

MEMORANDUM

TO: Council, SSC and AP Members

FROM: Chris Oliver *Chris*
Executive Director

ESTIMATED TIME
2 HOURS

DATE: January 22, 2004

SUBJECT: Observer Program

ACTION REQUIRED

- a) Receive overview of North Pacific Groundfish Observer Program
- b) Review NMFS letter on recommendations for the draft analysis to restructure the funding and deployment mechanism in the North Pacific Groundfish Observer Program

Background

- a) Receive overview of North Pacific Groundfish Observer Program

A general overview of the North Pacific Groundfish Observer Program will be presented by Dr. Bill Karp. Dr. Karp was recently appointed Observer Program Leader at NMFS in June 2003, having also served in this position from 1993 - 1999.

- b) Review NMFS letter on recommendations for the draft analysis to restructure the funding and deployment mechanism in the North Pacific Groundfish Observer Program

In April 2003, the Council reviewed a draft schedule and analytical outline to restructure the observer funding and deployment mechanism in the North Pacific Groundfish Observer Program, based on the recommendations of the Council and the Observer Advisory Committee (OAC). Under the new system, 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. The problem statement guiding the amendment identified data quality and disproportionate cost issues resulting from the current program structure. 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, cost-equity issues among the various fishing fleets, and the difficulty to respond to evolving data and management needs in individual fisheries.

The analytical outline the Council reviewed in April has since been developed into the standard EA/RIR/IRFA format, and the Council reviewed a preliminary draft of this analysis at its December 2003 meeting. The existing alternatives stemming from the current problem statement are distinguished primarily by which fisheries would be included in the new funding mechanism and program design. They range from including only GOA groundfish vessels, to including all GOA groundfish vessels and processors, halibut vessels, and BSAI groundfish and halibut vessels with currently less than 100% coverage requirements. Thus,

the alternatives currently before the Council focus on effecting these changes primarily in the GOA, since the issues to be addressed by a new program structure were recognized as most acute in the Gulf fisheries. A summary of the existing five alternatives is included at the end of this memo.

In addition to reviewing the preliminary draft analysis in December, the Council also received a report from NMFS detailing some potential issues of concern related to observer certification/decertification and the application of a new NMFS policy which defines wage rates and overtime requirements for observers under service delivery models that include direct contracts between NMFS and observer providers. NMFS requested additional time to address these issues, in order to determine whether the agency could support a hybrid program in which some vessels (primarily BSAI vessels) would operate under the current pay-as-you-go model and the remaining vessels (primarily GOA vessels) would operate under the new contract system. NMFS noted that such a hybrid program may mean two different procedures for addressing observer performance and conduct problems in the BSAI and the GOA fisheries, and potential differences in observer remuneration between the two systems.

NMFS has since determined that effective procedures for addressing observer performance and data quality issues can only be put in place through a service delivery model that provides direct contractual arrangements between NMFS and the observer providers. NMFS has provided a letter (Attachment C-2(a)) to that effect, describing the rationale for this determination and recommending that the Council include an additional alternative to the draft analysis. The new alternative would apply the proposed direct contract model program-wide, so that all observer services in both the BSAI and the GOA would be provided by observer companies that have direct contracts with NMFS.

The NMFS letter was sent to the Council on January 22. The Council is scheduled to review the letter at this February meeting, and consider taking action based on NMFS' recommendations. In sum, the recommendations include:

- 1) Adding a new alternative to the draft analysis for restructuring the observer program funding and deployment mechanism to extend a direct contract model for observer services to all vessels in the GOA and the BSAI
- 2) Revising the problem statement to encompass the existing alternatives as well as the proposed alternative above

In light of the above recommendations, a discussion of the schedule may be necessary at this meeting. Initial Council review of the draft analysis will likely need to be rescheduled for June 2004 at the earliest, as opposed to the current April timeframe. As suggested in the letter, the Council may want to task the OAC with refining the suite of alternatives, including those that may meet a program-wide approach, should that approach be approved by the Council at this meeting. The OAC is currently scheduled to meet March 11 - 12 in Seattle.

Alternatives currently proposed for the EA/RIR/IRFA to establish a new program for observer procurement and deployment in the North Pacific are as follows:

- Alternative 1. *No action alternative.*** Under this alternative, the current interim “pay-as-you-go” program would continue to be the only system under which groundfish observers would be provided in the groundfish fisheries of the BSAI and GOA.
- Alternative 2. *GOA groundfish vessels only.*** Under this alternative, a new fee-based program would apply only to GOA groundfish vessels, including GOA groundfish vessels under 60' length overall. The current 0%, 30%, and 100% coverage categories would be terminated and NMFS would determine when and where to deploy observers based on data collection and monitoring needs. The fee would be based on a percentage of the ex-vessel value of each vessel's GOA groundfish landings and would be collected through annual billing by NMFS.
- Alternative 3. *GOA groundfish and halibut vessels only.*** This alternative is the same as Alternative 2 except that halibut vessels from all areas off Alaska would be included in the program. Fees would be collected from halibut landings as well as groundfish landings, and NMFS would have the authority to place observers on halibut vessels as well as groundfish vessels.
- Alternative 4. *GOA groundfish and halibut vessels and GOA-based groundfish processors.*** This alternative is the same as Alternative 3 except that GOA groundfish processors would be included in the program. However, in contrast to Alternatives 2 and 3, fees would be collected by processors and fee proceeds would be submitted to NMFS on a quarterly basis.
- Alternative 5. *GOA groundfish vessels, halibut vessels, GOA-based groundfish processors, and BSAI groundfish vessels with less than 100% coverage requirements.*** This alternative is the same as Alternative 4 except that BSAI groundfish (and halibut) vessels that currently have less than 100% coverage requirements would be included. This includes all groundfish trawl and fixed gear vessels under 125' LOA, all pot vessels of any length, and all halibut vessels. BSAI-based groundfish processors that take deliveries from vessels participating in the program would have the option to participate in the program.



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration AGENDA C-2(a) 01
National Marine Fisheries Service FEBRUARY 2004
P.O. Box 21668
Juneau, Alaska 99802-1668

January 22, 2004

RECEIVED
JAN 22 2004
N.P.F.M.C.

Ms. Stephanie Madsen
North Pacific Fishery Management Council
605 W. 4th Avenue
Anchorage, Alaska 99501

Dear Madam Chair:

In a December 1, 2003, letter, we informed the Council of potential concerns about administration of an observer program with two different observer service delivery models in the Gulf of Alaska (GOA) and the Bering Sea Aleutians Islands management area (BSAI). We also informed the Council that we would be coming back in February with additional information on the issues we raised and any recommendations on how to address them.

In the December 1 letter, we expressed concern about operating an observer program under two service delivery models when the authority and procedures for addressing observer performance problems differed between the two models. We have now determined that effective procedures for addressing observer performance and data quality issues can only be put in place through a service delivery model that provides direct contractual arrangements between NMFS and the observer providers. The basis for this determination is outlined below. We believe a change to this type of service delivery model is essential because the current system does not provide us the tools we need to ensure observer accountability, data quality, and program credibility.

Procedures for dealing with observer performance problems that arise under the current pay-as-you-go system and that would remain in place in the Bering Sea under all the alternatives presently under consideration by the Council are inadequate. While observer performance and conduct problems are identified infrequently, NMFS must have effective procedures for dealing with these problems because they may directly affect the quality of data used for management and assessment, and because the perception of integrity is considered to be critical given the scientific, management, and compliance monitoring responsibilities of observers. Before the start of 2003, the Observer Program had procedures in place that allowed immediate suspension of observers when potential performance problems were identified. However, these procedures did not comply with the Administrative Procedure Act (APA) requirement that prior to suspension, an observer must have an opportunity for an appeal to provide his/her side of the story. Under the decertification process implemented in 2003, the administrative process for addressing potential performance problems and data quality issues was changed substantially to protect observers' constitutional rights and meet requirements defined in the APA. Under the new process, the agency is unable to take immediate action to suspend observers except in cases of threats to public health and safety. When the NMFS Observer Program Office identifies a concern, the agency must first allow the observer involved to respond to the allegations while continuing to work. If NMFS decides to take action to decertify, the observer has the right to



appeal. Based on discussions with the NMFS Office of Administrative Appeals and their priority workload, the appeal process could last nine months or longer, during which the observer is allowed to continue working. NMFS therefore would be obliged to discard data collected by observers in some situations, and information collected by some observers under these circumstances would not be deemed suitable for addressing compliance and enforcement concerns.

Based on initial consultations with agency contract specialists, we believe these concerns could be resolved through contracts between NMFS and observer providers under which the providers agree to be held accountable for the quality of data collected by observers. We believe the observer provider contractors would have greater flexibility than does NMFS to address observer performance concerns in ways that would minimize impacts on the overall quality of the data collected by the observer program while protecting the interests of observers under the terms of employment under which they would be hired. We believe, therefore, the only effective way for NMFS to deal with the critical data quality and performance issues identified above is by establishing direct contractual arrangements between NMFS and observer providers.

The alternatives currently before the Council focus on effecting these service delivery model changes primarily in the GOA, and retaining the current system for most vessels in the BSAI for the foreseeable future. Because NMFS must take steps to resolve the aforementioned data quality and credibility problems throughout the observer program, NMFS recommends the Council include a new alternative in the analysis being developed to assess restructuring of the observer program that would reflect a program-wide restructuring that extends the options for contractual arrangements in the GOA to the BSAI so all observer services are provided by observer companies under direct contractual arrangements with NMFS.

In the December 1 letter, we also raised concerns regarding possible consequences of a new NMFS policy which defines wage rates and overtime requirements for observers under service delivery models that include direct contracts between NMFS and observer providers. This could result in substantial differences in observer remuneration between status quo and NMFS-contracted sectors in a hybrid system between the GOA and the BSAI, and might seriously constrain observer availability in the less-remunerative sector. This is a complex issue and the potential consequences are difficult to predict. However, this issue would not arise under the program-wide change alternative recommended above because all observer services would be provided under direct contracts between NMFS and observer providers. Bear in mind that overall observer labor costs might increase under this new NMFS policy. We are investigating this concern and will keep the Council informed.

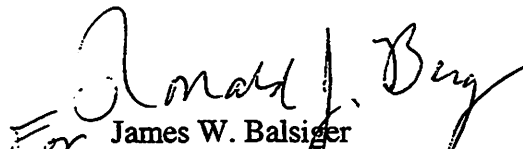
We recognize that including the BSAI in the initial restructuring of the observer program is potentially controversial and will require additional analytical work. We also believe that reasonable options for contractual arrangements exist that could address some of the major concerns raised by the Council when it voted to repeal the Research Plan in 1995. We continue to work with contract law specialists to determine if some of these arrangements could be

implemented without the need for a change in statute to collect fees for observer services. We encourage the Council to provide additional time to explore these concepts in an analysis that ultimately could support a much needed change to the observer program.

In order to proceed with an expanded analysis, we recommend the Council consider a revised problem statement for the analysis that could encompass the alternatives already under consideration by the Council, as well as a new alternative for a broader change. We have drafted a new statement for consideration by the Council (attachment 1). We also provide some additional information on the contracting process and our initial thoughts on one contracting approach that holds promise for resolving the problems described in this letter (attachment 2). As detailed in attachment 2, we think implementing this approach within existing statutory authority may be possible. This will, however, require a determination by NOAA General Counsel or the Department of Commerce General Counsel.

Whether or not new alternatives for program-wide change are proposed by the Council, we will need more time to address contracting issues with NOAA and DOC to ensure we identify approaches that meet the Council's and NMFS' goals and objectives for restructuring. We anticipate we will be able to have an initial analysis to the Council in June at the earliest. However, an April date for initial consideration of a completed draft analysis is overly optimistic given the nature and complexity of the issues and alternatives we are challenged to analyze. To facilitate this process, we ask the Council to consider adopting a new problem statement at the February meeting. Because the Council's Observer Advisory Committee (OAC) is scheduled to meet March 11-12, 2004, this might be a good opportunity for the Council to ask this committee to refine the existing suite of alternatives, including identifying new alternatives for analysis that fit the program wide approach proposed in this letter. The OAC also could begin to work with staff to assess the issues associated with different contractual models that could be employed to address the objectives for restructuring the observer program.

Sincerely


For James W. Balsiger
Administrator, Alaska Region

Attachments

Attachment 1

Revised problem statement for restructuring of the North Pacific Groundfish Observer Program

(Substantive changes to the original problem statement are underlined below. Editorial or non substantive changes are not identified)

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 Council and NMFS face a number of longstanding problems that result primarily from the current structure of the Observer Program. 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 adjusted to respond to current and future management needs and requirements for individual fisheries. In addition, the existing program does not allow fishery managers to control when and where observers are deployed. This results in coverage limitations that constrain the reliability of catch and bycatch estimates based on observer data. Furthermore, data quality concerns cannot be resolved quickly and effectively when observers who have been identified as not meeting performance or conduct requirements appeal NMFS's suspension or decertification decisions. The ongoing collection of observer data during the appeals process may further undermine data quality and program integrity, and data collected under these circumstances may not be suitable for management and enforcement actions. The current program is also one in which many smaller vessels face observer costs that are disproportionately high relative to their gross earnings. 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.

Attachment 2

Conceptual Approach for Tiered Contractual Arrangements to Provide Observer Services in the North Pacific Groundfish Fisheries

Government contracts can be designed in a number of different ways to match the agency's needs and interests with the services that are required of contractors. Through properly designed and implemented contracts, the government can put in place a mechanism which holds contractors accountable for the quality of work conducted by their employees. In a typical example, prospective contractors would be asked to provide a quality assurance plan as part of their submission when they bid on a contract. Contract provisions can also be crafted to ensure that observer skill and experience levels are properly matched with deployment requirements. As part of the evaluation process, the government source evaluation board would review quality control and observer deployment plans submitted by bidders, and evaluate their effectiveness. Once a contractor has been selected and the contract signed, these plans would be put into effect. In many instances, a contractor would likely identify and correct performance problems independently (although the government could require the contractor to document and inform the government of any such actions). In other cases, the government might identify specific concerns and ask the contractor to take appropriate action. Depending on the specific quality and performance requirements of the government, a quality control plan could contain a number of different provisions. For example, a contractor might choose to retrain or reassign a poorly performing employee, or could choose not to re-hire a poorly performing temporary employee. Quality control plans can be implemented to address specific quality-of-work concerns, codes of conduct, and other concerns which the government would identify in its request for proposals. Failure to follow the quality control plan could result in a negative performance evaluation affecting a contractor's ability to secure future contracts or, potentially, contract cancellation.

We have discussed an approach which holds promise for meeting the Council's and NMFS' needs for high quality observer services. It is a flexible approach, which could likely be modified to address concerns that might be raised during program development. Based on advice received from contracting specialists, we believe that this approach is viable and legally sound, although we intend to pursue a written legal opinion to confirm our understanding.

This approach is based on the concept of establishing two types of contracts. The first contract would be between the agency and a financial institution that has collection and disbursement capabilities. This company (the financial contractor) would be employed to collect observer fees from fishing companies and disburse them to observer providers as directed by the agency. Contractor fees could be recovered from industry payments or paid directly by NMFS if appropriated funds were available.

NMFS would also establish contracts with several observer providers to deploy observers to fishing vessels and plants as directed by the agency. These observer providers would invoice the

financial contractor to request payment for provision of observer services. Payment would be made as directed by NMFS.

A range of approaches could be developed for establishing the basis for collection of monies by the financial contractor. This contractor could be directed simply to recover daily observer coverage costs from vessels and plants required to obtain observer coverage. This could reproduce existing or modified coverage requirements. Alternatively, the contractor could be directed to collect a fee based on catch value from fishery participants, and use this to reimburse contractors for deploying observers as directed by NMFS. The possibility also exists to design a mixed model under which, for example, daily coverage costs would be collected from vessels in one sector (the Bering Sea), and a fee-based system put in place for another sector (the Gulf of Alaska). As currently considered in the alternatives developed to date, industry funds could be supplemented with appropriated funds through a "partial-cost" approach under which the financial contractor receives some funds from the industry and some from government sources in the event that appropriated funds become available.

In its simplest form, this approach could likely be put in place without changes in statutory authority. If so, it could be implemented in a more timely manner than other fee collection programs in which a federal agency directly collects and distributes fees and revenues. Enhancements that require statutory authority and/or appropriated funds could be added as authority and/or funds become available.

C-2
Hand out from
Nicole Kimball

November 13, 2003

MEMORANDUM FOR: Terry H. Lee
Office of General Counsel

FROM: William T. Hogarth, Ph.D. /signed/

SUBJECT: Applicability of Overtime Pay for Fisheries Observers

This memo supplements a request from Mr. Abe Vinikoor of the Western Administrative Support Center (WASC) for an legal opinion from the Department of Commerce Office of General Counsel (DOC OGC) on whether contracted fisheries observers are entitled to overtime pay. It provides justification for the National Marine Fisheries Service (NMFS) position that contracted fisheries observers are non-exempt from coverage under the Fair Labor Standards Act and other Acts, as appropriate, by virtue of their status as technicians, and therefore are eligible for overtime pay.

Based on information provided by DOC OGC and Department of Labor representatives during a workshop sponsored by the NMFS' National Observer Program (see Appendix 1; Fisheries Observers Insurance, Liability, and Labor Workshop, section 4.2, pp. 17-20), it was determined that NMFS needed to clarify the status of observers as either professionals (which are exempt from coverage under the Fair Labor Standards Act), or technicians (which are non-exempt).

This issue was discussed at a subsequent meeting of the National Observer Program Advisory Team. The National Observer Program Advisory Team is comprised of representatives from each NMFS region and headquarters office. The Advisory Team works with NMFS' National Observer Program staff in the Office of Science and Technology to identify issues of national concern, to recommend or establish priorities for national research and problem solving, and to support information collection and program implementation. The team, at its October 2001 meeting, recommended that the National Observer Program develop a Position Description for fisheries observers that would clarify their status as technicians, using the Biological Technician series (GS-404) as a starting point. It was recommended this Position Description be forwarded to the Department of Labor for consideration in issuing future Wage Rate Determinations and for inclusion in the Service Contract Act Directory of Occupations (see <http://www.dol.gov/esa/regs/compliance/whd/wage/main.htm>). This clarification would provide consistency in wages paid to observers in various regions of the U.S. In addition, it would help clarify pay scales for work performed on land and at sea and aid in determining appropriate types of benefits, i.e., overtime compensation.

The National Observer Program, in consultation with the National Observer Program Advisory Team, reviewed the duties and responsibilities of fisheries observers and developed a classification scheme identifying three levels of Fishery Observer for consideration by the

Department of Labor (Level I/II/III). I sent a letter to Mr. William Gross, Director of the Department of Labor's Wage Determination Division on September 9, 2002 (see Appendix 3) to that effect. That letter, along with a subsequent letter dated November 6, 2002, resolved to establish wage rates for contracted fisheries observers that are comparable to Federal Observers under the General Schedule (GS) system.

The development of Fishery Observer Position Descriptions for consideration by the Department of Labor was prompted by inconsistencies in wage rate determinations that had been made up to that point, and the fact that these wages were considerably less than the federal equivalency for the same type of position. Wage rate determinations issued by the Department of Labor for various localities stipulated minimum hourly wages ranging from \$9.55/hour (2001 for California, Oregon, Washington) to \$10.59/hour (2001 for California County of Los Angeles), whereas the 2003 hourly pay scale for GS-5 employees is \$11.23/hour (see http://www.opm.gov/oca/03tables/pdf/g_s_h.pdf). If the Department of Labor had a uniform national standard for making wage rate determinations for fisheries observers, then there would be more consistency in wage rates for contracted observers, and these wages would reflect wages that would be paid to federal employees performing the same job functions.

In developing the position that contracted fisheries observers are technicians, the National Observer Program, in consultation with the National Observer Program Advisory Team, considered both the duties and responsibilities of fisheries observers as well as past recruitment actions for Federal fisheries observers (see Appendix 4). In a 1999 Vacancy Announcement for Federally-employed fisheries observers in Hawaii that was issued before the program was converted to a contracted program, recruitment for fisheries observers were for Biological Science Technicians (ZT-404-II, equivalent to GS-5 through GS-8).

The classification of fisheries observers as technicians is also consistent with guidance from the Office of Personnel Management's classification standards for (see *The Classifier's Handbook*, Chapter 4 "Determining the Pay System and Series" at <http://www.opm.gov/fedclass/clashnbk.pdf>). The duties and responsibilities of fisheries observers involve adhering to routine sampling protocols that are planned and managed by professional employees. Fisheries observers perform these duties unsupervised, but all work is carefully reviewed for completeness and accuracy by professional biologists. Although most of the contracted observer programs currently require that observers have a professional degree (usually a Bachelor's degree in a biological science) as an eligibility standard for recruitment by the contracted observer service provider, specialized experience can be substituted for education (see also Appendix 4, Qualifications). Observers then receive up to three weeks of specialized training, which must be completed to the satisfaction of the program before observers are certified to be deployed aboard fishing vessels.

Therefore, NMFS maintains the position that fisheries observers are biological technicians and are therefore eligible for overtime compensation under the Service Contract Act (SCA), the Fair Labor Standards Act (FLSA), and other Acts stipulating wages and benefits for contracted service employees, as appropriate.

While we understand that work performed by observers beyond U.S. territorial waters is outside of the jurisdiction of the SCA and FLSA, attempting to track the geographical location of a vessel in order to determine whether or not SCA/FLSA wages apply would be a huge administrative burden for both the contracted observer provider and the agency. Therefore, it is the position of NMFS that the wage rate that the Department of Labor determines is appropriate for each specific locality should be applied to contracted fisheries observers whether they are working inside or outside of U.S. territorial waters in order to provide a fair, simple, and consistent application of the SCA/FLSA.

If you concur with this position, we strongly encourage you to advise WASC to request a revised Wage Rate Determination from the Department of Labor for Honolulu, as well as for localities that may be associated with the deployment of observers under current West Coast observer contracts as well as those solicited in the future. This would apply to contracts, cooperative agreements, and grants issued for the deployment of observers in the Alaska Marine Mammal Observer Program, the West Coast Groundfish Observer Program (via a cooperative agreement with the Pacific States Marine Fisheries Commission), and the California Longline and Gillnet Observer Programs. This will ensure that wage rates for fisheries observers reflect the new Position Descriptions for Fishery Observers that were provided to the Department of Labor in 2002, and that overtime pay is provided under these contracts in accordance with the SCA, FLSA, or other applicable laws.

Attachments

**PUBLIC TESTIMONY SIGN-UP SHEET FOR
AGENDA ITEM C-2 OBSERVERS**

	NAME (PLEASE PRINT)	AFFILIATION
1	BO Alton	FVWA Seattle
2	Michael Lake	Alaska Observers, Inc
3	S	
4	Susan Robinson-	Fishermen's Fleet
5	Joe Sullivan / Julie Bonney	Alaska Druggers / AG-DB / At-Sea Processors
6	Tracey Mayhew	ASSOC. for Prof. OBS.
7	Paul MacGregor	At Sea Processors
8	JOHN GAUVIN	GROUNDFISH FORUM
9	Jon Warrenchuk	Oceana
10	JOE KYLE	APICDA
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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.

Joe Sullivan

Comments on Agenda Item C-2: Observer Program

Submitted to the North Pacific Fishery Management Council on February 6, 2004
on behalf of the Alaska Groundfish Data Bank and the Alaska Dragger's Association

Restructuring of the North Pacific Groundfish Observer Program: National Marine Fisheries Service Policy on Observer Compensation

A recently adopted National Marine Fisheries Service ("NMFS") policy requires that observers "be compensated for overtime work pursuant to the Fair Labor Standards Act" when employed in programs under which NMFS has direct contractual arrangements with observer providers. The policy also extends the jurisdiction of the Fair Labor Standards Act's ("FLSA") overtime provisions outside of U.S. territorial waters. Implementation of the policy raises serious financial, operational, and legal concerns that have yet to be fully analyzed and resolved by the agency.

Cost Impacts

Treating observers as covered employees under the FLSA exposes the agency and/or the industry to a significant and potentially unintended degree of financial exposure. Under the FLSA, "an employee must be compensated for all hours worked. As a general rule the term 'hours worked' will include . . . [a]ll time during which an employee is required to be on duty or to be on the employer's premises or at a prescribed workplace."¹ FLSA regulations further provide that "waiting time" is generally compensable if "the employee is unable to use the time effectively for his own purposes."² In addition, "[a]n employee who is required to remain on call on the employer's premises" is generally deemed to be "working" while on call.³ Based on these regulations, the NMFS policy arguably requires that observers be compensated at an hourly rate for each and every hour spent on board a vessel, not just for hours spent in productive work.

The cost impacts associated with this policy are clearly substantial, and, as the agency has noted, could result in a significant increase in labor costs. Under the new overtime policy, observer providers could be required to compensate observers for 168 hours per week (with 128 of those hours being paid at 1½ times the basic rate of pay). To illustrate the degree of financial exposure that the agency and/or the industry could face under the new policy, consider the attached chart comparing observer compensation costs under a fixed 70-hour workweek model versus the FLSA model. Under the FLSA model adopted by the overtime policy, observer compensation costs would more than double. The agency should carefully consider and evaluate this potential cost impact before implementing a policy that would extend the jurisdiction of the FLSA and treat observers as "covered employees."

FLSA Exemption for Employees Engaged in Fishing Operations

The perceived need for the policy on overtime compensation appears to be based on the agency's conclusion that observers are technicians rather than professionals, and thus fall outside the FLSA exemption for executive, administrative, or professional employees. While the agency's conclusion in this regard may be reasonable, it does not appear that the agency has considered whether observers fall within the separate FLSA exemption for employees engaged in fishing operations. This exemption was specifically designed to address the unique problems that arise when attempting to apply the FLSA's overtime provisions to employees who work at sea.⁴ Specifically, Section 13(a)(5) of the

¹ 29 C.F.R. § 778.223 (Attached).

² 29 C.F.R. § 785.15 (Attached).

³ 29 C.F.R. § 785.17. See also 29 C.F.R. § 778.318 (Nonproductive working hours must be counted and paid for) (Attached).

⁴ See 29 C.F.R. § 784.118 (Attached).

FLSA grants an exemption from the FLSA's minimum wage and overtime requirements to employees engaged in the harvesting of fish, or whose duties "are functionally so related to [fishing activities] . . . that they are necessary to conduct such operation."⁵ Given that an observer's duties are so closely connected with fishing activities, and that fishing operations often would not be possible without an observer on board the vessel, there is a strong likelihood that observers fall within this FLSA exemption. Therefore, it is critical that the agency consider this issue before deciding whether the adoption and implementation of an overtime policy for observers is necessary or appropriate at this time.

Operational Concerns

The NMFS observer compensation policy also raises potentially serious operational concerns. Assuming that the overtime policy is clarified such that observer providers are not required to compensate observers on a 168 hour workweek basis, the agency would have to develop a mechanism whereby observer providers could verify the number of productive hours worked by an observer in a given week. It is unclear how the agency proposes to handle this concern under the new overtime policy. Presumably, only the skipper or the crew of a vessel would be in a position to verify the accuracy of an observer's time sheets.

Legal Concerns

The overtime policy adopted by NMFS unilaterally extends the jurisdiction of the FLSA and significantly impacts the existing rights and duties of observers and observer providers. This is a classic example of legislative rulemaking, requiring compliance with the notice and comment provisions of the Administrative Procedures Act ("APA"). By adopting the overtime policy without complying with the APA's rulemaking provisions, the agency exposes itself to potential APA-related litigation challenging the adoption and implementation of the policy. In addition, significant clarifications of the policy are needed before it can be effectively implemented. Both the agency and the industry would benefit from a full and open policy debate exploring the range of financial, operational, and legal ramifications associated with the policy.

Conclusion

In sum, the Council should urge the agency to reconsider and analyze the potential cost impacts, legal exposure, and operational problems associated with the overtime policy. The Council should specifically request that NMFS headquarters inform the Council about: (1) how the policy would impact observer compensation costs under a direct contract approach for the NPGOP; (2) whether the policy would require that observers be compensated on an hourly plus overtime basis for all non-productive waiting time spent on board the vessels; (3) whether and how the policy addresses the issue of whether observers fall within the FLSA exemption for employees engaged in fishing operations; and (4) how the number of hours worked by an observer will be verified if the policy requires contractors to compensate observers on an hourly basis. The Council's Observer Advisory Committee ("OAC") is scheduled to meet March 11-12, 2004. In order to permit the OAC to move forward with its work on the proposed restructuring of the NPGOP, it is important that Council request that agency headquarters address and resolve these issues prior to the meeting.

⁵ 29 C.F.R. § 784.100 (Attached).

Attachments

1. Memorandum from William T. Hogarth, Ph.D. to Terry H. Lee regarding Applicability of Overtime Pay for Fisheries Observers (November 13, 2003).
2. Summary of Cost Impact: 70 Hour Workweek Model vs. Fair Labor Standards Act ("FLSA") Model
3. Relevant FLSA Regulations on Compensable Hours Worked
4. Relevant FLSA Regulations on Exemption for Employees Engaged in Fishing Operations

Attachment 1



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1315 East-West Highway
Silver Spring, Maryland 20910
THE DIRECTOR

NOV 13 2003

MEMORANDUM FOR: Terry H. Lee
Office of General Counsel

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

SUBJECT: Applicability of Overtime Pay for Fisheries Observers

This memo supplements a request from Mr. Abe Vinikoor of the Western Administrative Support Center (WASC) for an legal opinion from the Department of Commerce Office of General Counsel (DOC OGC) on whether contracted fisheries observers are entitled to overtime pay. It provides justification for the National Marine Fisheries Service (NMFS) position that contracted fisheries observers are non-exempt from coverage under the Fair Labor Standards Act and other Acts, as appropriate, by virtue of their status as technicians, and therefore are eligible for overtime pay.

Based on information provided by DOC OGC and Department of Labor representatives during a workshop sponsored by the NMFS' National Observer Program (see Appendix 1; Fisheries Observers Insurance, Liability, and Labor Workshop, section 4.2, pp. 17-20), it was determined that NMFS needed to clarify the status of observers as either professionals (which are exempt from coverage under the Fair Labor Standards Act), or technicians (which are non-exempt).

This issue was discussed at a subsequent meeting of the National Observer Program Advisory Team. The National Observer Program Advisory Team is comprised of representatives from each NMFS region and headquarters office. The Advisory Team works with NMFS' National Observer Program staff in the Office of Science and Technology to identify issues of national concern, to recommend or establish priorities for national research and problem solving, and to support information collection and program implementation. The team, at its October 2001 meeting, recommended that the National Observer Program develop a Position Description for fisheries observers that would clarify their status as technicians, using the Biological Technician series (GS-404) as a starting point. It was recommended this Position Description be forwarded to the Department of Labor for consideration in issuing future Wage Rate Determinations and for inclusion in the Service Contract Act Directory of Occupations (see <http://www.dol.gov/esa/regs/compliance/whd/wage/main.htm>). This clarification would provide consistency in wages paid to observers in various regions of the U.S. In addition, it would help clarify pay scales for work performed on land and at sea and aid in determining appropriate types of benefits, i.e., overtime compensation.

The National Observer Program, in consultation with the National Observer Program Advisory Team, reviewed the duties and responsibilities of fisheries observers and developed a classification scheme identifying three levels of Fishery Observer for consideration by the

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Department of Labor (Level I/II/III). I sent a letter to Mr. William Gross, Director of the Department of Labor's Wage Determination Division on September 9, 2002 (see Appendix 3) to that effect. That letter, along with a subsequent letter dated November 6, 2002, resolved to establish wage rates for contracted fisheries observers that are comparable to Federal Observers under the General Schedule (GS) system.

The development of Fishery Observer Position Descriptions for consideration by the Department of Labor was prompted by inconsistencies in wage rate determinations that had been made up to that point, and the fact that these wages were considerably less than the federal equivalency for the same type of position. Wage rate determinations issued by the Department of Labor for various localities stipulated minimum hourly wages ranging from \$9.55/hour (2001 for California, Oregon, Washington) to \$10.59/hour (2001 for California County of Los Angeles), whereas the 2003 hourly pay scale for GS-5 employees is \$11.23/hour (see http://www.opm.gov/oca/03tables/pdf/g_s_h.pdf). If the Department of Labor had a uniform national standard for making wage rate determinations for fisheries observers, then there would be more consistency in wage rates for contracted observers, and these wages would reflect wages that would be paid to federal employees performing the same job functions.

In developing the position that contracted fisheries observers are technicians, the National Observer Program, in consultation with the National Observer Program Advisory Team, considered both the duties and responsibilities of fisheries observers as well as past recruitment actions for Federal fisheries observers (see Appendix 4). In a 1999 Vacancy Announcement for Federally-employed fisheries observers in Hawaii that was issued before the program was converted to a contracted program, recruitment for fisheries observers were for Biological Science Technicians (ZT-404-II, equivalent to GS-5 through GS-8).

The classification of fisheries observers as technicians is also consistent with guidance from the Office of Personnel Management's classification standards for (see *The Classifier's Handbook*, Chapter 4 "Determining the Pay System and Series" at <http://www.opm.gov/fedclass/clashnbk.pdf>). The duties and responsibilities of fisheries observers involve adhering to routine sampling protocols that are planned and managed by professional employees. Fisheries observers perform these duties unsupervised, but all work is carefully reviewed for completeness and accuracy by professional biologists. Although most of the contracted observer programs currently require that observers have a professional degree (usually a Bachelor's degree in a biological science) as an eligibility standard for recruitment by the contracted observer service provider, specialized experience can be substituted for education (see also Appendix 4, Qualifications). Observers then receive up to three weeks of specialized training, which must be completed to the satisfaction of the program before observers are certified to be deployed aboard fishing vessels.

Therefore, NMFS maintains the position that fisheries observers are biological technicians and are therefore eligible for overtime compensation under the Service Contract Act (SCA), the Fair Labor Standards Act (FLSA), and other Acts stipulating wages and benefits for contracted service employees, as appropriate.

While we understand that work performed by observers beyond U.S. territorial waters is outside of the jurisdiction of the SCA and FLSA, attempting to track the geographical location of a vessel in order to determine whether or not SCA/FLSA wages apply would be a huge administrative burden for both the contracted observer provider and the agency. Therefore, it is the position of NMFS that the wage rate that the Department of Labor determines is appropriate for each specific locality should be applied to contracted fisheries observers whether they are working inside or outside of U.S. territorial waters in order to provide a fair, simple, and consistent application of the SCA/FLSA.

If you concur with this position, we strongly encourage you to advise WASC to request a revised Wage Rate Determination from the Department of Labor for Honolulu, as well as for localities that may be associated with the deployment of observers under current West Coast observer contracts as well as those solicited in the future. This would apply to contracts, cooperative agreements, and grants issued for the deployment of observers in the Alaska Marine Mammal Observer Program, the West Coast Groundfish Observer Program (via a cooperative agreement with the Pacific States Marine Fisheries Commission), and the California Longline and Gillnet Observer Programs. This will ensure that wage rates for fisheries observers reflect the new Position Descriptions for Fishery Observers that were provided to the Department of Labor in 2002, and that overtime pay is provided under these contracts in accordance with the SCA, FLSA, or other applicable laws.

Attachments

Attachment 2

Summary of Cost Impact:
70 Hour Workweek Model vs. FLSA Model

	<u>70 Hour Workweek Model¹</u>	<u>FLSA Model²</u>
Weekly Compensation Cost for One Observer	\$904.00	\$2,350.48

¹ Derived based on an hourly rate of pay of \$9.84 (the minimum SCA wage) and a 70 hour workweek.

² Derived based on an hourly rate of pay of \$9.84 (the minimum SCA wage) and a 168 hour workweek.

Attachment 3

Section Number: 778.223

Section Name: Pay for non-productive hours distinguished.

Under the Act an employee must be compensated for all hours worked. As a general rule the term "hours worked" will include: (a) All time during which an employee is required to be on duty or to be on the employer's premises or at a prescribed workplace and (b) all time during which an employee is suffered or permitted to work whether or not he is required to do so. Thus, working time is not limited to the hours spent in active productive labor, but includes time given by the employee to the employer even though part of the time may be spent in idleness. Some of the hours spent by employees, under certain circumstances, in such activities as waiting for work, remaining "on call", traveling on the employer's business or to and from workplaces, and in meal periods and rest periods are regarded as working time and some are not. The governing principles are discussed in part 785 of this chapter (interpretative bulletin on "hours worked") and part 790 of this chapter (statement of effect of Portal-to-Portal Act of 1947). To the extent that these hours are regarded as working time, payment made as compensation for these hours obviously cannot be characterized as "payments not for hours worked." Such compensation is treated in the same manner as compensation for any other working time and is, of course, included in the regular rate of pay. Where payment is ostensibly made as compensation for such of these hours as are not regarded as working time under the Act, the payment is nevertheless included in the regular rate of pay unless it qualifies for exclusion from the regular rate as one of a type of "payments made for occasional periods when no work is performed due to * * * failure of the employer to provide sufficient work, or other similar cause" as discussed in Sec. 778.218 or is excludable on some other basis under section 7(e)(2). For example, an employment contract may provide that employees who are assigned to take calls for specific periods will receive a payment of \$5 for each 8-hour period during which they are "on call" in addition to pay at their regular (or overtime) rate for hours actually spent in making calls. If the employees who are thus on call are not confined to their homes or to any particular place, but may come and go as they please, provided that they leave word where they may be reached, the hours spent "on call" are not considered as hours worked. Although the payment received by such employees for such "on call" time is, therefore, not allocable to any specific hours of work, it is clearly paid as compensation for performing a duty involved in the employee's job and is not of a type excludable under section 7(e)(2). The payment must therefore be included in the employee's regular rate in the same manner as any payment for services, such as an attendance bonus, which is not related to any specific hours of work. [46 FR 7313, Jan. 23, 1981]

Section Number: 785.17

Section Name: On-call time.

An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call". An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call. (Armour & Co. v. Wantock, 323 U.S. 126 (1944); Handler v. Thrasher, 191 F. 2d 120 (C.A. 10, 1951); Walling v. Bank of Waynesboro, Georgia, 61 F. Supp. 384 (S.D. Ga. 1945))

Action Number: 785.15

Section Name: On duty.

A stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, a fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity. The rule also applies to employees who work away from the plant. For example, a repair man is working while he waits for his employer's customer to get the premises in readiness. The time is worktime even though the employee is allowed to leave the premises or the job site during such periods of inactivity. The periods during which these occur are unpredictable. They are usually of short duration. In either event the employee is unable to use the time effectively for his own purposes. It belongs to and is controlled by the employer. In all of these cases waiting is an integral part of the job. The employee is engaged to wait. (See: *Skidmore v. Swift*, 323 U.S. 134, 137 (1944); *Wright v. Carrigg*, 275 F. 2d 448, 14 W.H. Cases (C.A. 4, 1960); *Mitchell v. Wigger*, 39 Labor Cases, para. 66,278, 14 W.H. Cases 534 (D.N.M. 1960); *Mitchell v. Nicholson*, 179 F. Supp, 292, 14 W.H. Cases 487 (W.D.N.C. 1959))

Section Number: 778.318

Section Name: Productive and nonproductive hours of work.

(a) Failure to pay for nonproductive time worked. Some agreements provide for payment only for the hours spent in productive work; the work hours spent in waiting time, time spent in travel on the employer's behalf or similar nonproductive time are not made compensable and in some cases are neither counted nor compensated. Payment pursuant to such an agreement will not comply with the Act; such nonproductive working hours must be counted and paid for.

(b) Compensation payable for nonproductive hours worked. The parties may agree to compensate nonproductive hours worked at a rate (at least the minimum) which is lower than the rate applicable to productive work. In such a case, the regular rate is the weighted average of the two rates, as discussed in Sec. 778.115 and the employee whose maximum hours standard is 40 hours is owed compensation at his regular rate for all of the first 40 hours and at a rate not less than one and one-half times this rate for all hours in excess of 40. (See Sec. 778.415 for the alternative method of computing overtime pay on the applicable rate.) In the absence of any agreement setting a different rate for nonproductive hours, the employee would be owed compensation at the regular hourly rate set for productive work for all hours up to 40 and at a rate at least one and one-half times that rate for hours in excess of 40.

(c) Compensation attributable to both productive and nonproductive hours. The situation described in paragraph (a) of this section is to be distinguished from one in which such nonproductive hours are properly counted as working time but no special hourly rate is assigned to such hours because it is understood by the parties that the other compensation received by the employee is intended to cover pay for such hours. For example, while it is not proper for an employer to agree with his pieceworkers that the hours spent in down-time (waiting for work) will not be paid for or will be neither paid for nor counted, it is permissible for the parties to agree that the pay the employees will earn at piece rates is intended to compensate them for all hours worked, the productive as well as the nonproductive hours. If this is the agreement of the parties, the regular rate of the pieceworker will be the rate determined by dividing the total piecework earnings by the total hours worked (both productive and nonproductive) in the workweek. Extra compensation (one-half the rate as so determined) would, of course, be due for each hour worked in excess of the applicable maximum hours standard.

Section Number: 785.22

Section Name: Duty of 24 hours or more.

(a) General. Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. If sleeping period is of more than 8 hours, only 8 hours will be credited. Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked. (*Armour v. Wantock*, 323 U.S. 126 (1944); *Skidmore v. Swift*, 323 U.S. 134 (1944); *General Electric Co. v. Porter*, 208 F. 2d 805 (C.A. 9, 1953), cert. denied, 347 U.S. 951, 975 (1954); *Bowers v. Remington Rand*, 64 F. Supp. 620 (S.D. Ill, 1946), aff'd 159 F. 2d 114 (C.A. 7, 1946) cert. denied 330 U.S. 843 (1947); *Bell v. Porter*, 159 F. 2d 117 (C.A. 7, 1946) cert. denied 330 U.S. 813 (1947); *Bridgeman v. Ford, Bacon & Davis*, 161 F. 2d 962 (C.A. 8, 1947); *Rokey v. Day & Zimmerman*, 157 F. 2d 736 (C.A. 8, 1946); *McLaughlin v. Todd & Brown, Inc.*, 7 W.H. Cases 1014; 15 Labor Cases para. 64,606 (N.D. Ind. 1948); *Campbell v. Jones & Laughlin*, 70 F. Supp. 996 (W.D. Pa. 1947).)

(b) Interruptions of sleep. If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted. For enforcement purposes, the Divisions have adopted the rule that if the employee cannot get at least 5 hours' sleep during the scheduled period the entire time is working time.

(See *Eustice v. Federal Cartridge Corp.*, 66 F. Supp. 55 (D. Minn. 1946).)

Attachment 4

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- Code of Federal Regulations Pertaining to ESA
- ↳ Title 29 Labor
- ↳ Chapter V Wage and Hour Division, Department of Labor
- ↳ Part 784 Provisions of the Fair Labor Standards Act Applicable to Fishing and Operations on Aquatic Products
- ↳ Subpart B Exemptions Provisions Relating to Fishing and Aquatic Products

29 CFR 784.100 - The section 13(a)(5) exemption. The Statutory Provisions

- Section Number: 784.100
- Section Name: The section 13(a)(5) exemption. The Statutory Provisions

Section 13(a)(5) grants an exemption from both the minimum wage and the overtime requirements of the Act and applies to "any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning, or packing of such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee."



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CFR Code of Federal Regulations Pertaining to ESA

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29 CFR 784.106 - Relationship of employee's work to the named operations.

▪ **Section Number:** 784.106

▪ **Section Name:** Relationship of employee's work to the named operations.

It is clear from the language of section 13(a)(5) and section 13(b)(4) of the Act, and from their legislative history as discussed in Secs. 784.102-784.105, that the exemptions which they provide are applicable only to those employees who are "employed in" the named operations. Under the Act as amended in 1961 and in accordance with the evident legislative intent (see Sec. 784.105), an employee will be considered to be "employed in" an operation named in section 13(a)(5) or 13(b)(4) where his work is an essential and integrated step in performing such named operation (see *Mitchell v. Myrtle Grove Packing Co.*, 350 U.S. 891, approving *Tobin v. Blue Channel Corp.*, 198 F. 2d 245; *Mitchell v. Stinson*, 217 F. 2d 210), or where the employee is engaged in activities which are functionally so related to a named operation under the particular facts and circumstances that they are necessary to the conduct of such operation and his employment is, as a practical matter, necessarily and directly a part of carrying on the operation for which exemption was intended (*Mitchell v. Trade Winds, Inc.*, 289 F. 2d 278; see also *Waller v. Humphreys*, 133 F. 2d 193 and *McComb v. Consolidated Fisheries Co.*, 174 F. 2d 74). Under these principles, generally an employee performing functions without which the named operations could not go on is, as a practical matter, "employed in" such operations. It is also possible for an employee to come within the exemption provided by section 13(a)(5) or section 13(b)(4) even though he does not directly participate in the physical acts which are performed on the enumerated marine products in carrying on the operations which are named in that section of the Act. However, it is not enough to establish the applicability of such an exemption that an employee is hired by an employer who is engaged in one or more of the named operations or that the employee is employed by an establishment or in an industry in which operations enumerated in section 13(a)(5), or section 13(b)(4) are performed. The relationship between what he does and the performance of the named operations must be examined to determine whether an application of the above-stated principles to all the facts and circumstances will justify the conclusion that he is "employed in"



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29 CFR 784.118 - The exemption is intended for work affected by natural factors.

- Section Number: 784.118
- Section Name: The exemption is intended for work affected by natural factors.

As indicated by the legislative history, the purpose of the section 13(a)(5) exemption is to exempt from the minimum wage and overtime provisions of the Act employment in those activities in the fishing industry that are controlled or materially affected by natural factors or elements, such as the vicissitudes of the weather, the changeable conditions of the water, the run of the catch, and the perishability of the products obtained (83 Cong. Rec. 7408, 7443; S. Rep. No. 145, p. 33 on H.R. 3935, 87th Cong., first session; Fleming v. Hawkeye Pearl Button Co., 113 F. 2d 52; Walling v. Haden, 153 F. 2d 196, certiorari denied 328 U.S. 866).



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