are retained. *An observer must be on board for all gear retrievals during the 24-hour period in order to count as a day of observer coverage.* Days during which a vessel only delivers unsorted codends to a processor are not fishing days.

While the Observer Program staff is best able to comment on the effects on data quality, it is well documented that a significant component of the 30% fleet is utilizing the existing ambiguity of the regulation to their advantage by fishing for a portion of a day unobserved, then embarking an observer late in the day, then making one small set or haul on the first day, and reversing this process on the last fishing day, thereby accruing two "observer days for very little observed fishing activity or resultant data".

I would appreciate your consideration of this proposed change.

## APPENDIX 3

### Section 402(b) of the Magnuson Stevens Act

#### (b) CONFIDENTIALITY OF INFORMATION.--

- (1) Any information submitted to the Secretary, a State fishery management agency, or a marine fisheries commission by any person in compliance with the requirements of this Act shall be confidential and shall not be disclosed except--
  - (A) to Federal employees and Council employees who are responsible for fishery management plan development, monitoring, or enforcement;
  - (B) to State or Marine Fisheries Commission employees as necessary to further the Department's mission, subject to a confidentiality agreement that prohibits public disclosure of the identity or business of any person;
  - (C) to State employees who are responsible for fishery management plan enforcement, if the States employing those employees have entered into a fishery enforcement agreement with the Secretary and the agreement is in effect;
  - (D) when required by court order;
  - (E) when such information is used by State, Council, or Marine Fisheries Commission employees to verify catch under a limited access program, but only to the extent that such use is consistent with subparagraph (B);
  - (F) when the Secretary has obtained written authorization from the person submitting such information to release such information to persons for reasons not otherwise provided for in this subsection, and such release does not violate other requirements of this Act;
  - (G) when such information is required to be submitted to the Secretary for any determination under a limited access program; or
  - (H) in support of homeland and national security activities; including the Coast Guard's homeland security missions as defined in section 888(a)(2) of the Homeland Security Act of 2002 (6 U.S.C. 468(a)(2)).
- (2) Any observer information shall be confidential and shall not be disclosed, except in accordance with the requirements of subparagraphs (A) through (H) of paragraph (1), or—
  - (A) as authorized by a fishery management plan or regulations under the authority of the North Pacific Council to allow disclosure to the public of weekly summary bycatch information identified by vessel or for haul-specific bycatch information without vessel identification;
  - (B) when such information is necessary in proceedings to adjudicate observer certifications; or

- (C) as authorized by any regulations issued under paragraph (3) allowing the collection of observer information, pursuant to a confidentiality agreement between the observers, observer employers, and the Secretary prohibiting disclosure of the information by the observers or observer employers, in order—
- (i) to allow the sharing of observer information among observers and between observers and observer employers as necessary to train and prepare observers for deployments on specific vessels; or
  - (ii) to validate the accuracy of the observer information collected.
- (3) The Secretary shall, by regulation, prescribe such procedures as may be necessary to preserve the confidentiality of information submitted in compliance with any requirement or regulation under this Act, except that the Secretary may release or make public any such information in any aggregate or summary form which does not directly or indirectly disclose the identity or business of any person who submits such information. Nothing in this subsection shall be interpreted or construed to prevent the use for conservation and management purposes by the Secretary, or with the approval of the Secretary, the Council, of any information submitted in compliance with any requirement or regulation under this Act or the use, release, or publication of bycatch information pursuant to paragraph (2)(A).