

MEMORANDUM

TO: Council, SSC and AP Members

FROM: Clarence G. Pautzke  
Executive Director



ESTIMATED TIME

4 HOURS

DATE: April 8, 1996

SUBJECT: Observer Program

**ACTION REQUIRED**

- (a) Receive Report on Draft Statement of Work (SOW) for 'Third Party' Program and EA/RIR to repeal Research Plan and establish Third Party Program.
- (b) Receive report of Observer Advisory Committee.
- (c) Final action on EA/RIR and comments on SOW.

**BACKGROUND**

In December 1995 the Council voted to repeal the fee-based Research Plan and initiate development of a modified pay-as-you-go Observer Program utilizing a third party 'Prime' contractor as an interface between observer contracting companies and vessels/plants required to carry observers. The Council's motion is included for reference as Item C-3(a). It is likely that such a system will not be fully in place until mid-1997, while the Plan language requiring observer coverage in the groundfish fisheries will expire at the end of 1996. Therefore, the Council needs to take final action at this meeting in order to have a replacement program in place at the beginning of 1997. Basically, this Plan Amendment will re-establish existing observer requirements, while including the flexibility to incorporate the third party 'Prime' contractor in mid-1997.

The SOW and the EA/RIR were mailed to you last week and will be presented at this meeting by NMFS staff. In addition to taking action on the EA/RIR (plan amendments), the Council will be reviewing and providing comment on the draft SOW. The comment period on this SOW ends on April 22, after which time NMFS will re-issue it as a Request for Proposals (RFP). Selection of the Prime contractor could occur this fall - allowing for start-up time, the new program probably would not be fully operational until mid-1997.

The Council's Observer Advisory Committee (OAC) met on March 28-29 in Seattle to review the same documents and provide recommendations to the Council. Their report, which includes specific recommendations on the SOW, is included as Item C-3(b), and will be presented by OAC Chair Chris Blackburn. Part of the Council's motion from December included development of alternatives to address the disproportionately high costs that burden some smaller operations (as percentage of gross revenues from groundfish) under a pay-as-you-go program. This plan amendment does not directly address that issue, and more time will be needed to research the viability of the alternatives posed to date. It is uncertain whether this issue can be addressed in time for 1997 implementation.

Comments received on this issue are under Item C-3(c). Item C-3(d) is a letter and information from NMFS regarding the refund process for fees collected under the Research Plan.

**DRAFT MINUTES  
NPFMC  
DECEMBER 1995**

**Report of the Scientific and Statistical Committee**

The SSC reiterated its serious concern over future data quality and urged the Council to move swiftly to select a program. Prolonged debate on this issue will only increase uncertainty faced by industry and persons associated with the program and will undermine the morale of observers and program staff, with the likely end result being a deterioration in the quality of the program and data collected.

**Report of the Advisory Panel**

The AP recommended the Council not go forward with the Research Plan, but that they proceed with an analysis of a modified pay-as-you-go program outlined in a letter submitted by Courageous Seafoods, with the analysis available for Council review at the April Council meeting. Other AP recommendations included analysis of a regulatory process to allow randomized pooling of observer coverage by fishery for those vessels requiring less than 100% coverage, and that if the Council proceeds with a modified pay-as-you-go program, they should proceed immediately to terminate the 1995 fee collection program and refund 1995 fees collected.

**DISCUSSION/MOTIONS**

**Steve Pennoyer moved:**

**That the Council repeal the Research Plan and its associated fee-based funding mechanism for the North Pacific fisheries and that staff, in consultation with the OOC, be directed to come back in April with an EA/RIR, draft proposed rule, and draft FMP amendment language that would implement a modified pay-as-you-go program for NMFS groundfish observer coverage.**

**As presented by staff to the Council on December 7, 1995, this program would retain the direct payment for observer services feature of the old Observer Plan but would incorporate changes specifically designed to address the needs for establishing an arms-length relationship between fishing companies and observer contractors, and assuring that observers receive fair and equitable treatment with regards to compensation packages and insurance coverage. Under this scheme NMFS would initiate a competitive procurement for a prime contractor with the stipulation that the prime contractor subcontract with observer companies for deployment of**

**observers. Fishing companies would contract directly with the prime contractor for all NMFS observer requirements and would be responsible for paying the contractor for each deployment. The AP recommendations on this issue would provide general guidelines for the development of the proposal.**

**A consistent mechanism for providing observers for ADF&G-managed FMP crab fisheries would also be developed. ADF&G would work closely with NMFS to develop this mechanism in order to ensure that the crab and groundfish observer programs would be operated in a compatible manner.**

**The Council's intent is to take final action on the modified pay-as-you-go program at its April 1996 meeting. Implementation would occur as early as possible in 1997.**

**Options for helping to defray costs to vessel owners who would pay an unreasonably high proportion of their gross catch value for direct observer coverage would be developed by an industry/agency workgroup for future consideration. The Council would receive a report from this group not later than its June, 1996 meeting.**

**The motion was seconded by Dave Benton.**

**Dave Fluharty moved to amend that the analysis include, but not be limited to the following options:**

- a. Adjusting coverage levels required in those fisheries to reduce the related observer costs;**
- b. Assessing a fleetwide surcharge of up to 10% of the cost of obtaining observers through the modified pay-as-you-go plan to create a fund to pay all or part of the costs of hiring and training observers to be deployed on vessels participating in such fisheries;**
- c. Permitting pooling arrangements under which vessels engaged in such fisheries that are not required to maintain 100% observer coverage could jointly employ one or more observers to cover their observer needs; and**
- d. such other options as may be identified during the analytical process.**

**DRAFT MINUTES  
NPFMC  
DECEMBER 1995**

**This option paper is to be prepared in time for the June 1996 Council meeting, with the goal of having an EA/RIR evaluating viable options available for review in September. And further, that the National Marine Fisheries Service initiate the steps necessary to terminate the 1995 research fee collection program and to issue refunds of fees collected to date.**

**The motion was seconded by David Benton.**

Steve Pennoyer pointed out that repeal of the Research Plan is included in the original motion, as well as several other of these provisions. There was also discussion of the timing of an amendment for the Fluharty motion; it was understood that this portion could not be done in time for a 1997 implementation.

Linda Behnken moved to amend to retain the option to consider a fee-based program, up to 2%, at the April meeting. The motion was seconded by Robin Samuelsen and failed, 7 to 4, with Behnken, O'Leary, Samuelsen and Tillion voting in favor.

Dr. Fluharty's amendment carried unanimously and the main motion, as amended, carried, 8 to 3, with Behnken, O'Leary and Tillion voting no.

Dave Benton moved to establish an Observer Program Advisory Committee, similar to the Observer Oversight Committee; the committee will include at least two members that are observers in addition to observer company representatives. The motion was seconded by Linda Behnken and carried without objection.

The Council indicated that the "new" committee is necessary because the Observer Oversight Committee will be disbanded as a result of the repeal of the Research Plan. The new committee would be similar to the OOC and have similar responsibilities.

**EXECUTIVE SUMMARY**  
**OBSERVER ADVISORY COMMITTEE - SUBMITTED FOR THE APRIL 1996 MEETING**  
**OF THE NORTH PACIFIC FISHERY MANAGEMENT COUNCIL**

The North Pacific Fishery Management Council's Observer Advisory Committee at its March 28 and 29 meeting reviewed National Marine Fisheries Service's Draft Statement of Work, the EA/RIR which replaces the Research Plan with a third party pay-as-you-go Observer program and the proposed implementing recommendations.

**I. DRAFT STATEMENT OF WORK - COMMENTS**

**GROUND FISH AND SHELL FISH OBSERVER PROGRAMS**

At this point, the State of Alaska's shellfish observer program is not included under the proposed third party pay-as-you-go observer program. Whether the shellfish program will be incorporated in the future depends on the Board of Fish and Alaska Department of Fish and Game. Treating the shellfish observer program differently than the groundfish observer program may cause several problems.

1. Industry prefers "one stop shopping" for observers.
2. In order to assure no direct financial arrangement between observer contractors and vessels, NMFS proposed to prohibit subcontractors working for the prime contractor from any direct business dealings with vessels. This means that the same contractor would not be able to supply both groundfish and shellfish observers unless an exemption were made to specifically exempt supplying crab observers from the prohibition.
  - a. If there were not an exemption, there could be no or few contractors supplying crab observers.
  - b. If there is an exemption, the effort to eliminate direct financial relationships between contractors and vessels may be breached.

The Observer Advisory Committee understands NMFS and ADF&G will work towards resolving this conflict.

**OBSERVER QUALITY**

The OAC supports NMFS recommendation that observers should be graded based on experience and observer contractors should be required to maintain at least a minimum level of observers at the higher grades (grades 3 and 4).

The OAC also recommends that NMFS revise the grading system so that grade reflect the observer's diversity of experience on different vessels and gears as well as the observer's number of trips. This issue is discussed more fully in the attached minutes.

**OBSERVER COMPENSATION**

The OAC felt the RFP should specify some minimum level of compensation for entry level grade observers, but did not feel it was in a position to suggest a dollar amount. The OAC did feel it was appropriate that industry and observers should address this issue in their comments on the plan of work and during comments to the Council.

## **OBSERVER INSURANCE**

The insurance package mandated in the Statement of Work is the package recommended by the Insurance Technical Committee. The committee questioned the necessity for the Preferred Additional Coverages listed by NMFS, though felt coverage for the observer's computer and survival suit may be appropriate.

## **II. EA/RIR - COMMITTEE COMMENTS**

### **COSTS TO INDUSTRY**

The OAC feels it is important for industry to recognize that the proposed third party pay-as-you-go observer program will be more expensive than the current observer program and that some of the costs, which may be substantial, will not be quantifiable until the bid process is completed.

Items listed in the EA/RIR which represent additional costs to industry are:

1. Shift of costs for observer gear and computers: \$26.50 per observer deployment day.
2. Observer equipment such as rain gear: \$2/observer deployment day.

Unquantifiable costs include:

1. Prime Contractor Overhead.
2. Mandated salary at some level for training, briefing, travel and debriefing days.
3. Any increases in observer salaries.
4. Any increases in costs due to requiring minimal levels of experienced observers.
5. Any increases in costs due to mandatory insurance package.

Reductions in costs may occur in the following areas:

1. Subcontractors increased ability to plan for requests for observers.
2. Decreased risk of late or non-payment of fees.
3. Economies of scale.
4. Economies of specialization.

### **COST MITIGATION MEASURES FOR SMALL VESSELS**

The OAC feels that finding a legal and effective way to reduce the costs of observer coverage (in terms of percentage of the gross) to small vessels will require more time to explore than will be available without holding up implementation of the third-party pay-as-you-go plan.

The OAC compliments the NMFS staff on the timely and thorough job done on the Statement of Work, EA/RIR and implementing regulations and the attention that was paid to past and current industry comments.

**Report of the NPFMC  
OBSERVER ADVISORY COMMITTEE  
March 28-29, 1996**

The Council's Observer Advisory Committee met on March 28-29 at the Alaska Fisheries Science Center in Seattle, for the purpose of reviewing a Draft Statement of Work (SOW) and Draft EA/RIR for the Plan Amendments to establish a modified, pay-as-you-go Observer Program. This program would, as instructed by the Council, utilize a third party, umbrella organization as an interface between observer contracting companies and the fishing/processing operations required to carry groundfish observers. The following persons were in attendance:

Committee members:

Chris Blackburn, Chair	Arni Thompson	John Winther	Gary Westman
Lisa Polito	John Iani	Mandy Merklein	Nancy Munro
Michael Lake	Christian Assay	Paula Cullenberg	Teresa Turk
Paul MacGregor			

Agency/staff:

Chris Oliver	Sue Salvesson	Kim Rivera	Bill Karp
Shannon Fitzgerald	Bob Maier	Martin Loefflad	Joe Terry
Connie Sathre	Earl Krygier	Ken Griffin	

Other:

John Roos	Brent Paine	Dave Edick
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The Committee heard reports from NMFS Observer Program and Regional Office staff summarizing the SOW and the EA/RIR, noting that the public review period for the SOW will encompass both this meeting and the Council meeting. The SOW would be modified as necessary after all comments are received, and then released as a Request for Proposals (RFP), likely in June, in order to select a 'Prime Contractor' to administer the modified observer program. If the contract is awarded this fall, the new program could be in place as early as mid-1997. The EA/RIR (Plan Amendment) being reviewed would replace the Research Plan with the modified pay-as-you-go program, though with a mechanism to have the existing (old pay-as-you-go) program in place beginning in 1997, prior to full implementation of the modified program.

The Committee found that the SOW as drafted is generally consistent with the intent of the Council's December 1995 action which initiated development of this program. As drafted, the SOW establishes the basic structure of the new program and identifies those tasks which will be the responsibility of the Prime contractor, and observer subcontractors, and those which will remain within the purview of NMFS. The SOW does not dictate the specifics of how the Prime Contractor will accomplish these tasks and responsibilities, leaving many avenues for creative business planning and, hopefully, competitive bids. The Committee makes the following specific comments and recommendations:

**Statement of Work**

**Interactions Between Groundfish and Shellfish Observer Programs**

At this time, the program would pertain only to the management of groundfish observers, and would not include the State of Alaska shellfish observer program, though that program could be incorporated in the future depending on the wishes of ADF&G and the Alaska Board of Fish. ADF&G representatives indicated that they are in a wait and see mode and want to see how the program works for groundfish observers before signing on

to the program. They believe it has the potential to solve many of their concerns with the shellfish observer program. The BOF will be reviewing all observer related issues in the spring of 1997.

### Prohibition on Outside Business Relationships

Related to shellfish interactions, the SOW as drafted contains a prohibition which would preclude observer companies (and the Prime Contractor) from participating in business relationships with companies required to obtain groundfish observer coverage through the third party system. Because crab observers will be outside this program at least initially, this would preclude any contractor from providing both crab and groundfish observers. If all existing contractors participated in the third party groundfish program, there may be no observers available for the shellfish fisheries, unless a new contractor entered the business specifically to provide shellfish observers only. The OAC does not find either of these alternatives acceptable. OAC feels that this prohibition has too many serious implications, and we should at least exempt the crab observer program from such prohibition and see if ADF&G engages in the third party program, and thereby eliminates the problem.

The OAC has always strived for and supported the idea of "one-stop-shopping"; i.e., observers who could do both groundfish and crab. This may not be possible unless and until ADF&G comes into the fold of this program, and the third party contractor can be used for both programs. The OAC discussed two alternatives to this prohibition which they are recommending that NMFS consider in redrafting the SOW:

(1) To change the wording such that it simply prohibits a company from getting its groundfish and crab observer from the same subcontractor. Under this alternative, we would have trouble tracking partial and/or overlapping ownerships; however, this is not seen to be an overwhelming problem, and may be an acceptable middle ground. This type of prohibition may tend to increase costs, because of the Prime's necessity to take this into account, and have alternate observers available.

(2) Another solution would be to disallow outside business relationships, with the specific exception of contractual relationships involving the State of Alaska shellfish observer program. This would solve the one dilemma, but unfortunately would allow for just the kind of business relationship the agency was attempting to avoid when they originally drafted this section of the SOW.

Costs associated with either alternative are unquantifiable at this time. There is no consensus at this time by the OAC, but an understanding that NMFS and ADF&G will continue to work this out.

### Observer Grade Requirements

The SOW contains a new grading system for observers (Grades 1-4), and requires a minimum percentage of each grade which must be maintained by the Prime Contractor. This is to directly address the issue of data integrity, observer moral, and maintaining a core of dedicated, professional observers. OAC recommends that these percentages be minimums as opposed to absolutes; i.e., we do not want to make them use 30% Grade 1 observers if they have higher grades available. On the other hand, we do not want to be forced to use higher grade, more expensive observers beyond what is necessary, so we recommend a minimum percentage of Grade 3 and 4 combined. This leaves some flexibility, and still maintains the intent of this provision, but would encourage the Prime not to use more of the expensive grade 4 observers than necessary.

The OAC notes that the grading system is differential by gear types used, which may have unintended and adverse consequences. For example, the way it is laid out on page 18 will enable an observer to be grade 2 for trawl, but still be stuck in grade 1 for other gear types which may actually be easier. This will likely create morale problems for the observers and pay differential impacts, which are based on grades. This in turn will encourage an individual to stay in one gear type, and not get the cross-training to become a grade 4 observer. The OAC feels that we don't want gear specialists/constituents among the observers. The OAC also notes that cost increases



may be an indirect consequence of this grade structure because an observer will only want to work on vessels for which he is a high grade, requiring a new observer to be flown in for additional assignments. These grading levels could also encourage dry-labbing by observers in an attempt to score well on the grading system. Criteria should be very explicitly laid out for the observer on how they will be graded (the point scale particularly).

**The OAC recommends that the grading criteria be altered such that it encourages both returns of observers, and cross-training, by making the advancement dependent on both number of trips, and gear type observed.**

Some members were also concerned about going back and retroactively grading for 1995. Observer morale is an issue since some observers will not fully understand how they got the grade they got, and it will likely have financial implications. The OAC simply urges NMFS to exercise caution in this sensitive area.

### Observer Compensation

The Committee recognizes that, as currently written, there are incentives built in to the RFP process to promote improved observer compensation through mandatory grade percentage requirements. However, there is nothing explicitly mandated as to what the minimum should be, but an expectation for the bidders to know what is going to be acceptable, while everyone's idea of that number is likely to be different. **The Committee feels that there are advantages for observers, the agency, and the industry to specify some minimum compensation level in the RFP itself, at least for entry level observers, if not for the higher grades.**

There is no consensus on the Committee on whether the specification should extend beyond the entry level grade. This approach allows everyone to know up front what the minimum level is, and the bids can be judged on other criteria and merits. One downside to this approach is that laying these guidelines out may tend to restrain the creativity and innovativeness in the bids received. The Committee also recognizes that there may be constraints on this approach by federal contracting guidelines. Some Committee members expressed interest in some type of arbitrated process to arrive at the minimum compensation level, though there is limited time to do this prior to the end of the SOW comment period. Committee believes that specific comments as to this minimum level should be submitted by all interested parties prior to the April 24 deadline.

The SOW requires observers to be paid at some rate for all time worked, including debriefing, over which the industry has little control; therefore, some maximum time for debriefing should be specified, beyond which the industry would not be required to pay. The Committee recognizes that differential compensation rates may be applied to different phases of deployment; and the minimum level recommended above, for Grade 1, is meant to apply to actual deployment days (from date of deployment to the vessel to date of deployment from the vessel/plant).

### Observer Qualifications

A new provision for observer qualification is a minimum 3.0 GPA. The OAC questioned this requirement, noting that grade point average may not be an accurate determinate of what makes a good, long-term observer. Such a requirement could even be counterproductive - people with high GPA may not make the best observers. NMFS feels that because the work is getting more technical, this is a valid requirement and will increase likelihood of observers passing their training. Concern is also expressed that this may be discriminatory in terms of hiring practices. The OAC recommends that NMFS attempt to verify any correlations in regard to observer ranking and longevity through their own records. Similar thoughts were expressed in regard to the statistics course work requirement. Some people have statistics experience, without having actually taken a formal course in it. We recommend NMFS reconsider these two requirements, perhaps specifying a preference for statistical experience.

## Observer Insurance

ITC did not include Employment Related Practices or Personal Property under their previous recommendations of required coverage (it was listed under 'preferred additional coverage'). It was recognized that some level of coverage for observer's computer, survival suit, etc., may be appropriate; however, the Preferred Additional Coverage section has significant economic implications which may have not been considered, and those coverages may not be really necessary.

## EA/RIR for Plan Amendments

The OAC's discussions of the EA/RIR were centered primarily on cost issues—what is this new program likely to cost the industry? The OAC discussed this issue but did not attempt to quantify overall costs due to uncertainties in several of the major cost components of the program. Although the Committee was unable to quantify all cost components of this program, it can make a general statement about the direction and magnitude of the costs of this program, relative to the status quo pay-as-you-go structure.

The Council needs to recognize that this program will be more expensive than the current pay-as-you-go program, and that the benefits of this program will have to be weighed against those additional costs. The magnitude of the increased costs could be substantial, and will depend primarily on a few major variables, such as observer compensation, Prime Contractor overhead, and the eventual total levels of required observer coverage; these variables are not yet quantified, and will not be certain until bids are received in response to the RFP. The Committee notes that industry and/or industry representatives should be urged to make their own best assessments of what this new program will cost them, and present that information to the Council early on in the process.

Other cost aspects discussed by the OAC included the issue of non-payment. It is suggested that potential non-payment could increase overall costs because the Prime Contractor will have to build in some level of expected non-payment when structuring their bids. The OAC notes that under the Research Plan, we could deny permits to those who were delinquent, and that perhaps something along these lines could be pursued instead of assuming a cost increase buffer. Non-payment may be less of an issue under a single Prime than under the previous pay-as-you-go program; i.e., previously a vessel could simply go to another contractor, now they have to go through the Prime Contractor for their observers. In any case, it is the Prime's responsibility to figure out how to ensure payment, whether it's through pre-payment, bonding, or other means.

The provision that "Prime Contractor must respond to NMFS requirements to provide observers with specified experience and/or training for certain deployments" creates an area of uncertainty for the Prime Contractor, for which contingency planning will tend to increase costs. Some members expressed concern that NMFS' intent to shift the cost of providing safety and sampling gear for observers from NMFS to the Prime Contractor/subcontractors could result in duplication and will certainly increase costs to the industry.

## Issue of Disproportionate Costs to Some Vessels

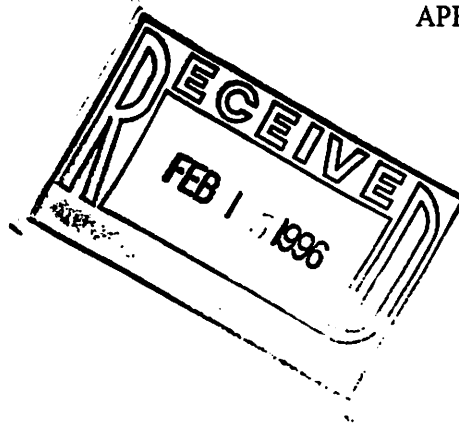
The Council's motion from December 1995 also called for development of alternatives to mitigate the high cost (as a percentage of the gross landings) to some smaller vessels under a pay-as-you-go program. Three specific options were put forward at that time: (1) surcharge on some observer coverage to offset costs for this sector, (2) pooling of observers in these sectors, and (3) simply reducing required coverage levels for this sector.

The OAC discussed these issues, recognizing that they would have to be the focus of future meetings for legitimate treatment and resolution. The option of a surcharge may not be legal, since it amounts to a fee which is no longer authorized. However, the SOW requires a standardized rate for all vessels (with some exceptions

as noted), which could be construed as a type of surcharge, so resolution of this option is not clear at this time. The OAC notes that the initial Prime contract will be for one year, so we may be able to develop and incorporate such provisions for the second and subsequent years of this program. The OAC feels that this issue will need further time to resolve, further recognizing that a final decision on the basic third party program is necessary at this time.

February 10, 1996

Richard B. Lauber  
Chairman, North Pacific Fishery  
Management Council  
605 West 4th Avenue, Suite 306  
Anchorage, Alaska 99510



Dear Mr. Lauber,

There are not words to describe how disappointed I am in the dissolution of the Research Plan. I continue to feel that the Research Plan is the best plan for managing the observer program proposed to date. The third party alternative will not only be more expensive but will also decrease the NMFS' flexibility to manage the Bering Sea and Gulf of Alaska resource. Greater flexibility and higher quality data collection were two of the original objectives when restructuring of the observer program was first proposed.

Before a third party alternative can work, the Council should address the following points:

- 1) If NMFS is not involved in choosing subcontractors under a third party system, it is possible the observer program will have only one subcontractor. The Research Plan was derailed last April partially due to the Council's concern about putting some contractors out of business. Any third party alternative must address the number of subcontractors or face potential derailment after thousands of tax dollars have been futilely spent;
- 2) Subcontractors will continue to bid against each other. Therefore, the issue of observer wages is not solved by the proposed third party alternative unless the plan specifically stipulates wages. Contractors currently pay different wages based on various factors. The time one has been employed as an observer is the predominate factor used by contractors to determine wages but performance is also used by some contractors. Before the issue of wages can be solved, the following questions should be answered: i) Has NMFS noted any differences in the data collected based on pay of the observers? ii) Has anyone tracked why observers really leave the observer program? Do most first/second time observers leave due to insufficient wages or do they leave because they don't like the job? iii) At what point in one's observing career does one leave the program due to wages? The wage issue should be resolved early in the evolution of any future alternative;
- 3) A third party system further removes the observer from NMFS and ADF&G. Observers need more and better support from the management agencies, not less support. NMFS and ADF&G should continue training and debriefing observers under any proposed system so that the integrity and the consistency of the data is maintained;
- 4) Conflict of interest problems do not automatically disappear under a third party system. For example, vessel A is assigned subcontractor A for pollock season. Midway through the pollock season, vessel A decides it doesn't like the services being provided by

subcontractor A and asks for a new observer and subcontractor. Will the Contractor be obligated to remove the observer/ subcontractor? If yes, under what conditions? It would be inappropriate and extremely unprofessional to remove an observer for reasons not related to data quality. If an observer is removed because a vessel doesn't like the composition of the collected samples and the observer's sampling methods are scientifically sound, the message sent to the entire fishing community would be that the data doesn't matter. The message sent to observers would be that data integrity isn't going to be supported so don't "rock the boat". [I am told this practice currently occurs and is frequently disguised as a personality conflict between the observer and vessel personnel although I have never had this experience myself.] Who will be responsible for investigating any complaints about an observer and/or subcontractor? If safeguards aren't established in the beginning, the third party system could give more control to industry regarding their observer and the quality of data collected at the expense of the contractor and more importantly at the expense of data quality. The Council's objectives and intents regarding the issue of subcontract assignments should be discussed in detail before the "umbrella" process moves any further.

If the Council is interested in exploring other options, I have a few comments/questions that should be addressed. Is it possible to maintain the status quo ( the previous Observer Plan) but require more oversight of the contractors? NMFS could apply higher standards to the contractors through the "certification" process. Certification could be re-evaluated yearly or biannually and be based not only on contact between NMFS and the contractor but also on the observers' reports of professionalism between the contractor and the observer. I am uncertain if it is legally possible to solve the wage issue under the previous plan, but it seems that since the NMFS already dictates many of the business practices between contractor and observer, they should also have some input on wages. If NMFS can decide who is qualified to be an observer and who is not, why isn't input regarding wages allowed?

Conflicts of interest, or at least the perception of conflicts of interest, would continue to be an issue under the status quo. But, with more oversight of the contractors and more discussion with observers, I think the problems can be solved. For example, if a vessel requests to have an observer removed from a vessel, NMFS should always be involved. There should be specific reasons provided by a vessel making such a request and the reasons should be based on data quality issues, not on personality conflicts. NMFS should have the authority to make the final decision whether an observer is removed from a vessel or not.

Thank you for your time.

Sincerely,



Kimberly S. Dietrich  
Observer

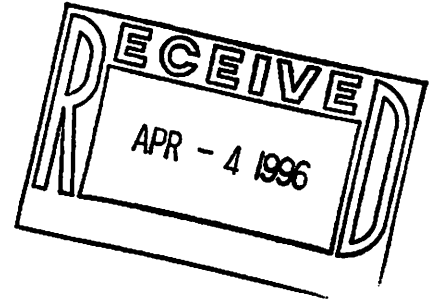
K. Dietrich  
c/o Alaskan Observers  
P.O. Box 920566  
Dutch Harbor, AK 99692



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

AGENDA C-3(d)  
APRIL 1996

April 1, 1996



Mr. Clarence G. Pautzke  
Executive Director, North Pacific  
Fishery Management Council  
605 West 4th Avenue, Suite 306  
Anchorage, Alaska 99501-2252

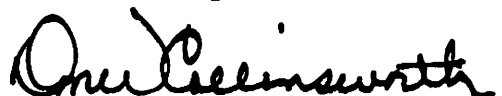
Dear Clarence:

The National Marine Fisheries Service (NMFS) recently published regulations implementing an interim final rule that will discontinue the 1995 North Pacific Fisheries Research Plan (Research Plan) fee collection process, issue Federal processor permits without regard to payment of Research Plan fees, revise the effective dates of Federal processor permits from a semiannual to an annual period, and refund all fees collected by NMFS under the Research Plan, along with accrued interest.

This action is taken by NMFS in response to the North Pacific Fishery Management Council's (Council) vote at its December 1995 meeting to repeal the Research Plan and the resulting determination by NMFS to terminate the 1995 fee collection program authorized by the Research Plan. This action revises the requirements found in 50 CFR § 677.

I have enclosed a summary to be included as an informational item under agenda item C-3 for the April 1996 Council meeting.

Sincerely,

  
Steven Pennoyer  
Director, Alaska Region

Enclosure



NEWS RELEASE (96-37)  
Steven Pennoyer  
907-586-7221

April 1, 1996  
8:05 a.m.  
For Immediate Release

TERMINATION OF THE 1995 RESEARCH PLAN FEE COLLECTION PROCESS AND  
INITIATION OF  
REFUNDS TO PROCESSORS THAT PAID FEES DIRECTLY TO NMFS

NMFS issues an interim final rule that will discontinue the 1995 North Pacific Fisheries Research Plan (Research Plan) fee collection process, issue Federal processor permits without regard to payment of Research Plan fees, revise the effective dates of Federal processor permits from a semiannual to an annual period, and refund all fees collected by NMFS under the Research Plan, along with accrued interest, according to Steven Pennoyer, Director, Alaska Region, NMFS.

The interim final rule outlines a refund procedure that describes how Research Plan refund recipients will be identified, how the refunds will be calculated, and how and when refund checks will be disbursed. NMFS intends to issue refunds as soon as is administratively possible.

NMFS collected fees only from processors. NMFS did not collect fees directly from fishermen and does not have the necessary information to provide refunds to fishermen. NMFS expects processors to refund to fishermen any Research Plan fees collected from fishermen. NMFS encourages fishermen who paid Research Plan fees to one or more processors to coordinate directly with those processors to obtain their portion of the Research Plan refund.

This action is taken by NMFS in response to the North Pacific Fishery Management Council's vote at its December 1995 meeting to repeal the Research Plan and the resulting determination by NMFS to terminate the 1995 fee collection program authorized by the Research Plan. This action revises the requirements found in 50 CFR § 677.

This press release provides notice of changes in regulatory requirements. Do not rely on it to guide you in complying with these requirements. To obtain information concerning this regulatory change, or other requirements of the Research Plan, consult the applicable regulations at 50 CFR part 677 or changes to those regulations published in the Federal Register. Further assistance may be obtained by contacting Fisheries Management Division, Alaska Region, NMFS, 907-586-7228. An unofficial copy of the regulations has been placed on the NMFS Bulletin Board (907-586-7259 or 907-586-7278) and the NMFS Home Page (<http://www.fak/akr-home.htm>) for convenient access.



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

**TERMINATION OF THE 1995 RESEARCH PLAN FEE COLLECTION  
PROCESS AND INITIATION OF REFUNDS TO  
PROCESSORS THAT PAID FEES DIRECTLY TO NMFS**

**(61 FR 13782, March 28, 1996)**

- 1. The 1995 Research Plan fee collection process will be discontinued.**
- 2. All monies, including accrued interest, in the North Pacific Fishery Observer Fund will be refunded to the processor that was billed and made direct payments to NMFS (monies include assessed fees and any late charges).**
- 3. Processor permits will be issued without regard to status of Research Plan fee payments.**
- 4. Processor permits will be effective for a calendar year rather than a semiannual period.**
- 5. NMFS expects processors to refund to fishermen any Research Plan fees collected from fishermen; NMFS encourages fishermen who paid Research Plan fees to processors to coordinate directly with processors to obtain their portion of the Research Plan refund.**
- 6. \$5,647,311.50 was collected from 331 billed Research Plan processors (approximately 250 unique entities).**





## **REFUND PROCEDURE**

Contents herein reflect recent changes in regulatory requirements. Do not rely on this to guide you in complying with these requirements. Consult the applicable regulations at 50 CFR part 677 or changes to those regulations published in the Federal Register at 61 FR 13782, March 28, 1996 .

### **Introduction**

- 1. All monies in the Observer Fund will be refunded. This includes: fee assessment payments, late charge payments, and accrued interest.**
- 2. All monies will remain in the Observer Fund, earning interest, until time of refund.**
- 3. NOAA/NMFS will not retain any funds for costs incurred to implement the Research Plan or to issue refunds.**

### **Refund Procedure**

- 1. Refunds will be issued to the entity (individual or company) that was billed and made payments to NMFS. The identification of the refund recipient will be based on Federal processor permit records and Research Plan billing records.**
- 2. Refunds consist of a principal portion and an interest portion.**
  - a. The principal portion is all payments for fees and late charges made by a processor directly to NMFS.**
  - b. The interest portion is from the interest earned by the principal portion invested in the Observer Fund and is based on a processor's proportional contribution to the Observer Fund. The proportional contribution is based on two factors---1) the processor's total payment amount (principal portion), and 2) the number of days the processor's total payment was on deposit.**
- 3. NMFS will notify each processor by certified mail of a preliminary determination of the principal portion of the refund amount. The notification will include itemized information enabling the processor to verify the principal portion of the refund amount with their own records (payment amount received, date received, check number, Research Plan bill number, fishery category the payment was applied to).**
- 4. If a processor disagrees with any determination of the principal portion of the refund amount, the notification letter must be signed and returned within 30 days to NMFS, along with documentation supporting the dispute (copy of Research Plan bill and copy of cancelled check).**
- 5. NMFS will determine if any errors exist and notify affected processors of its determination. Final determination of a processor's principal portion is subject to resolution of all processor disputes received by NMFS.**
- 6. Once all disputes have been resolved, NMFS will authorize disbursement of refund checks by the United States Treasury.**

## **CALCULATION OF THE INTEREST PORTION**

- 1. The interest portion is based on two factors: the processor's total payment amount and the number of days the processor's total payment amount was on deposit.**
- 2. The interest portion of the refund will be calculated as follows:**
  - a. A processor's total payment amount multiplied by the number of days the processor's total payment amount was on deposit equals the processor's contribution (the number of days is based on the payment receipt date at the First National Bank of Chicago).**

**For example, if a processor's total payment amount was \$20,000 and this amount was on deposit for 150 days, then the processor's contribution is  $\$20,000 \times 150 = \$3,000,000$ .**

- b. A processor's contribution divided by the total amount of all processor contributions multiplied by 100 equals the processor's percent contribution to the Observer Fund.**

**For example, if the total amount of all processor contributions is \$750,000,000 ( $\$5,000,000 \times 150$  days), then the processor's percent contribution is  $\$3,000,000 / \$750,000,000 \times 100 = 0.4\%$ .**

- c. A processor's percent contribution multiplied by the total amount of interest earned by the Observer Fund equals the processor's interest portion of the Research Plan refund.**

**For example, if the total amount of interest earned by the Observer Fund is \$200,000, then the processor's interest portion of the Research Plan refund is  $0.4\% \times \$200,000 = \$800$ .**

- 3. This interest calculation method is necessary to ensure that the interest that is refunded does not exceed the interest amount that was earned and is available in the Observer Fund. Due to the administrative process used to invest the funds, certain delays existed between the date a processor made payment and the actual investment date. The date of payment is not the date the deposits were invested. Therefore, using the date of payment to calculate interest earned on an individual processor's payments will not accurately reflect the interest that was actually earned.**
- 4. The interest portion of the refund cannot be calculated until Observer Fund investments are withdrawn. Withdrawal of investments will occur just prior to the earliest possible issuance of refund checks in order to avoid unwarranted loss of interest. The actual amount of a processor's interest portion of the refund will be evident upon receipt of the refund check.**



UNITED STATES DEPARTMENT OF COMMERCE  
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C-3  
APRIL 1996  
Supplemental

April 12, 1996

Richard B. Lauber  
Chairman  
North Pacific Fishery  
Management Council  
605 West 4th Avenue  
Anchorage, AK 99501-2252

Dear Rick,

At its December 1995 meeting, the North Pacific Fishery Management Council (Council) requested NMFS to cease implementation of the North Pacific Fisheries Research Plan (Research Plan) and to refund the \$5.6 million collected under the 1995 Research Plan fee collection program. In response to the Council's request, NMFS published an interim final rule in the Federal Register that established the procedure NMFS will pursue to refund 1995 Research Plan fees. We anticipate that refunds will be issued to Research Plan processors by mid June 1996.

Also at its December 1995 meeting, the Council requested NMFS to pursue an alternative to the Research Plan that would revert back to direct payment for observer services rather than a fee-based program. The alternative program being considered by the Council would require NMFS to contract with a third party (Prime Contractor) to serve as a liaison between persons requiring observer services and companies providing those services. The Council further requested NMFS to draft an analysis of the new alternative for final Council action at its April meeting so that the new program may be implemented by mid 1997.

As an initial step of the procurement process necessary to secure a contract between NMFS and a Prime Contractor, we prepared and made available for public review and comment a draft Statement of Work that describes the scope of a proposed contract between NMFS and a Prime Contractor. We also prepared a draft analysis of the Council's proposed alternative to the Research Plan, and draft regulations for implementation of this alternative. These documents were reviewed by the Council's Observer Advisory Committee (OAC) during a March 28-29 meeting in Seattle.

We believe that costs for observer services under the Council's preferred alternative may be significantly greater than they were under the old observer program. The largest single factor



contributing to this increase likely would be increased compensation for observers during all phases of their contracted employment. A complete quantitative assessment of the cost of observer services under the Council's alternative to the Research Plan cannot be provided at this time for several reasons. NOAA General Counsel provided an earlier opinion (see December 4, 1995, letter to Mr. Pautzke from Lisa Lindeman) that contracts and subcontracts for observer services under the Council's alternative to the Research Plan may be subject to the Service Contract Act (SCA). If the SCA applies, observer salaries and fringe benefits must be no less than those found by the Department of Labor (DOL) to prevail in the locality where services are to be performed. These minimum base salary rates would be established by the DOL and would enable NMFS and the Council to assess the minimum cost for observer services prior to issuing an RFP. We are requesting a determination on SCA applicability from the Administrator of the DOL's Wage and Hour Division.

If the DOL determines that the SCA does not apply to the contract for observer services, we would rely on the competitive bid process to determine observer compensation levels necessary to meet data quality requirements specified in the Request for Proposals (RFP). Under this scenario, we would be unable to determine the cost of the Council's alternative to the Research Plan until a contract is awarded to the organization that is selected by NMFS to be the Prime Contractor.

Lengthy discussions on the cost for observer services under the Council's alternative to the Research Plan were held during the March OAC meeting. We anticipate that public testimony will be presented at the Council's April meeting on the potential cost impact of the Council's proposed alternative on different sectors of the groundfish industry. The Research Plan was repealed following determination by the Council that it was too costly to pursue; significant Agency and Council resources were expended before this determination was made. To avoid a repeat of this process, we urge the Council to consider all relevant testimony and discuss the level of cost increase which would be acceptable to accommodate necessary changes to the observer program advocated by the Council.

Any increase in the cost for observer services would result in a disproportionate impact on small vessels and processors. These operations would probably pay more for observer services under the third party alternative than they would have paid under the Research Plan. We recognize that the Council requested NMFS to

work with industry to develop solutions to this equity concern and present a discussion paper to the Council at its June 1996 meeting. We intend to explore this issue with industry, however, we are not optimistic that an effective resolution is possible without some kind of fee-based system or other cost subsidization that would require an amendment to the Magnuson Act.

We recommend that the Council delay final action on the Prime Contractor alternative until its June or September 1996 meeting because of the uncertainty about SCA applicability and the potential impact of this determination on overall costs. By then, we hope to have received a determination from the DOL and be in a better position to quantify potential cost increases.

Notwithstanding this delay, the Council must take final action at its April 1996 meeting to adopt interim groundfish FMP amendments that would authorize observer coverage after the Research Plan expires at the end of 1996. A proposed interim program is included as an option to the Council's alternative to the Research Plan in the draft analysis of alternatives prepared for Council review at the April meeting. The interim program would reinstate an observer program similar to the one that existed prior to the Research Plan and would extend current observer coverage requirements beyond 1996.

Sincerely,



Steven Pennoyer  
Director, Alaska Region

April 19, 1996

Steve Fish  
P.O. Box 6448 Sitka, Ak. 99835

North Pacific Fisheries Management Council  
Richard Lauber, Chair

Dear Mr. Chairman and Council members,

I would like the opportunity to comment on agenda item c-3 at this meeting: the observer program.

I am a longliner and owner of a 66' boat and fall into the 30% coverage group.

One problem I have with the 3rd party pay-as-you-go system being considered is that there is no responsibility on the part of under 60' boats to contribute to observer coverage data collection in any way. Under 60' boats are no longer even required to carry logbooks. Now with the "buy-down" provision in the black-cod and halibut fisheries, the fisherman in those fisheries will have another incentive to put in his shares on an under-60' boat. He can then dodge any observer requirements and avoid the expenses obligatory to the over-60' boats.

This contributes to a shrinking pool of information from which to make management decisions. It will also increase the amount of fish caught on vessels which are not even required to carry logbooks.

With the recommended expansion and improvement of the existing observer program (third party cost, improved observer wages; computers for observers; increased coverage levels necessary for bycatch reduction, means of being considered; etc.), the additional expense also will lead to a greater than anticipated burden on the fleet.

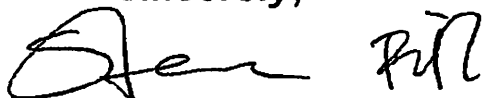
I feel it is the attitude of some that the observer program

is simply a burden to be managed in a way which minimizes inconvenience and expense. The truth is that this system of data collection is a large part of the foundation upon which decisions, which determine the current and future health of the resources and our livelihoods, will be made.

I am by no means advocating handing NMFS a blank check drawn against the hard work of the industry. I am in favor of a strong, flexible, effective and meaningful research plan which is paid for by and which benefits all segments of the industry.

Thank you for your consideration and for your commitment to these issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Fish", with a stylized flourish at the end.

Steve Fish