

# Public Testimony Sign-Up Sheet

## Agenda Item C-5 Observer Program

	NAME (PLEASE PRINT)	AFFILIATION
1	Julie Bonney / Paul MacGoyes	Nk. Grandfil. Data Bank / At-Sea Processor Comm.
2	Tom Gray	Alwest Islem
3	Michael Lake	AOI
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

NOTE to persons providing oral or written testimony to the Council: Section 307(1)(I) of the Magnuson-Stevens Fishery Conservation and Management Act prohibits any person "to knowingly and willfully submit to a Council, the Secretary, or the Governor of a State false information (including, but not limited to, false information regarding the capacity and extent to which a United State fish processor, on an annual basis, will process a portion of the optimum yield of a fishery that will be harvested by fishing vessels of the United States) regarding any matter that the Council, Secretary, or Governor is considering in the course of carrying out this Act.

MEMORANDUM

TO: Council and AP Members  
FROM: Chris Oliver *Chris*  
Executive Director

ESTIMATED TIME  
2 HOURS

DATE: May 30, 2007

SUBJECT: Observer Program

**ACTION REQUIRED**

Review discussion paper on proposed regulatory changes; review Observer Advisory Committee report; and provide direction on regulatory amendment package

**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-5(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>

---

<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 proposed rule for this action was published on February 22, 2007 (72 FR 7948), and the public comment period ended March 23, 2007.

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 that cannot be anticipated at this time. Thus, the previous analysis of the restructuring alternatives was intended as a starting point for a future amendment. The Council's problem statement from the June 2006 action is provided below for reference.

#### **BSAI Amendment 86/GOA Amendment 76 Problem Statement (June 2006)**

The North Pacific Groundfish Observer Program (Observer Program) is widely recognized as a successful and essential program for management of the North Pacific groundfish fisheries. However, the Observer Program faces a number of longstanding problems that result primarily from its current structure. The existing program design is driven by coverage levels based on vessel size that, for the most part, have been established in regulation since 1990. The quality and utility of observer data suffer because coverage levels and deployment patterns cannot be effectively tailored to respond to current and future management needs and circumstances of individual fisheries. In addition, the existing program does not allow fishery managers to control when and where observers are deployed. This results in potential sources of bias that could jeopardize the statistical reliability of catch and bycatch data. The current program is also one in which many smaller vessels face observer costs that are disproportionately high relative to their gross earnings. Furthermore, the complicated and rigid coverage rules have led to observer availability and coverage compliance problems. The current funding mechanism and program structure do not provide the flexibility to solve many of these problems, nor do they allow the program to effectively respond to evolving and dynamic fisheries management objectives.

While the Council continues to recognize the issues in the problem statement above, existing obstacles prevent a comprehensive analysis of potential costs. Immediate Council action on a restructured program is not possible until information is forthcoming that includes clarification of cost issues that arise from Fair Labor Standards Act and Service Contract Act requirements and statutory authority for a comprehensive cost recovery program. During the interim period, the Council must take action to prevent the expiration of the existing program on December 31, 2007.

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-5(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. This letter is provided as **Item C-5(c)**.

Given that the cost issues remain, in March, NMFS recommended 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-5(d)**). There are several relatively short-term type actions that NMFS has proposed be developed in one regulatory package; these are changes to the existing Observer Program that NMFS believes need to occur regardless of observer restructuring. A discussion paper outlining these proposed regulatory changes is attached as **Item C-5(e)**.

In April, the Council requested that the Observer Advisory Committee meet to review and provide recommendations on the proposed changes and alternatives outlined in the discussion paper prior to the June Council meeting. The OAC convened May 21 – 22 in Seattle, and its report is provided as **Item C-5(f)**.

Council action at this meeting is to review the staff discussion paper on proposed regulatory changes to the Observer Program and the OAC report and take action as necessary. Dr. Bill Karp, Director of the Fisheries Monitoring and Analysis Division at the Alaska Fisheries Science Center, and NMFS and Council staff will be available to review and discuss the proposed changes with the Council. The Council could potentially initiate and approve alternatives for a regulatory amendment package to make changes to the existing Observer Program at this meeting. If this approach is desired, initial review of a draft analysis could be tentatively scheduled for the October 2007 Council meeting.



AGENDA C-5(a)  
JUNE 2007  
**UNITED STATES DEPARTMENT OF COMMERCE**  
**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).

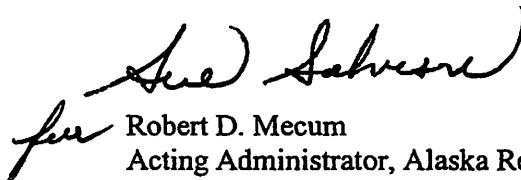
The magnitude of these increased costs depends on the design of the new monitoring system, the complexity and number of VMPs that are put in place and the overall increase in observer deployment days. However, at a minimum, salaries for new FTEs and operational costs would be required.

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~~ any 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.~~ 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.

**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 subparagraph (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; and

(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 his 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**

# North Pacific Fishery Management Council

Stephanie Madsen, Chair  
Chris Oliver, Executive Director



605 W. 4th Avenue, Suite 306  
Anchorage, AK 99501-2252

Telephone (907) 271-2809

Fax (907) 271-2817

Visit our website: <http://www.fakr.noaa.gov/npfmc>

May 29, 2007

Dr. William Hogarth  
NOAA Fisheries  
1315 East-West Highway  
Silver Spring, MD 20910

Dear Dr. Hogarth:

At its recent meeting in April, the North Pacific Fishery Management Council (Council) scheduled a review of issues related to the North Pacific Groundfish Observer Program (observer program) and a report on progress to modify the existing service delivery model to one in which NOAA Fisheries would contract directly with observer providers for observer services. Currently, vessels and processors contract directly with observer providers to procure observer services to meet the coverage levels in Federal regulation. As you well know, during the past several years, the Council and NMFS have been working to develop a new, more flexible system for observer funding and deployment, typically referred to as "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 if available.

The Council reviewed such 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 Council initial review in February 2006, NMFS presented a letter 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 NOAA Fisheries to DOC OGC in November 2003, which stated that NMFS maintains that fisheries observers are biological technicians and therefore eligible for overtime compensation under the FLSA. During the development of the observer program restructuring amendment package, the Council became concerned with the implications of the NMFS position on observer wages. These concerns are related to both the potential cost impacts and the need for further clarification on the interpretation of this policy, as it relates to several issues including the computation of hours worked, geographical applicability, and the associated rules governing compensation of fisheries observers. These issues were outlined in the attached letter from the Council on February 11, 2004, and a response was requested from NOAA Fisheries.

I understand that a request for an interpretation of the applicability of certain SCA and FLSA provisions to fisheries observers employed by observer providers that are either under contract with or permitted by NMFS was subsequently sent to the Department of Labor in a letter dated November 29, 2005. I also understand that NMFS has not yet received a response from the Department of Labor, nor have these issues been clarified by statute or regulation. This significantly inhibits our ability to estimate costs associated with a new fee-based system.

In June 2006, the Council thus approved an extension of the existing service delivery model for the observer program, in order to prevent the program from expiring under the 2007 sunset date provided in Federal regulations. The Council recommended this action as opposed to a restructured program, primarily due to 1) ongoing concerns with not being able to provide estimates of observer costs under a new service delivery model in light of SCA and FLSA applicability, and 2) the lack of statutory authority in the Magnuson-Stevens Act to assess different fees against different fisheries or sectors.

Since the Council recommended this action in June, the Magnuson-Stevens Act was reauthorized to include changes to Section 313, which allows 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. 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 undefined.

As the Council continues to support moving forward with efforts to restructure the observer program to better meet evolving data and management needs, it reiterates the need to resolve the observer compensation issues related to the SCA and FLSA under a new service delivery model. To meet this end, the Council requests that NOAA Fisheries again request clarification from the Department of Labor on these issues, in hope that we may move forward with analytical efforts to restructure the observer program in the North Pacific in the near future.

In the meantime, at the recommendation of NMFS, the Council will review a list of proposed regulatory changes to the existing observer program at its June 2007 meeting. The Council's Observer Advisory Committee will convene in late May to provide recommendations on these proposed amendments prior to the Council meeting.

Thank you in advance for considering this request.

Sincerely,



Chris Oliver  
Executive Director

cc: Dr. Bill Karp  
Ms. Sue Salvesson  
Mr. Tom Meyer  
Dr. Jim Balsiger



UNITED STATES DEPARTMENT OF  
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</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.

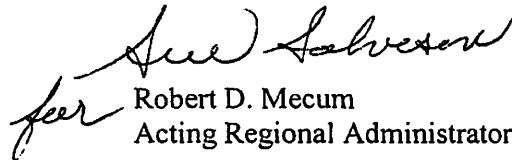
We expect that it would take several years to complete the restructuring process and, therefore, we seek the support of the Council to address several outstanding issues under the current program structure. These include:

- 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

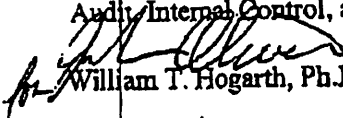
Enclosure



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL MARINE FISHERIES SERVICE  
131 E 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, 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, Stephanie Bost, Bonnie Ponwith, Lisa DesFosse,  
Stephen Brown

## North Pacific Groundfish Observer Program – Proposed Regulatory Revisions May 2007 Discussion Paper

### Introduction

At its June 2006 meeting, the Council adopted a motion to extend regulations governing the North Pacific Groundfish Observer Program (Observer Program) beyond December 31, 2007. 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 has been published as a proposed rule and the public comment period closed on March 23, 2007.<sup>1</sup>

The Council's June 2006 motion indicated its intent to consider initiating a new amendment proposing restructuring alternatives for the Observer Program at such time that: 1) legislative authority is established for fee-based (restructuring) alternatives; 2) the Fair Labor Standards Act 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) a response is necessary 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 Council to adopt fee-based alternatives which were considered in the observer program restructuring analysis. Specifically, Section 313 of the MSA was amended to state 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 language, 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.

A second impediment to restructuring, however, remains unresolved. NMFS has not yet received a response to its November 29, 2005 letter to the Department of Labor (DOL) which requested guidance on several observer compensation issues, including computing hours worked and the associated rules governing compensation of fisheries observers, and the applicability of the Service Contract Act and Fair Labor Standards Act on land, in the territorial sea, in the Exclusive Economic Zone, and in international waters. NMFS continues to seek guidance from DOL and has initiated an internal process to document labor costs associated with current direct NMFS contracts for observer services.<sup>2</sup> The intent is to have comprehensive observer cost information available later this year.

While NMFS continues to believe that the substantive data quality and operational issues facing the Observer Program can only be properly addressed through restructuring the entire program, restructuring the Observer Program is not likely feasible until the remaining impediment identified by the Council is adequately resolved. Upon resolution, it would likely take several years before a restructured Observer Program could be implemented through rulemaking.

In the meantime, NMFS has identified several issues which may be addressed through regulatory amendments, in order to make improvements to the existing Observer Program. NMFS does not expect

---

<sup>1</sup>72 FR 7948, February 22, 2007.

<sup>2</sup>In addition, the Council approved a motion at its April 2007 meeting to send another letter to Dr. Bill Hogarth, NOAA Fisheries, requesting a response from the Department of Labor on the applicability of the SCA and FLSA, in order to make further progress on observer restructuring.

the identified issues to be labor intensive to analyze or implement, and intentionally did not propose to address complex issues which would best be solved by restructuring. This discussion paper briefly describes the issues NMFS proposes to address under the existing program structure, and offers some potential solutions in terms of alternatives for analysis.

#### **Potential Council action in June 2007**

At its April meeting, the Council requested that the Observer Advisory Committee (OAC) meet to review and further develop these issues and potential alternatives, prior to the June Council meeting. Council action at the June meeting is to review this discussion paper and the OAC recommendations. At that time, the Council could potentially take action to initiate and approve alternatives for a regulatory amendment package to make changes to the existing Observer Program.

The following is a proposed outline for the actions that NMFS recommends analyzing, for the OAC and Council review. Each of seven issues is described separately, and they represent mutually exclusive decision points. 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**

##### **Background**

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 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.

##### **Alternatives proposed for analysis**

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.)

## **General impacts of the alternatives**

**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 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 applicants that are denied observer provider permits. This would continue to draw on limited staff resources, and potentially 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. Poor performing observers also have an overall negative effect on the quality of observer data, which is crucial to effective management of the fisheries.

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.

Other observers undergoing training may be impacted under 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 generally slow the pace of training. Generally, a lower quality observer candidate entering the ranks of other certified observers may have an overall negative affect on the image and credibility of the observer sector.

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.

**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 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 the NOAA Office of Administrative Appeals would be unnecessary. 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.

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 will better serve NMFS' interest in having well-qualified observers monitoring the North Pacific groundfish fisheries.

Current observer providers would not be directly affected by changes to the initial permitting process for new observer providers. 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.

Observer providers are not anticipated to be substantially affected by the increased discretionary nature of issuing observer certifications. Since 2005, the observer candidate failure rate has been less than seven percent of trainees, and observer provider companies plan for this possibility while recruiting new observers. Under current Federal regulations, only two failing trainees have appealed the Agency's initial determination to deny certification and the opportunity to pursue further training, and neither candidate has been rehired by an observer provider company.

Current observers would not be affected by changes to the initial observer certification process. Future observers may be affected by proposed changes to the observer certification process; however, 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.

Current and future observers are not anticipated to be significantly affected by proposed changes to the observer provider permitting process.

Industry is not expected to be affected by changes to the observer provider permitting or observer certification processes.

## **Issue 2. Observer conduct**

### **Background**

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 General Counsel (GC) that many of these regulations are unenforceable, and/or are outside of its authority and need to be clarified or deleted. 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)). This wording is broad and ambiguous, and therefore unenforceable.

### **Alternatives proposed for analysis**

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 conduct, and remove references to the Observer Program's drug and alcohol policy in the regulations.

### **General impacts of the alternatives**

**Alternative 1** 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). Observer conduct while performing the 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 the connection between the off duty behavior 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.

**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 policy, as the applicable 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.

NMFS continues to consider inappropriate conduct, especially the use of illegal drugs and the abuse of alcohol, a serious issue that warrants appropriate sanctions. However, NMFS asserts 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.

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. In effect, each observer provider would be required 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. It is expected that the OAC and public testimony at the June Council meeting will provide additional input as to the benefits and costs of this alternative for observer providers.

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. 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, NMFS would need to continue to be informed of these behaviors when they occur; the difference under Alternative 2 is that the responsibility for taking remedial action would clearly reside with the observer's employer (i.e., the observer provider). Current regulations at 679.50(i)(2)(x)(I)(5) require 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.<sup>3</sup> Under Alternative 2, this language would likely 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.

The proposed action is not expected to have significant impacts on the vessels and processing plants that contract with observer providers for observer services. To the extent that roles and responsibilities of NMFS and observer providers are clarified, this action may serve to resolve behavioral issues more expeditiously. Many in the industry currently perceive the observer provider as the point of contact for observer behavior issues, thus, there may not be a substantive practical effect.

Finally, NMFS would benefit from Alternative 2 in that it would not be responsible, and not be perceived to be responsible, for developing and enforcing standards of professional observer behavior that it cannot effectively enforce.

### **Issue 3. Observer providers' scope of authority regarding research and experimental permits**

#### **Background**

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) in the North Pacific. Other research activities, such as scientific research permits (SRPs) and stock assessment cruises, also occasionally employ scientific data collectors. 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.

---

<sup>3</sup>The conflict of interest and standards of behavior provisions are at 679.50(j)(2)(i) and (j)(2)(ii), respectively.

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 of the vessel 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 and other activities. Additionally, the permit holder may need scientific data collectors to do work specific to the project. 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, it is not used by NMFS to manage fisheries in the normal manner, and it does not undergo the same rigorous quality control as observer collected data. Lastly, regulations that apply to observers and observer deployments do not apply to scientific data collectors.

Significant confusion results for the permit holder, crew, observer or scientific data collector, and NMFS program managers when permits are not clear as to the role of the personnel, or if a person switches between observer and scientific data collector roles during the same deployment. NMFS staff at the Sustainable Fisheries Division, Alaska Region, address this issue by communicating with NMFS staff at the Alaska Fisheries Science Center, Fisheries Monitoring and Analysis Division prior to issuing a permit that would require an observer or scientific data collector. Staff determine whether an observer or a scientific data collector would be needed for the EFP, and outline their expected activities.

However, Federal regulations are ambiguous as to whether observer providers are prohibited from providing observers or scientific data collectors for purposes of research activities. Two alternatives are proposed under this issue, one of which would revise Federal regulations to explicitly allow observer providers to provide staff for purposes of EFPs, SRPs, and other research activities.

#### **Alternatives proposed for analysis**

**Alternative 1.** No action. No change would be made to existing Federal regulations, which are unclear as to whether observer providers may provide employees 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>4</sup>

#### **General impacts of the alternatives**

**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

---

<sup>4</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.



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** 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 NMFS sponsored 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. Alternative 2 is NMFS' preferred alternative.

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

##### **Background**

On January 3, 2005, the NMFS Sustainable Fisheries Division received a memorandum from NMFS Enforcement (**Attachment 1**) requesting revision of a regulation defining "fishing day" for purposes of enforcing observer coverage requirements. Specifically, Enforcement 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.

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.*

Furthermore, "fishing day" is defined at 679.2 as:

*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.*

For purposes of meeting observer coverage requirements, these regulations have been interpreted to mean that an observer must only be aboard a vessel at any point during a 24-hour period to count as a "fishing day." 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 a haul at 2330 and retrieve a second haul at 0030 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 could vary significantly. Thus, there is a concern that the resulting observer data do not comprise a representative sample.

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, NMFS Enforcement recommends revising the definition of "fishing day." This recommendation is included as Alternative 2.

However, during the course of internal agency discussions, NMFS and Council staff agreed that Alternative 2 may not be preferable, as it may adversely affect normal fishing operations and increase costs (see *General impacts of the alternatives* below). **Therefore, NMFS specifically requests input from the OAC and the Council on a regulatory revision that reduces vessels' ability to operate in this manner, but does not significantly adversely affect normal fishing operations.**

#### **Alternatives proposed for analysis**

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

#### **General impacts of the alternatives**

**Alternative 1** would not clarify 30 percent observer coverage requirements, which pertain to all catcher/processors and catcher vessels 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.

NOAA Enforcement has 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. Another example of this issue is when the vessel has an observer onboard, does not deploy fishing gear when the observer is onboard, and returns to port early in the day. Later, the vessel returns to the fishing grounds without an observer and resumes fishing. Under the current regulations, this may be interpreted as an "observer" day.

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 sampled hauls are expanded to determine the quantity of a given groundfish species and the PSC that would be attributed to the 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. This error could result in inaccurate fishery removal information, and result in managers making more conservative closure decisions, therefore affecting fishery participants.

**Alternative 2** would affect all catcher/processors and catcher vessels greater than 60 ft LOA, but less than 125 ft LOA that are subject to 30% observer coverage requirements. 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 Enforcement 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 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.

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

### **Background**

Currently, NMFS lacks precise information on the total costs, and components of those costs, of the industry-funded component of the groundfish observer program. Existing Federal regulations (50 CFR 679.50(i)(2)(x)(G)) require that observer providers must 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, and 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. This includes any agreements or policies with regard to observer compensation or salary levels.

The cost information in the current contracts submitted by observer providers is generally limited to the daily fees charged by the observer providers or daily rates of pay for observers (e.g., \$355/day). NMFS has collected some other cost information voluntarily from observer providers but cooperation has varied. NMFS has used this information as the basis for developing estimates of airfare costs and per diem rates in past analyses, but its use is relatively limited and likely not representative of the entire 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 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 comprehensive 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>5</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>6</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, 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>7</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 (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.

---

<sup>5</sup> *Comprehensive Socioeconomic Data Collection for Alaskan Fisheries: A Discussion and Suggestions*, AFSC, Seattle WA. Presented at the April 2007 Council meeting.

<sup>6</sup> See the October 2006 Council motion on this issue.

<sup>7</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.

The standard observer cost of \$355/day is typically used in analyses supporting a proposed fisheries management action, although these costs vary on 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 the \$355/day average. Thus, observer costs differ greatly by sector, fishery, and year, as do the cost components that factor into the daily rate. More accurate estimates are necessary to adequately assess the baseline component of any proposed regulatory change to the observer program on the various fishery sectors; mandatory cost reporting is one approach to meet this goal.

#### **Alternatives proposed for analysis**

NMFS has proposed the following two alternatives for analysis. Staff is interested in feedback from the OAC and the Council as to the general impacts of Alternative 2, as well as whether there are additional alternatives that should be considered.

Alternative 1. No action. Observer providers would continue not to 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. All mandatory cost information would be confidential information.

#### **General impacts of the alternatives**

**Alternative 1** is the no action alternative, or status quo, in which observer providers would not be required to report cost information to NMFS. The general impacts of the alternative are outlined in the previous section; primarily, 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 previously under the status quo.

**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 categories. 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 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, along with the information already required under Federal regulations, would represent a substantial cost to the observer providers. It is expected that the OAC and the Council will provide feedback as to the general impacts of Alternative 2. The OAC and

the Council may also be able to provide suggestions as to the types of information that should or could be collected, as well as the timing for submittal of this information.

#### **Approaches to data collection**

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. NMFS's current approach under Alternative 2 is to collect observer cost information from the observer providers 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 providers 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 only five observer providers, data would be collected from all five companies, as opposed to sampling a subset of the entities.

#### **Authority for and confidentiality of data collected**

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.

Alternative 2 proposes mandatory reporting of detailed cost information by the (currently five) entities operating as observer providers in Alaskan fisheries. 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. 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 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>8</sup> The Council will have an opportunity to review these protocols as they are developed. It is expected that confidential financial information from observer providers collected under Alternative 2 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. This section is provided as **Attachment 2** to this paper.

---

<sup>8</sup>*Comprehensive Socioeconomic Data Collection for Alaskan Fisheries: A Discussion and Suggestions*, AFSC, Seattle WA, pp. 17- 18.

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

### **Background**

NMFS staff complete 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 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. For example, in 2006, 17 observers were on cruises which continued into 2007. One of these cruises lasted until March 24, effectively delaying completion of the data set. Additional data illustrating this issue are provided in **Table 1** and **Attachment 3**. 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 considered under this issue.

### **Alternatives proposed for analysis**

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

**Alternative 2.** Revise regulations to establish a calendar date cutoff whereby observers who collected fishing data in one year would be required to return from sea and be available for debriefing. [NMFS proposes February 28 as the cut-off date.]

### **General impacts of the alternatives**

**Alternative 1** would continue to delay completion of the 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 the observer returns.

**Alternative 2** would establish a cutoff date 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 is initially proposing February 28 as the cut-off date, and is interested in comments on the impacts of this date from affected sectors. It is anticipated that specific feedback on this issue will be generated through the OAC and Council meetings. 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, 7 observer deployments would have needed to be truncated in 2006. However, as the observer providers do not control the deployments, they would need to plan in advance. In other words, observer providers would not be able to deploy an observer on a trip if the trip had potential to go beyond the February 28 cut-off date. Thus, the number of affected observers may be greater than is indicated here. The actual impact is difficult to predict because it would depend on the composition of the providers' clients and the duration of the trips they take. For example, a provider could optimize the observer's deployment if they had some clients who took short, predictable trips. NMFS is interested in comments from observer providers on the potential cost and logistical implications of this action.



Only those observers whose cruises span two different fishing years would be impacted by this action. As provided in Table 1 below, 17 observers had cruises which spanned two fishing years, and 7 of them continued fishing into March (see Attachment 3 for the detailed breakdown of these data). The effect would be to shorten the duration of such cruises. This could provide a negative or positive impact, depending on the perspective of the individual observer. NMFS' experience is that there are a variety of perspectives on the desired duration of a cruise. Some individuals would like a cruise to be longer, thus, a reduction in cruise duration would result in a negative impact. Other individuals, however, prefer shorter cruises. These perspectives vary within the observer population.

Fishing industry costs could increase to the extent observer provider costs are incorporated into billable costs. These costs are difficult to predict without input from the observer providers. The industry would benefit to the extent they are dependent on receiving finalized observer information or completion of analyses using observer data generated from recent years.

This proposed change would benefit NMFS and the 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 final data set. The data set would be available to end users in a more timely manner, allowing work on a range of analyses which use the recent years' data. A second benefit to NMFS is that these observers would debrief earlier than other observers deployed in the new fishing year, potentially reducing the number of observers who need to debrief at the same time. This could slightly increase efficiencies in the debriefing process, potentially benefiting observer providers, observers, and industry.

Table 1. The number of observers whose cruises spanned 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.

## Issue 7. Miscellaneous modifications

### Background

Several minor adjustments are necessary in order to correct inaccuracies or make clarifications in existing Federal regulations. These are simple changes, primarily housekeeping issues, which should not warrant extensive analysis.

### Alternatives proposed for analysis

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.

### **General impacts of the alternatives**

Alternatives 2a and 2c do not have any significant impacts, as they are housekeeping in nature and will only serve to correct technical inaccuracies in the current regulations. Alternative 2b will impact the (currently five) existing observer providers, as they will be required to submit contracts with observers and/or industry by a specified date each year. Effects are expected to be minimal, as the only addition to the current requirement is the deadline for submission. In addition, the majority of observer providers have been submitting example contracts at the beginning of each year, along with copies of certificates of insurance, which already have a submission date of February 1<sup>st</sup>. Thus, this proposed action would clarify the deadline for submission of the contracts, similar to other reporting requirements.




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 

**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.

**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).

**Detailed list of cruises which had catch data spanning two calendar years, 2002 - 2007**

The following list comprises the breakdown of cruises that are provided in Table 1 under Issue 7. Starting in 2002, the following lists cruises which had catch data which spanned two calendar years. Note that 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 7.

**2002 - 2003**

8047 11/2/02 – 1/17/03  
 8064 12/17/02 – 2/24/03  
 8066 12/20/02 – 1/27/03  
 8074 12/31/02 – 3/8/03  
 8079 12/30/02 – 3/13/03  
 8080 12/28/02 – 3/13/03  
 8087 12/30/02 – 1/31/03

**2003 - 2004**

8735 11/23/03 – 1/10/04  
 8738 11/24/03 – 2/13/04  
 8745 12/1/03 – 2/16/04  
 8751 12/19/03 – 1/20/04  
 8764 12/3/03 – 2/16/04  
 8767 12/29/03 – 2/29/04  
 8768 12/31/03 – 3/4/04  
 8772 12/31/03 – 3/20/04  
 8774 12/31/03 – 3/13/04  
 8780 12/27/03 – 3/13/04  
 8785 12/29/03 – 3/13/04

**2004 - 2005**

9471 11/29/04 – 2/13/05  
 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  
 9500 12/31/04 – 2/25/05  
 9503 12/31/04 – 1/13/05  
 9504 12/31/04 – 3/5/05  
 9510 12/31/04 – 3/6/05  
 9515 12/31/04 – 2/22/05

**2005 - 2006**

10169 11/6/05 – 1/25/06  
 10172 11/13/05 – 2/3/06  
 10174 11/16/05 – 2/5/06  
 10178 12/3/05 – 1/25/06  
 10179 12/30/05 – 1/27/06  
 10193 12/29/05 – 3/5/06  
 10196 12/31/05 – 2/18/06  
 10202 12/30/05 – 3/1/06  
 10203 12/30/05 – 3/10/06  
 10204 12/28/05 – 2/25/06  
 10211 12/31/05 – 2/18/06  
 10212 12/28/05 – 2/18/06  
 10213 12/31/05 – 2/19/06  
 10216 12/31/05 – 2/21/06  
 10217 12/30/05 – 2/19/06  
 10221 12/30/05 – 2/18/06  
 10233 12/29/05 – 1/15/06

**2006 - 2007**

10897 12/31/06 – 3/1/07  
 10899 12/31/06 – 2/11/07  
 10902 12/31/06 – 2/12/07  
 10904 12/30/06 – 3/17/07  
 10908 12/30/06 – 2/18/07  
 10909 12/30/06 – 2/12/07  
 10918 12/29/06 – 3/14/07  
 10920 12/31/06 – 3/9/07  
 10921 12/29/06 – 2/10/07  
 10923 12/29/06 – 2/26/07  
 10925 12/29/06 – 2/14/07  
 10927 12/30/06 – 3/8/07  
 10931 12/30/06 – 3/24/07  
 10934 12/29/06 – 2/10/07  
 10943 12/29/06 – 1/24/07  
 10946 12/29/06 – 3/14/07  
 10959 12/30/06 – 2/9/07

DRAFT

**Observer Advisory Committee Report  
May 21 – 22, 2007**

Alaska Fisheries Science Center  
7600 Sand Point Way, NE, Seattle  
Building 4, Room 1055  
May 21: 12:30 pm – 5 pm  
May 22: 8:30 am – 4:30 pm

**Committee present:** Joe Kyle (Chair), Bob Alverson, Jerry Bongen, Julie Bonney, Rocky Caldero, Paul MacGregor, Tracey Mayhew, Brent Paine, Susan Robinson, Thorn Smith

**Committee not present:** Kathy Robinson, Pete Risse

**Staff:** NPFMC – Chris Oliver, Nicole Kimball  
NMFS/AFSC – Bill Karp, Martin Loefflad, Bob Maier, Heather Weikart,  
Jennifer Ferdinand  
NMFS AK Region – Jason Anderson, Sue Salvesson  
NMFS HQ – Dennis Hansford  
NOAA GC – Tom Meyer  
NOAA Office for Law Enforcement (Alaska Division) – Mike Adams

**Other participants:** John Gauvin, Stacey Hansen, Jan Jacobs, Earl Krygier, Michael Lake, Todd Loomis, Dave Money, Diana Starr, Lori Swanson, Mike Vechter

**AGENDA**

- I. Review and approve agenda
- II. Review discussion paper and provide recommendations on proposed regulatory changes to existing North Pacific Groundfish Observer Program
- III. Update on the National Bycatch Report initiative
- IV. Update on Observer Program operations
- V. Scheduling & other issues

**SUMMARY OF OAC RECOMMENDATIONS**

OAC recommendations on the proposed regulatory changes to the observer program (agenda item II) are as follows. See the relevant sections of the minutes for details.

- Issue 1: Alternative 2.
- Issue 2: Alternative 2. The committee recommended making the notification requirement an option under Alternative 2, and requested that staff provide some discussion or options in the analysis which would allow a longer timeframe in which a provider must report an incident.
- Issue 3: Alternative 2. The committee also expressed desire to retain flexibility for observer providers to work with NMFS on the issue of allowing an observer to redeploy for an EFP prior to debriefing from their last observer deployment.



## DRAFT

- Issue 4: The committee recommended that the agency further develop two additional options: 1) establish that a 'water tow' does not count towards an observer coverage day; 2) add a provision in 50 CFR 679.7 that defines and prohibits the activities NMFS is trying to prevent (i.e., fishing solely for observer coverage).
- Issue 5: Replace Alternative 2 with the following changes to Federal regulations:
- 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%, and 100% coverage level fisheries; and gear type.
  - Prohibit allowing a person/entity that receives this confidential information on behalf of the government from being certified as an observer provider in the North Pacific, or alternatively, implement a non-competitive clause.
  - Establish a time limit on the data collection (e.g., 2 - 3 years).
- Issue 6: Remove Issue 6 from the proposed regulatory amendment package.
- Issue 7: Alternative 2.

The committee also recommended:

1. The Council request that NMFS provide a breakout of the percentage of harvest observed for each year 2004 – 2006 for the subset of observed vessels >60' LOA, in order to evaluate the effective rate of coverage in particular target fisheries. The data should be broken out by observer coverage category (30%, 100%), gear type, area (BSAI, and Western and Central Gulf subareas), and component of the catch by the ≤60' fleet that is unobserved.
2. The Council send a letter to NOAA HQ asking to see the draft National Bycatch Report before it is finalized.
3. The committee expressed interest in reviewing the analysis for the amendment package prior to the Council taking final action, in order to make final recommendations on preferred alternatives.

### **I. Review and approve agenda**

The agenda was approved with two additions: 1) Tracey Mayhew asked to provide an update on issues related to observer worker's compensation issues, and 2) Julie Bonney asked to discuss whether updated data could be provided on observer coverage by target fishery and Central and Western Gulf areas. The Chair noted that the primary purpose of the meeting was to review the discussion paper (dated May 2007) and recommend any changes or additions. This task is in preparation for the Council's review of the discussion paper at its June 2007 Council meeting. The paper was provided to the OAC prior to the meeting to facilitate its review.

### **II. Review discussion paper and provide recommendations on proposed changes to existing North Pacific Groundfish Observer Program**

Jason Anderson (NMFS) presented a discussion paper outlining seven issues that NMFS is proposing to address in a regulatory amendment package, in order to make improvements to the existing North Pacific Groundfish Observer Program (observer program). Each of the seven issues is described separately, with proposed alternatives for analysis; each issue represents a mutually exclusive decision point.

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

There is no statutory or other requirement that a new observer candidate be provided an appeals process if the candidate fails observer training and is denied initial certification and the opportunity to pursue further training. Similarly, there is no requirement that a new observer provider applicant be provided an appeals process if they are denied a permit. The granting or denial of observer certifications and observer provider

## DRAFT

permits are discretionary agency actions. The action alternative (Alternative 2) would remove the Federal regulations that provide an appeals process to an observer candidate or new observer provider as described above. NMFS would continue to issue a letter to the candidate stating that they cannot pursue further observer training, but this decision would not be subject to appeal to NOAA. An observer candidate would continue to have the opportunity to pursue a challenge to that decision in district court.

The committee questioned whether this issue warranted changes, as NMFS reported that only two observers have appealed the decision not to allow further training and certification in the past. The committee also asked about the training pass/fail rate in recent years. Most recently, about 7% of the observer candidates failed training, which represented fewer than 24 observers. All of those who failed were told they could not re-take the training, and only two appealed that decision. NMFS reported that those who pass the training typically do so with a very high score.

Some concern was also expressed that better performance in training does not always translate to a better field biologist. Members noted that if an observer candidate wins an appeal under the current regulations, and if they eventually pass the training and become certified, they still have to be hired by an observer provider. Thus, allowing for the appeals process does not necessarily directly translate into poorer quality observers in the field.

However, concerns were also expressed that a poorer quality observer could take advantage of the appeals process to keep taking the test and eventually be successful in certification, potentially degrading the quality of the observer program and the data it produces. Given these concerns, and the fact that this is a discretionary provision by NMFS that does not affect compliance with the Administrative Procedure Act, **the committee recommended Alternative 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 its authority and need to be clarified or deleted. The action alternative (Alternative 2) would remove Federal regulations attempting to control observer behavior related to activities including drugs, alcohol, and physical sexual contact. The applicable policies addressing these behavioral issues would be the purview of each observer provider (the observer's employer).

Generally, most members agreed that the providers should be responsible for policies related to standards of conduct. However, several members asserted that if providers were to be fully responsible, then they should not be required to report incidents related to behavioral problems to NMFS, which is part of the proposed alternative. Further discussion occurred related to whether an observer provider should have to report the incident to NMFS, similar to the current requirement that the provider must report information on observer conflict of interest or breaches of the other standards of conduct within 24 hours of becoming aware of the information.

NMFS contends that they need to continue to be informed because some of these problems can affect the observer's performance and data quality. Several members were concerned that the proposed changes would remove NMFS' authority to deal with or decertify observers upon such incidents; NMFS and NOAA GC noted that NMFS can continue to use reports of such incidents in the decertification process. This type of information is relevant as mitigating circumstances, if an observer behaved in such a way that their job performance and data quality were negatively affected.

## DRAFT

One member suggested having every observer sign a document that says that they understand they are working under a zero tolerance policy. It was noted that observers under the union contract sign a 'letter of understanding' acknowledging that the observer will abide by the observer duties and responsibilities, standards of conduct, conflict of interest standards, and confidentiality standards; although it is not enforceable. Another member suggested that if vessel owners and shoreplants are not satisfied with an observer provider's drug and alcohol policy, industry should address these issues when negotiating contracts with observer providers.

In general, most members agreed that it is not NMFS' role to regulate and attempt to enforce observer behavioral policies. Members wanted to ensure that there would continue to be a policy in place (through the providers) and that the expectations for conduct are made clear during observer training. Many noted that industry, the observer union, and the observer providers should work collaboratively, with NMFS' input, to redevelop such policies. Most members wanted to keep industry involved but did not think that this involvement needed to be federally regulated.

**The OAC recommended Alternative 2, with the implementation concerns discussed above.** The committee understood that this alternative requires NMFS to ensure that the observer providers have policies in place to address these types of activities, and that these are part of the contracts that providers employ with industry. The committee also understood that this alternative includes the requirement that NMFS must be notified by the provider upon learning of an incident, and that the notification requirement does not constitute an approval mechanism for NMFS to remove an observer from a boat for incidents related to these specific activities (drugs, alcohol, physical sexual conduct). This type of sanction would be the responsibility of the observer provider. **The committee recommended making the notification requirement an option under Alternative 2, and requested that staff provide some discussion or options in the analysis which would allow a longer timeframe in which a provider must report the incident (e.g., more than 24 hours).**

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

Current Federal regulations are unclear as to whether observer providers can provide observers or scientific data collectors for research activities. The action alternative proposed by NMFS (Alternative 2) would clarify that this is allowed, for purposes of exempted fishing permits (EFPs), scientific research permits, or other scientific research activities. NMFS observer program regulations would apply to observers operating under NMFS certification but would not apply to scientific data collectors. (There are circumstances in which observers would be required to account for harvest removals or the research is being conducted within the context of the normal fishery.)

Generally, the committee was supportive of this regulatory change, given that several members represent operations that use EFPs for various research activities. Members noted that revisions to the regulations could serve to clarify the responsibilities of both the observer provider and the observer.

One provider asked whether Alternative 2 addresses the question of whether an observer can move from a normal observer role to an EFP in the same deployment, i.e., whether an observer can be deployed on another vessel (for an EFP) prior to completing the debriefing process. NMFS' concern is that some research activities can take a long time, thus significantly delaying the necessary closure on an observer's deployment (i.e., debriefing). In addition, NMFS conveyed that switching roles within the same deployment has at times caused confusion; an observer isn't always aware of the changes in rules or sampling protocol if a vessel abruptly switches from normal operations to operating under an EFP. Thus, NMFS would like to maintain the ability to require that observers complete their work as observers before they are re-deployed in another capacity (e.g., as a scientific data collector). However, the existing language proposed under Alternative 2 is not clear in this regard.

## DRAFT

The industry and providers' concern with this intent is related to the likelihood of a back-up in the debriefing process at peak times in the season, thus precluding the observer from being available for deployment immediately on an EFP. The providers expressed the desire to retain some flexibility for this purpose. NMFS committed to working with the providers on this issue, and agreed that it is more appropriately a policy and program operations issue than a requirement that must be included in Federal regulations under Alternative 2. Note that there is no proposal to remove the current regulation that requires that an observer must be de-briefed within five days of the fishing trip.

**The committee recommended Alternative 2, but expressed desire to retain flexibility to work with NMFS on the issue described above.**

### Issue 4: Fishing day definition

In January 2005, the NMFS Sustainable Fisheries Division received a memorandum from NOAA Enforcement requesting revision of a regulation defining "fishing day" for purposes of enforcing observer coverage requirements. Specifically, Enforcement 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. 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 a haul at 11:30 pm and retrieve a second haul at 12:30 am the next day, and obtain two observer coverage days. Often these hauls are not representative of normal haul durations, location, and depth, and catch composition could vary significantly.

NOAA Enforcement recommended revising the definition of "fishing day" to resolve this concern (Alternative 2 requires that 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). However, during the course of internal agency discussions, NMFS and Council staff agreed that Alternative 2 may not be preferable, as it may adversely affect normal fishing operations and substantially increase costs. Therefore, NMFS specifically requested input from the OAC on a regulatory revision that reduces vessels' ability to operate in this manner, but does not significantly adversely affect normal fishing operations.

The OAC agreed that there could be a legitimate situation in which this applies to a vessel, most notably when nearing a fishery closure or due to (inadvertent) poor planning. This provision likely would apply primarily to the 30% hook-and-line and trawl fleets in the Gulf, as pot vessels are subject to different coverage requirements. Gulf representatives noted that there have been, at times, observer availability problems, resulting in some vessels becoming nervous that they won't be able to meet their coverage requirements before the fishery closes. One vessel may drop an observer off at the dock early, simply so another vessel can take them and not be found in violation. However, members also generally agreed that non-representative fishing occurs in various forms, and that this serves to degrade the credibility of observer data. Alternative 2 would increase costs to both a legitimate operator and one who is purposefully manipulating the system.

In general, three types of problem activities were identified:

1. Taking an observer part of the day (with limited gear retrievals), dropping them off mid-day and going back out to fish.
2. Completing one tow before midnight and one tow after midnight to receive two days of observer coverage.
3. Conducting only 'water hauls' with the observer onboard, in which no or few fish are harvested.

## DRAFT

Several members also noted that NMFS has not provided sufficient quantitative analysis to document the problem. For example, members wanted to know how many vessels have conducted one tow in a 24-hour period, or a few tows only between 10 pm and just after midnight, etc, in order to groundtruth the issue. NMFS noted that while some of these data can and will be provided, it would not clarify whether the instance is normal fishing behavior or intentional manipulation of the regulations. In addition, understanding the percentage of the catch that is affected by this behavior does not sufficiently define the problem, since the data are also supposed to provide an adequate representation of the spatial and temporal distribution of the harvest in a target fishery.

Several members and NMFS agreed that true resolution of this issue in the 30% fleet is only possible through a change in the service delivery model (i.e., restructuring of the observer 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. One member noted that a similar discussion was had several years ago in the context of the restructuring analysis, and at that time the committee agreed that it was not equitable to address the issues within the 30% fleet absent restructuring or some level of subsidized observer coverage for the Gulf.

Other members stressed that this problem would be mitigated in part by improving communications between observer providers and industry, which may not require Federal regulations. Some providers noted that if industry knows it will be a three day fishery, some vessels wait until the last minute before requesting an observer, anticipating an observer availability problem.

Members were concerned with the possibility of severely penalizing all vessels due to the unacceptable behavior of a few. Alternative 2 as proposed in the discussion paper was not regarded as a preferable solution due to the potential cost implications. The OAC discussed several alternative regulatory solutions to the problem identified by NMFS and NOAA Enforcement, including:

- Requiring a minimum percentage of gear retrievals to be done with an observer onboard that would constitute statistically sound PSC estimates. One member noted that this is not likely feasible, as one retrieval might represent an entire vessel load.
- Change the regulatory definition of a "Fishing Day" from a 24-hour period, from 0001 hours A.l.t. through 2400 hours, to a 24-hour period from noon to noon. Require that an observer be onboard and observe all gear retrievals for one of the two consecutive 12-hour periods. Members noted that while this may represent a compromise position relative to the proposed Alternative 2, it does not resolve all of the identified problem activities.
- Establish that a gear retrieval that does not result in any target fish does not count towards observer coverage. The committee questioned whether the entire day of observer coverage is foregone if one gear retrieval during the period does not result in any target fish.
- Require the observer to bring back the logbook pages, and require NMFS or NOAA Enforcement to evaluate them to determine whether vessels were purposefully fishing in a non-representative manner with the observer onboard.
- If only one gear retrieval is completed in a fishing day, require that that retrieval must meet a minimum time period or tonnage (e.g., at least 20 minute tow, at least one ton, etc.)
- Require that a vessel provide additional advance notice to an observer provider when it needs an observer (e.g., 30 day notice). Some industry members noted that a vessel cannot always know what it needs ahead of time and wants to avoid paying for more coverage than necessary.
- Retain the current 30% observer coverage regulations and add a requirement such that 30% of the tonnage of each target species must be covered.
- Increase the current 30% coverage requirement to 35% or greater, in order to create a buffer in the system to produce at least 30% coverage. Members expressed concern with simply increasing the amount of 'non-representative' fishing data under this option.

## DRAFT

- Establish that a 'water tow' does not count towards an observer coverage day.
- Add a provision in 50 CFR 679.7 (prohibitions section) that defines and prohibits the activities NMFS is trying to prevent (i.e., fishing solely for observer coverage). NOAA Enforcement could review on a case by case basis and prosecute as necessary.

NOAA Enforcement reminded the OAC to focus on solutions that are enforceable. In addition, NMFS would not want an observer to have to judge whether a tow constitutes an observed tow or not.

NMFS also noted that due to the rockfish pilot program (100% coverage) and the July flatfish sideboards, this will not be an issue in the rockfish fishery in the future. In addition, the Gulf trawl pollock and cod fisheries are fairly short, 3-day fisheries, so there is not time for a vessel to manipulate the system. In effect, the only Gulf fisheries in the near future to which this issue could apply are the flatfish fisheries and the longline fisheries, although it was noted that very few vessels greater than 60' fish in the Gulf with longline gear (and are thus subject to 30% coverage requirements).

The discussion of this issue also spurred discussion of a broader data request, similar to what was provided in the restructuring analysis in 2006. **The committee requests that NMFS provide a breakout of the percentage of harvest observed for each year 2004 – 2006 for the subset of observed vessels >60' LOA, in order to evaluate the effective rate of coverage in particular target fisheries. The OAC requested that the data also be broken out by observer coverage category (30%, 100%), gear type, area (BSAI, and Western and Central Gulf subareas), and component of the catch by the ≤60' fleet that is unobserved.** Some of these data may be provided as appropriate in the analysis under Issue 4 of the proposed regulatory amendment, but the intent is that the overall data represent a separate product. NMFS emphasized that this type of data analysis will show the strengths and weaknesses of the overall system more so than what is attributable to the particular problem identified in Issue 4.

Given that there is no clear solution within a regulatory environment, the OAC discussed whether to set this issue aside at this time and ask NMFS to conduct a separate assessment of the scope of the problem, and whether it is potentially limited to the flatfish trawl fishery. **The committee ultimately recommended that the agency further develop the last two bulleted ideas suggested in the above list.** While the committee did not endorse Alternative 2 as proposed in the staff discussion paper, it did not recommend removing that alternative, as it may serve as comparison in the analysis. In addition, the committee noted that if after reviewing the draft analysis there is not consensus that there is a problem, the committee could recommend eliminating Issue 4 or recommending Alternative 1 (status quo) as its preferred alternative.

### Issue 5. Observer program cost reporting

Currently, NMFS lacks precise information on the total costs, and components of those costs, of the industry-funded component of the groundfish observer program, and is thus limited in the type and scope of analysis it can support. The cost information required under current regulations is limited to a copy of each signed and valid contract between the observer providers and industry. The information provided is generally limited to the daily fees charged by the providers or the daily rates of pay for observers (e.g., \$355/day). NMFS has proposed (Alternative 2) to require that observer providers report annual costs to NMFS according to the following categories: labor, overhead, transportation, housing, food, and insurance. These would be further broken out by BSAI versus GOA fisheries, and by 30%, 100%, and 200% covered vessel/processor categories. The discussion paper explicitly noted that all cost information provided is considered confidential, and thus must be aggregated sufficiently in order to be provided in a public document.

## DRAFT

The committee appeared to have fewer problems with providing proprietary information to NMFS than it did with the potential implementation of the confidentiality provisions provided in the Magnuson Stevens Act (MSA). Several examples were cited to support a lack of confidence in the confidentiality aspects of the proposed alternative. First, in 2005, a company that was under contract with NMFS in a previous year to audit the observer program (and thus, received confidential business information from each existing observer provider) was certified to become a competing observer provider for the North Pacific groundfish fisheries. While this concern was made known to NMFS at the time, there were no regulations that prevented the company from becoming legitimately certified.

Second, in the recent past, Oceana submitted a FOIA request for vessel specific fishery information that NMFS agreed was confidential and thus could not provide. Subsequently, the Dept. of Commerce General Counsel disagreed and stated they intended to provide the requested data. As a result, industry filed suit in Federal district court. While the request was eventually withdrawn by Oceana, it was expensive for industry and resulted in a lack of confidence in the confidentiality provisions.

The confidentiality issue is exacerbated by the fact that there are only five observer providers, three of which provide the vast majority of observer days. In addition, one provider (Saltwater, Inc.) services the majority of the Gulf fisheries. Thus, even aggregation rules may not prevent the public from being able to discern confidential information relative to a specific provider.

NOAA GC noted that Section 402(b) of the MSA was recently amended in 2006 to add 1) a few additional disclosures for information that is considered confidential under the act, and 2) stricter standards by which the government can disclose information to entities that are authorized to receive this information.

The OAC also questioned the analytical gains from providing the cost components (breakdown by subcategory) as proposed in Alternative 2. Some members noted that the disproportionate observer costs experienced within the Gulf fisheries would be better understood if these variable costs could be provided, even in aggregate form. NMFS also noted that it is not possible to provide a comprehensive economic analysis of a restructured program (i.e., new service delivery model in which NMFS contracts directly with observer providers) without more detailed costs than the average observer cost per day. Variable costs would allow analysts to provide the difference in costs by sector, deployment, 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 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.

Most members agreed that NMFS needs to gather enough information to inform the public process, while at the same time considering the observer providers' concerns about confidentiality. Support for requiring cost information was stronger from those representing Gulf fisheries that want to enable observer restructuring efforts to proceed. Given that, several suggestions were raised for discussion, including:

- Finding other ways to receive cost information other than a mandatory economic data collection program, such as industry invoices, research on airplane fares, etc.
- Establishing a time limit on the data collection effort, for example, two to three years
- A prohibition on allowing a person/entity that receives this confidential information on behalf of the government from being certified as an observer provider in the North Pacific. Similarly, a non-competitive agreement could be developed, such that it must be agreed that a person/entity that receives confidential information on behalf of the government would not engage in competition with the businesses providing the information.
- Requiring submittal of this information from individual vessels and processors

## DRAFT

Concerns were expressed about requiring submittal of this information from individual vessels and processors, as only the total cost of what boat owners pay (as opposed to the cost components) would be available. In addition, it complicates the data collection process in shifting from five observer providers to potentially hundreds of entities.

In sum, NMFS noted that the more detailed the information provided, the better the ability to provide a comprehensive economic analysis on related issues. NMFS noted it does not want to be more intrusive than necessary or implement an overly complicated system. The agency would still benefit from receiving overall information by BSAI and GOA subareas, if not by all categories proposed in Alternative 2.

### **The OAC recommended replacing Alternative 2 with the following:**

- 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%, and 100% coverage level fisheries; and gear type.
- Prohibit allowing a person/entity that receives confidential observer provider information on behalf of the government from being certified as an observer provider in the North Pacific, or alternatively, implement a non-competitive clause.
- Establish a time limit on the data collection (e.g., 2 - 3 years).

### Issue 6. Completion of the fishing year

Currently, NMFS completes quality control checks and finalizes all observer data as soon as possible after the close of the fishing year; these data are then available to NMFS and Council analysts who need the full year data set to develop requested analyses. Because current regulations allow observer cruises to span two different fishing years and deployments can last up to 90 days, observers deployed late in one fishing year can delay completion of the entire data set and its availability until as late as March of the following year. Under Alternative 2, NMFS proposes to establish a cutoff date (February 28) whereby observers collecting fishing data over a span of two years in the same deployment would be required to return to port and be available for debriefing.

NMFS noted that the sooner the data are available, the better. The February 28 proposed date (as opposed to the current potential of not receiving data until the end of March), while still not ideal, is preferable to the status quo. NMFS noted that this issue relates almost exclusively to freezer longline vessels harvesting Pacific cod late in the year, in both the CDQ and non-CDQ fisheries. These vessels can then start new fisheries on January 1.

Members expressed concerns about shortening the length of observer deployments in such situations, as it potentially causes a hardship on both the observer and industry. In addition, many members thought that the scale of the problem is relatively small and thus does not warrant a regulatory fix. Table 1 in the discussion paper shows that only 7 observer cruises spanned 2006 and 2007 as part of the same deployment and had fishing continue into March. Members wanted to know what level of harvest (pounds) these trips represented. Other members interpreted this table such that the solution proposed by the agency would not cause an undue burden on a significant number of observers.

Some members questioned, if timing is the issue, whether this data is necessary for a 'complete' data set for the fishing year. NMFS noted that data from late in the year, most notably size and age distribution data, are often different from those earlier in the year. Thus, it is not solely an issue of having fewer data if data late in the year were excluded. These data are used for both stock assessment purposes and for other Council analyses. It is the users of the data at the Alaska Fisheries Science Center that have requested expediting this information.



## DRAFT

Other potential solutions to the identified problem were also discussed. One member suggested that because all of the vessels at issue have ATLAS software, the observer could complete a mid-cruise debriefing at such time that a vessel comes into port for a delivery. This would mitigate the need to fly an observer to Anchorage to debrief and find a new observer to 'finish' the trip. NMFS noted that mid-cruise debriefings typically take a considerable amount of time, and they have had problems in the past working with providers to ensure the observer is in port long enough to complete a comprehensive debriefing. One member also noted that contrary to the discussion paper, observers on freezer longliners typically prefer to be on longer deployments, thus, the observer would not benefit from being required to cut the deployment short.

One observer provider suggested a replacement for Alternative 2, as follows:

- The observer generates a set of data for the first year under a NMFS issued cruise code.
- On January 1 of the second year, the observer starts a new data set with a second cruise code.
- At the first offload in the second year, the observer submits data from the previous year to the NMFS field office. If there is adequate time, the observer completes their computer input and debriefing for that data in the field.
- If there is not adequate time to debrief at the first offload, observers offloading in remote ports would send data by certified mail to NMFS in Anchorage or Seattle, and follow-up with debriefing on a subsequent offload.

In general, most OAC members understood the issue but were not supportive of the solution proposed in the discussion paper. The committee did not see a pressing need for a regulatory solution, as the number of cruises affected is relatively small. NMFS could first attempt to implement the intent of the (bulleted) alternative above through working with the observer providers in the next couple of years (i.e., debrief some observers in Dutch Harbor), and then re-evaluate whether a regulatory solution is necessary. **The committee recommended that Issue 6 be removed from the proposed amendment package.**

### Issue 7: Miscellaneous modifications

Issue 7 outlined three minor housekeeping issues related to regulatory language that needs to be updated or corrected. The OAC agreed with such revisions. **The committee recommended Alternative 2.**

### **III. Update on the National Bycatch Report initiative**

As requested by the Council, Dr. Bill Karp provided a similar update on the National Bycatch Report initiative to the OAC as provided to the Council in December 2006 and March 2007. This is a NOAA HQ driven initiative to develop a report on regional and fishery-specific bycatch of fish, marine mammals, and seabirds. The intent is to provide current information to inform the U.S. public and international community on the status of bycatch in our nation's fisheries. Bycatch levels in each Federal commercial fishery would be quantified and used to monitor progress in bycatch over time. A tier system was developed to characterize the level of data available relative to bycatch in specific fisheries, such that fisheries can be comparably ranked across regions. The initial version of the report is expected sometime in 2008, and will contain 2005 data and estimates.

The committee asked about the definition of bycatch used in the development of the report, as all regions should be compared using the same definition. Dr. Karp reported that the definition being used is consistent with that in the MSA (i.e., at sea discards). Dr. Karp will continue to update the OAC as this effort progresses.

**The OAC recommended that the Council send a letter to NOAA HQ asking to see the draft report before it is finalized.**

## DRAFT

### IV. Update on Observer Program operations

Dr. Karp provided an update on observer program operations, noting that a fully staffed program equates to 45 observer program FTEs, at an annual cost of \$5 million. Due to increased costs over the last several years (e.g., salaries, rent, etc.), the program has not been fully staffed. There are 32 current staff, and NMFS is in the process of hiring 3 more. While most staff are located in the Seattle office, a field office was opened in Anchorage three years ago with the intent of building the observer cadre. The cadre has typically consisted of 6 – 7 individuals, with 1 in Kodiak and another 1- 2 in Dutch Harbor.

The demands on the observer program resulting from new Council programs have increased substantially over the past five years, without resulting in a larger budget. NMFS is thus obligated to maintain the observer data system and coverage levels in regulations with fewer resources. In sum, there is not a sufficient budget to support maintaining the observer cadre (Anchorage field office) at a level at which it can function effectively. Thus, the observer cadre will not be continued, and NMFS will focus primarily on core functions.

Another example of the challenges surfacing recently has been the major debriefing backlogs at certain times of the year, which are driven by external factors such as the fishing calendar, timing of fishing closures, etc. NMFS has recently developed a contract to hire individual debriefers to assist in peak debriefing times.

In addition, the Observer Training Center (OTC) in Anchorage has been responsible for the majority of observer training and debriefing. The OTC has typically been provided funds through a grant. As a result of a legal review of that arrangement, NMFS was asked to change its relationship with the OTC due to oversight issues and because funding must be based on negotiated costs relative to contract provisions.

Dr. Karp also noted that NMFS is undertaking some test monitoring in the halibut fishery, in cooperation with the Fishing Vessel Owners Association, as well as undertaking a rockfish EFP. The rockfish EFP is a NMFS AKR/AFSC/industry collaboration to evaluate how one might employ electronic monitoring (EM) for PSC accounting. PSC accounting is the primary factor driving the need for the 100% observer coverage requirement in the Gulf rockfish catcher vessel fleet, as it is operating under individual bycatch accounts in the new rockfish pilot program. The EFP has two phases: 1) compare basket samples versus whole haul samples versus EM for halibut PSC<sup>1</sup>; and 2) use video in combination with 100% observer coverage to find ways to potentially shift away from 100% observer coverage in the future.

### V. Scheduling and other issues

#### Observer worker's compensation

This issue was added to the agenda at the request of a committee member (Tracey Mayhew). Ms. Mayhew provided a brief update on recent issues related to the Federal Employee Compensation Act (FECA). In the case an observer is injured, they are considered federal employees and can receive worker's compensation under FECA. She noted that some insurance companies are insisting that an observer go through FECA for compensation. As a result, it is taking a long time for observers to be approved for medical compensation and overtime pay is not being included in the compensation calculation. Some long-term solutions were discussed at the 2007 International Fisheries Observer Conference on how to improve service out of FECA, and the National Observer Program is going to contact the Department of Labor, Office of Worker's Compensation to develop short-term solutions.

---

<sup>1</sup> Electronic monitoring is intended to provide a length estimate in order to estimate halibut weight.

## DRAFT

One provider noted that this issue was a problem for several years, but that they are now relatively satisfied with the current system. Dr. Karp noted that the Federal Observer Compensation Act (FOCA) continues to be a proposal within the Department of Commerce; if there is no longer industry support for FOCA, industry should notify the agency.

### Schedule for next OAC meeting

If the Council initiates an analysis for the proposed regulatory amendment package that was discussed under agenda item II, initial review could be scheduled as soon as October 2007, with final action at a subsequent Council meeting. Implementation could not likely take place until the beginning of 2009. **The committee expressed interest in reviewing the analysis prior to the Council taking final action.** The committee noted that it is not feasible to hold an OAC meeting in November, due to the end of the fishing season and peak debriefing time.

AGENDA C-5  
Supplemental  
JUNE 2007

May 23, 2007

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

Re: Agenda Item C-5, Observer Program

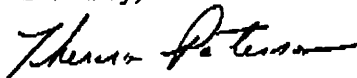
Dear Members of the NPFMC,

My name is Theresa Peterson and I am a member of a long time commercial fishing family in Kodiak, Alaska. I also work part time as an outreach coordinator for Alaska Marine Conservation Council and in this capacity strive to network with as many fishermen and community members as possible to gain a better understanding of this communities fishery concerns. An issue that comes to light again and again is the concern that the lack of observer coverage in the Gulf of Alaska Groundfish fisheries may be negatively impacting our community due to the lack of data from which comprehensive management plans and goals to reduce bycatch may be formulated. We depend upon the abundance of fishery resources adjacent our community and encourage the Council to continually work toward increased of scientific data to manage this fishery to its utmost potential with minimal long term habitat impacts.

Observer data provided from observed Groundfish fisheries is crucial to sound management decision in the GOA. Used in conjunction with reporting and weighing requirements, information collected by observers provides the foundation for in season, management and for tracking species; both specific catch and bycatch amounts. The 30% observer coverage for vessels over 60 feet was designed to provide sufficient data, once extrapolated, to base groundfish management decisions in the Gulf. Although well intended, this program has long been recognized as inadequate to provide substantial baseline data from which well informed management strategies may be composed.

NMFS has stated that data quality and operational issues facing the observer program can only properly be addressed by a restructuring that would likely take several years to set into rule. However, NMFS has identified several issues that may be addressed through regulatory amendments to improve the existing Observer Program. To increase coverage I urge the Council to revise the definition of "fishing day" as proposed by NMFS and described in alternative 2 in the fishing day definition issue found in the NPFMC Observer Program Discussion Paper, May 2007. Coverage needs to increase. This adjustment would achieve this and should by all means be accepted. I recommend that increased cost, if found to be overly burdensome on the fleet, may be offset by an additional regulatory amendment.

Sincerely,



Theresa Peterson  
F/V Patricia Sue

**RECEIVED**  
MAY 24 2007  
N.P.F.M.C.

*Tom Casey*

Attachment 1



**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

**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.

*NPFMC Testimony of Tom Casey for Bill Alwert  
9 June 2007 at Sitka, Alaska*

①

### Gulf of Alaska

For the period 1990-2005 there were 78,842 observed bottom trawl sets in the Gulf of Alaska. The spatial pattern of this effort was much more dispersed than in the Bering Sea region. During 2005, the amount of trawl effort was 2,090 sets, which was the low for the 15 year period. Patterns of high fishing effort were dispersed along the shelf edge with high pockets of effort near Chirikoff, Cape Barnabus, Cape Chiniak and Marmot Flats (Figure 148). Primary catches in these areas were pollock, Pacific cod, flatfish and rockfish. A larger portion of the trawl fleet in Kodiak is comprised of smaller catcher vessels that require 30% observer coverage, indicating that the actual amount of trawl effort would be much higher since a large portion is unobserved.

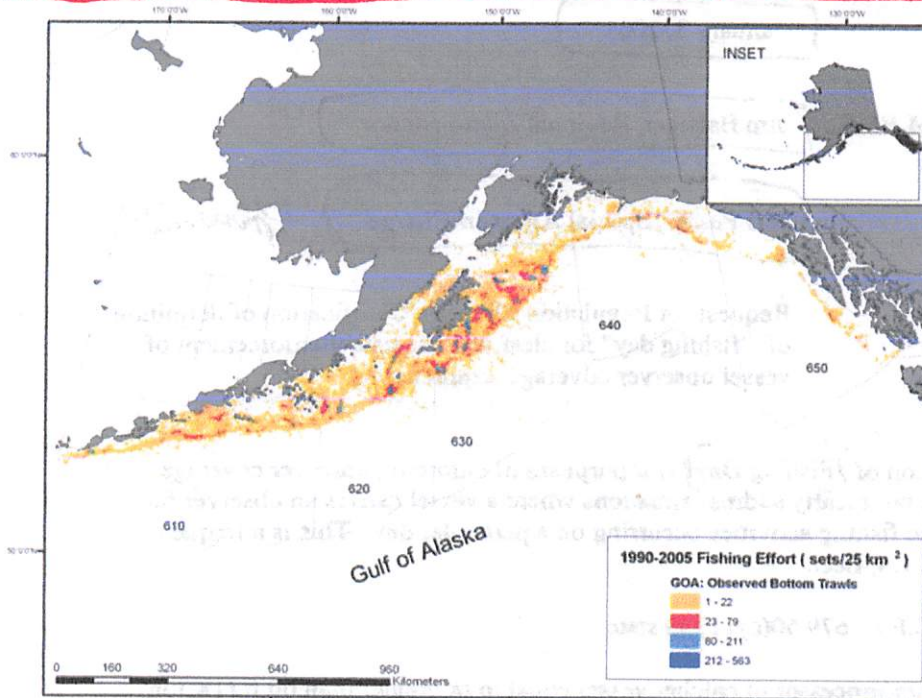


Figure 148. Spatial location and density of bottom trawl effort in the Gulf of Alaska, 1990-2005.

(2)