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

August 31, 2016

Mr. Arvidas Poshkus
A.I.S., Inc.
4516 Union Bay Place NE
Seattle, WA 98105

Dear Mr. Poshkus:

The National Marine Fisheries Service has determined that your application seeking an observer provider permit for the North Pacific Observer Program is complete and all applicable requirements are met. Therefore, your permit application is approved, and this letter serves as issuance of a North Pacific observer provider permit. Enclosed is information about the factors considered in evaluating your permit application.

Your permit is effective as of the date on this letter. If no observers are deployed by A.I.S., Inc., in the North Pacific groundfish fisheries for a period of 12 continuous months, your observer provider permit will expire. We recommend that you carefully review the responsibilities of observer providers as outlined in Federal regulations at 50 CFR § 679.52.

Your observer provider permit is not transferable. If A.I.S., Inc., experiences a change in ownership in the future, you must submit a new permit application and cannot continue to operate until a new permit is issued.

Congratulations on submitting a successful application and receiving this observer provider permit. We look forward to working with you and your staff in the future.

Sincerely,

James W. Balsiger, Ph.D.
Administrator, Alaska Region

Enclosure

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
Alaska Fisheries Science Center
7600 Sand Point Way N.E. Bldg 4
Seattle, Washington 98115-6349
(206) 526-4000

August 16, 2016

MEMORANDUM FOR: James W. Balsiger, Ph.D.
Administrator, Alaska Region

FROM: Chris Rilling, Director
Fishery Monitoring and Analysis Division

THROUGH: Douglas DeMaster, Ph.D.
Science and Research Director, Alaska Region

SUBJECT: NMFS review of AIS, Inc.'s application for an observer provider permit, findings, and recommendation for approval of issuance of permit

Federal fishing regulations for Alaska require observer provider companies to obtain a permit from the National Marine Fisheries Service (NMFS) to provide observer services for groundfish fisheries requiring full observer coverage per § 679.51(a)(2) and (b)(2). Section 679.52(a) outlines the process for submitting a permit application to NMFS to become an observer provider for full coverage services. At present, four companies are permitted to provide observer services in fisheries requiring full coverage.

In an application dated March 24, 2016, AIS, Inc. (AIS) applied to be permitted as a full coverage observer provider in the North Pacific groundfish fisheries. AIS currently holds a Federal contract with NMFS to provide observer services in North Pacific groundfish and halibut fisheries requiring partial observer coverage per § 679.51(a)(1). As required by § 679.52(a)(4)(i), the Regional Administrator established an observer provider permit application review board composed of NMFS employees to review and evaluate AIS's application. This memorandum documents the review board's recommendations to the Regional Administrator.

The review board reviewed AIS's application and an application addendum dated July 19, 2016, and determined that the application is complete and contains all of the information required in § 679.52(a)(3). In addition, an important consideration for the review board is whether AIS can successfully fulfill the requirements for full coverage providers on an on-going basis in the future. The review board notes that AIS has successfully provided observers for the partial observer coverage category in the North Pacific since 2013. The performance of AIS in

providing observer services in the partial coverage category in the North Pacific is documented in an annual report provided to the North Pacific Fishery Management Council (Council) in June of each year[1]. AIS has met all of the goals of providing observers to vessels in the partial coverage category in a timely manner with minimal delays or cancellations of observed trips, and has met all of the terms and conditions of the contract. A contractor performance assessment report card based on six different performance criteria is submitted annually to the NOAA Acquisition and Grants Office and AIS has consistently received either very good or exceptional ratings. On October 2, 2014, a solicitation for a new observer services contract for the North Pacific was released on FedBizOpps.gov and in April 2015, NOAA awarded a new 5-year contract to AIS. Many of the requirements for the partial coverage observer services contract are the same as, or similar to, the requirements for full coverage observer providers.

Section 679.52(a)(4) also requires NMFS to consider whether approval of the application is consistent with the needs and objectives of the observer program, and authorizes NMFS to consider "other relevant factors" in review of an observer provider permit application. The remainder of this memorandum primarily addresses information about other issues the review board recommends are relevant to the review of AIS's application. A summary of the findings and recommendations of the review board are at the end of the memorandum.

During the course of reviewing AIS's application, additional information regarding the potential repercussions of AIS's application for full coverage services was submitted to NMFS and the Council by the full coverage observer provider companies Alaskan Observers Inc., Saltwater Inc., and Tech Sea Inc. via written correspondence and in public testimony at the June 2016 Council meeting in Kodiak, Alaska.[2&3] The full coverage providers asserted that approval of AIS as a full coverage observer provider would create an unfair competitive advantage for AIS because it holds the Federal contract to provide observer services in the partial observer coverage category in the North Pacific. Specifically, the full coverage observer providers stated that holding this contract allows AIS to generate a steady supply of lead level 2 (LL2) observers[4] because AIS has "sole access to a fleet of small fixed-gear vessels," and provides AIS access to confidential fisheries information, observer gear in the field, reimbursement for observer briefings and trainings, and an expedited observer debriefing process, all of which are not available to the currently permitted full coverage observer providers.

The full coverage observer providers further stated that permitting AIS as a full coverage provider would create an un-level playing field among the full coverage providers, diminish the North Pacific Observer Program in the long run, increase costs, and decrease data quality and flexibility. The full coverage providers did not provide an analysis or data to support their assertions that costs would increase and data quality would decrease if AIS is permitted as a full

[1] See NMFS 2014 and 2015 North Pacific Groundfish and Halibut Observer Program Annual Reports https://npfmc.legistar.com/View.ashx?M=F&ID=3753675&GUID=A5E5BCBB-A34A-439B-AF7B-8430577511AA
http://npfmc.legistar.com/gateway.aspx?M=F&ID=1128d2b3-5246-48c4-ab69-785bdc0108c1.pdf
[2] See Agenda item C1 at http://npfmc.legistar.com/gateway.aspx?M=F&ID=6bdee979-17c7-47d2-b0d3-c2f21ae04365.pdf
[3] North Pacific Fishery Management Council audio files 06/08/2016 C1 Observer Program.
[4] For a full description of the regulatory requirements for a lead level 2 endorsement, see § 679.53(a)(5)(iv).

coverage observer provider. Rather, they requested that NMFS postpone action on AIS's application until "a full and complete analysis" was prepared and publically reviewed.

After consideration of testimony by the full coverage observer providers, the Council passed a motion on June 9, 2016, requesting that "NMFS postpone action on AIS's application to be a full coverage observer provider until getting input from the Council after they have received the October white paper on LL2 observer issues that will include looking at the impacts of an observer provider being in the partial and full coverage categories in terms of 1) confidential fishery information; 2) reimbursements by the Federal government; and 3) other unfair competitive advantages." The review board interprets the three issues identified by the Council to be the same issues related to unfair competitive advantage that were identified by the full coverage observer providers in their May 23, 2016, letter. The review board addresses these issues below.

Background

The regulations controlling NMFS' issuance of an observer provider permit do not address whether addition of another observer provider would create an unfair competitive advantage for the newly-permitted observer provider. While there is no regulatory guidance or definition for "unfair competitive advantage," NMFS can look at federal contract protest litigation for guidance. In the federal acquisition field, contracting officials must avoid, neutralize, or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity.[5] These situations can be broadly categorized into three groups: (1) unequal access to information; (2) impaired objectivity; and (3) biased ground rules.[6] An unfair competitive advantage exists, for example, where a contractor competing for award of any federal contract possesses proprietary information that was obtained from a government official without proper authorization and where access to that information may provide the firm a competitive advantage in a competition for a government contract. Contracting officials will presume the existence of an unfair competitive advantage where an offeror possesses competitively useful, non-public information that would assist that offeror in obtaining a contract, provided the determination of an unfair competitive advantage is based on facts, and not mere innuendo or supposition.[7] In the context of federal acquisition, the existence of unfair competitive advantage must be based on "hard facts" rather than inference or suspicion.[8] As discussed further below, and drawing from this particular guidance when relevant, NMFS has no basis to conclude that an unfair competitive advantage exists if AIS receives a full coverage observer provider permit.

The 5-year contract issued to AIS was awarded through a competitive bidding process in April 2015 and could have been awarded to any observer provider company. Award of this contract

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[5] FAR §§9.504(a), 9.505.
[6] *See* FAR §9.505(b); *Smartronix, Inc.; ManTech Advanced Sys Int'l, Inc.*, B–411970 *et al.*, Nov. 25, 2015, 2015 CPD ¶373 at 15–16.
[7] *Threat Mgmt. Group*, B–407766.6, Jul. 3, 2103, 2013 CPD ¶167 at 5. *Arctic Slope Mission Servs., LLC*, B-412851, 2016 CPD ¶ 169 at 7 (Comp. Gen. June 21, 2016).
[8] See *TeleCommunication Sys., Inc.*, B-404496.3, Oct. 26, 2011, 2011 CPD ¶229 at 3

was done through a transparent, public process available to all interested parties. Currently permitted full coverage observer providers were eligible to compete for the partial coverage contract, and there is no prohibition on an observer provider holding a contract with NMFS to provide observer services while also being permitted as a full coverage observer provider. AIS would not be entitled to payment or reimbursement under the partial coverage contract for any services rendered under full coverage per the terms of the current contract.[9] The current contract expires June 16, 2019, and a new contract will be solicited through a competitive bidding process at that time.

A review of other observer programs in the United States indicates that there are several regions in which observer provider companies hold both Federal contracts for observer services and direct contracts with fishery participants to provide observer services.[10] This is a fairly common practice both within and among different regions in which industry pays a portion of observer costs. Some providers hold Federal contracts in one or more regions while providing direct pay-as-you-go services in another region, while other providers hold both Federal contracts and direct contracts with industry within a single region. As a result, issuing a permit for AIS to become a full coverage provider while also holding the Federal contract to provide observer services would not represent a unique, unusual, or prohibited situation.

1. *Observer providers assert that AIS would have an unfair competitive advantage over currently permitted full coverage observer providers in the provision of LL2 observers for vessels using fixed (nontrawl) gear because AIS has sole access to a fleet of small fixed-gear vessels through its contract to provide observers in the partial observer coverage category.*

The main issue raised by the current full coverage observer providers is that approval of AIS as a full coverage observer provider would create an unfair competitive advantage for AIS that would negatively affect the existing full coverage observer providers and the program as a whole. The primary difference regarding potential unfair competitive advantage in the North Pacific as compared to other regions is that in the North Pacific, some vessels subject to full observer coverage must carry an observer with an LL2 endorsement. Specifically, unlike other catcher/processors in the North Pacific that are required to carry two observers, catcher/processor longline vessels with NMFS certified flow scales are authorized to carry only one observer, but the observer is required by regulation to have an LL2 endorsement. The total number of observer days in the full observer coverage category in 2015 was 44,123 days, of which 9,541 (22%) were observers with LL2 endorsements deployed on vessels using longline gear that were required to carry LL2 observers.

To obtain an LL2 endorsement for a fixed gear (nontrawl) vessel an observer is required to achieve the following:[11]

[9] Personal communication in May 2016 with NOAA Acquisition and Grants Office staff familiar with the partial coverage contract.
[10] Personal communication in May 2016 with NMFS Northeast and West Coast Observer Program Managers.
[11] See § 679.53(a)(5)(iv).

- Successfully complete 60 days of observer data collection in the groundfish or halibut fisheries off Alaska;
- Receive an evaluation from NMFS for their most recent deployment that indicates the observer's performance met Fishery Monitoring and Analysis Division's (FMA's or Observer Program's) performance standards for that deployment;
- Successfully complete at least two cruises of 10 days each; and,
- Sample at least 30 sets on a vessel using nontrawl gear.

The first requirement for LL2 observers was implemented for the Western Alaska Community Development Quota (CDQ) Program in 1998.[12] The specific requirements that apply to the longline catcher/processors were implemented in 2012[13] to ensure that observers placed into this challenging work environment have the requisite experience to successfully complete the task of collecting high quality data. Under the restructured observer program, with the exception of a few options described below, full coverage providers have reduced access to fixed gear vessels that provide the necessary training and sampled hauls needed to obtain an LL2 endorsement because most of the fixed gear vessels that do not require observers with prior experience are in the partial observer coverage category.

In the summer of 2014, industry representatives stated that there was a shortage of LL2 observers in the catcher/processor longline fleet. In November 2014, FMA staff met with the Freezer Longline Coalition (FLC) and observer providers to consider non-regulatory options to address the shortage, including streamlining the process for observers to obtain LL2 endorsements when deployed as a voluntary second observer on FLC vessels. A summary of non-regulatory actions that were taken were provided by NMFS to the Council's Observer Advisory Committee in September 2015.[14] While these actions appear to have resolved the issue, according to the FLC this has come at a cost of the industry having to pay for the voluntary second observers. From the industry's perspective, a less costly and permanent long-term solution to reduce the potential for shortages in LL2 observers for fixed gear vessels is desired.

Currently, there are three options for observers in full coverage fisheries to obtain a LL2 endorsement. The first option is to deploy onto non-CDQ catcher/processors fishing with pot gear (§ 679.51(a)(2)(ii)). The second option is to deploy onto catcher/processors fishing with longline gear that do not have a flow scale (§ 679.51(a)(2)(vi)(E)). A third option is for catcher/processor longline vessels to voluntarily carry a second observer in order to for them to obtain the necessary sampled sets. There are approximately thirty longline catcher/processors active in the groundfish fisheries off Alaska. The current pool of LL2 observers available to full coverage providers does not indicate there is an imminent shortage in LL2 observers. In addition, although limited in number and nature, options are available for the existing full coverage observer providers to continue to generate new LL2 observers.

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[12] This final rule (63 FR 30381, June 4, 1998) established observer coverage and prior experience requirements for the newly expanded "multispecies" CDQ fisheries. What is now known as LL2 observers were referred to as "lead CDQ observers" in this final rule.

[13] The final rule (77 FR 59053, September 26, 2012) was effective October 26, 2012.

[14] National Marine Fisheries Service, Alaska Fisheries Science Center, Fishery Monitoring and Analysis Division. http://www.npfmc.org/wp-content/PDFdocuments/conservation_issues/Observer/LL2Update915.pdf

2. *Observer providers assert that AIS will have an unfair competitive advantage because confidential fisheries information is shared with AIS that is not shared with full coverage providers. AIS would be entering into the full observer coverage sector with confidential information, not available to other providers, that has been granted them through their contracted relationship with the government.*

Other than the confidential data collected by observers while deployed at sea, NMFS is not aware of any confidential data being shared with AIS or full coverage observer providers. Data collected by observers is transmitted via secure networks to NMFS for processing and hard copies are maintained by NMFS in the FMA Seattle office. The only fisheries information currently provided to AIS are the vessel names and the owner/operator's contact information which are provided through the Observer Declare and Deploy System when a trip is logged by the owner/operator. This is done to ensure that AIS can contact the appropriate vessel owner/operator to arrange logistics and timing of deployment of an observer onto the vessel selected for coverage.

3. *Observer providers assert that AIS will have an unfair competitive advantage because NMFS issues gear to AIS field staff in case of emergencies. Other providers are not given this same consideration*

FMA issues sampling and safety gear to all observers upon completion of training in Seattle, and the gear must be returned to Seattle upon completion of the observer's deployment. Due to instances of gear being lost during flights from Seattle to remote ports in Alaska, FMA began working with AIS as well as the full coverage providers to issue full sets of observer gear to field offices in case of emergencies. An example of an emergency situation is one in which an observer's gear is confiscated by the Transportation Security Agency at an airport security check or a set of gear is lost overboard. An example of a non-emergency situation is if the observer's gear is not on the same flight as the observer, but there is every indication that the gear will arrive on the next flight. In the former case, the gear is irretrievably lost and must be replaced, whereas in the latter case there may be a delay but the situation can be remedied by waiting. FMA also stations gear in FMA field offices in Kodiak, Dutch Harbor, and Anchorage that is available to all providers. Although there are limitations on the amount of gear that can be prepositioned in the field, FMA will continue to work with all observer providers on an as-needed basis to provide gear when and where it is needed.

4. *Observer providers assert that AIS will have an unfair competitive advantage because, in the 2015 Annual Report, NMFS reported that it had reduced the (government paid) partial coverage debriefing wait times from 12 days to 5 days. There was no analysis done of the full coverage debriefing wait times; therefore, the observer providers assume there was no equal effort for this sector.*

Due to continued interest on the part of the Council and NMFS to reduce costs and improve efficiencies in the partial coverage contract, as well as to reduce the backlog of observers waiting in Seattle for debriefing during peak debriefing periods, FMA implemented changes to the debriefing process for partial coverage observers in 2015. Partial coverage is inherently different from full coverage. While full coverage observers tend to deploy on three or four larger vessels

during their 90-day deployment, partial coverage observers deploy on short fishing trips, 3 to 5 days in duration, on multiple vessels less than 125 feet length overall during their 90-day deployment. The complexity of debriefing an observer who has deployed on multiple smaller vessels can be challenging due to problems recalling specific sampling circumstances on a particular vessel. The ability to recall specific situations is essential during the debriefing process in which FMA staff are responsible for verifying and ensuring that sampling protocols were followed and that data were collected properly, thus ensuring high data quality.

As a result of the unique needs in the partial observer coverage category, the FMA implemented a change whereby FMA debriefing staff are assigned to specific observers to monitor performance while the observers are deployed on vessels in the partial coverage fleet. Observers are required to mail their data sheets after completing deployments on each vessel so that FMA debriefing staff can front-load the debriefing process. Decreasing the backlog of partial coverage observers during peak debriefing periods has had a positive impact on debriefing times for both full and partial coverage observers, and anecdotal information suggests that data quality also has improved. In meetings with full coverage providers in April 2016, they noted that debriefing times have been substantially reduced during the past year. This information will be included in the 2016 Observer Program Annual Report.

Findings and Recommendations

As noted above, the review board determined that AIS's application is complete and contains all of the information required in § 679.52(a)(3). In addition, AIS has demonstrated the ability to successfully provide observers for the North Pacific fisheries. The review board also considered other relevant factors identified by the full coverage observer providers and the Council. Specifically, the review board considered whether AIS would have an unfair competitive advantage as a full coverage observer provider. **For reasons described below and elsewhere in this memorandum, the review board recommends approval of AIS's application.**

The review board acknowledges that, should AIS be permitted as a full coverage observer provider, it may have a competitive advantage over other full coverage observer providers in the provision of LL2 observers for vessels using nontrawl gear. This competitive advantage could occur because many of the opportunities for observers to obtain the experience necessary to qualify as an LL2 observer for vessels using nontrawl gear are on vessels in the partial observer coverage category. AIS is the sole provider for observers in the partial coverage category. However, the review board concluded that AIS's potential competitive advantage does not constitute an unfair competitive advantage. There are no prohibitions against an observer provider holding a contract with NMFS to provide observer services and being permitted as a full coverage observer provider. The other full coverage observer providers will continue to have some options through which observers under their employ can obtain the experience necessary for the LL2 endorsement, and they will have another opportunity to compete for the partial coverage contract when it is renewed in 2019. NMFS has no information suggesting that AIS has access to proprietary or confidential information through its contract with NMFS, nor that it had any special opportunity to set ground rules for observer services with NMFS. In addition, the review board concluded that the manner in which NMFS replaces gear in the field and the briefing and debriefing schedules for observers would not create an unfair competitive advantage

for AIS. Finally, AIS will not receive any reimbursement from the government for costs it would incur to provide observers in the full observer coverage category.

NMFS has received numerous communications expressing concern about the potential for a shortage of LL2 observers and the economic consequences for the fishing industry if they cannot obtain observers when needed. The Council passed a motion on October 13, 2015[15] to "[E]ncourage AIS to become a certified observer provider, and supply LL2 observers to FLC vessel [*sic*]." AIS subsequently submitted such an application to NMFS. Taking actions that may increase the supply of LL2 observers for vessels using nontrawl gear is consistent with the needs and objectives of the Observer Program.

The review board also considered requests by the other full coverage observer providers and the Council to delay consideration of AIS's application until additional analysis of concerns about unfair competitive advantage could be analyzed and reviewed by the Council in October 2016. Regulations governing the review of an observer provider permit application do not require review by the Council or public or provide guidance for how or when to incorporate such a review. In addition, complete information about the economic impact of permitting AIS as a full coverage provider on the other full coverage providers or an evaluation of the issue of competitive advantage will not be in the October 2016 LL2 discussion paper. Therefore, the request to delay consideration of AIS's application until such an analysis could be prepared would mean a delay well beyond a few months. The review board recommends that such a delay would deny AIS timely review of the application it submitted based on a process described in regulation that did not require such an analysis or Council review.

Identifying the impacts of permitting a specific observer provider on the profitability or viability of other full coverage observer providers or the full coverage observer provider market in general is difficult, as is addressing fairness and equity, or determining what constitutes a level playing field. An analysis to examine these questions can be done, but it would be complicated and would take some time to complete. In addition, such an analysis likely would need to rely on confidential business information that may not be available to analysts or be releasable to the Council and public. Furthermore, even if NMFS or the Council could establish a desired level of competition among the full coverage observer providers, the appropriate role for NMFS in monitoring and managing that market could present difficult policy and legal challenges, and could have implications for future conditions for the partial observer coverage contract for the Alaska Region and other regions.

NMFS's primary responsibility is to implement observer coverage, certification, and experience requirements that support collection of the data needed to conserve and manage the North Pacific groundfish and halibut fisheries, and to understand the impact of those fisheries on other living marine resources. Although the impact of the observer requirements on the full coverage observer providers is secondary to meeting conservation and management objectives, the review board notes that a competitive full coverage observer provider market is consistent with the needs and objectives of the Observer Program. A competitive market supports the goals of

[15] http://npfmc.legistar.com/gateway.aspx?M=F&ID=d48bb7fd-f8ac-418e-a49b-5740794a46b5.pdf

providing the observers necessary to meet NMFS's requirements and minimizing the cost of observer coverage to the fishing industry. However, NMFS does not have a clear authority or responsibility to ensure a level playing field among the full coverage observer providers or guidance about when and how to undertake such a role. As the Council examines the nature of the problems that currently exist with the LL2 observer coverage requirements and alternatives to address these problems, the Council could consider whether, in the future, additional measures should be taken to regulate competition among full coverage observer providers, or prohibit observer providers permitted in the full coverage category from also contracting with NMFS to provide observer services.