


**PUBLIC TESTIMONY SIGN-UP SHEET FOR
AGENDA ITEM C-8 Observers**

	NAME (PLEASE PRINT)	AFFILIATION
1 ✓	PAUL MAC GREGOR	at-Sea Processors
2 ✓	BRENT PAINI	United Catcher Boats
3 ✓	JOHN GAWIN	GROUNDIST FORUM
4 ✓	THORW SMITH	NPCA
5 ✓	ERIC OLSON	BBDC
6 ✓	JULIE BANNY	AGDB
7 ✓	DUSTAN DICKERSON	UNFA
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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.

MEMORANDUM

TO: Council, SSC and AP Members

FROM: Chris Oliver 
Executive Director

ESTIMATED TIME
4 HOURS

DATE: June 1, 2005

SUBJECT: Observer Program

ACTION REQUIRED

- a) Update on Fair Labor Standards Act issues
- b) Preliminary review of analysis to restructure the funding and deployment mechanism in the North Pacific Groundfish Observer Program
- c) Review of Observer Advisory Committee report

BACKGROUND

- a) Update on Fair Labor Standards Act issues

Dr. Bill Karp (Observer Program Director, NMFS) will present a brief overview of recent discussions and correspondence related to observer compensation issues and the status of observers with regard to the requirements for overtime pay under the Fair Labor Standards Act (FLSA) and the Service Contract Act (SCA). This issue was brought to the forefront in a memo from Dr. Bill Hogarth in November 2003, which stated that NMFS maintains that fisheries observers are biological technicians and therefore eligible for overtime compensation under the FLSA. That memo raised several questions with regard to the status of observers in the North Pacific, although it was initiated due to issues surrounding an agency-funded observer program in Hawaii that required documentation of the agency's position.

In order to help clarify the issues raised in Dr. Hogarth's memo, the Department of Labor (DOL) scheduled two public workshops in February 2005. These workshops were subsequently cancelled and have not been rescheduled, likely due in part to the complexity of the questions that DOL staff realized were likely to be asked. Dr. Karp and other NOAA and Department of Commerce (DOC) staff met with the DOL in February in order to determine how to proceed in a request for answers to outstanding questions regarding the applicability of exemptions under the FLSA (**Item C-8(a)(1)**). DOL personnel were able to provide responses to some of the questions raised by NOAA, but did not resolve questions regarding the extent of geographical applicability of SCA and FLSA, and questions regarding hours worked. DOL agreed to initiate a response to these questions upon receipt of a formal request from DOC, indicating that a response would take at least six months following receipt of a formal request. The request has not yet been drafted by NOAA and DOC.

The applicability of FLSA and SCA provisions hinge, in part, on whether observers are classified as technical employees, and not professionals. The National Observer Program Advisory Team discussed this issue in 2002 – 2003. Following this discussion, consensus was reached that NOAA fisheries observers should be

considered technicians. However, the record of these meetings indicates that those present understood that this determination may not be appropriate for North Pacific groundfish observers, and that it may be necessary to revisit the issue at a later date. In a memo dated February 4, 2005, Dr. Balsiger requested that Dr. Hogarth concur with a determination that North Pacific groundfish observers are professionals under the FLSA, in order to properly recognize the professional nature of the duties, education, and training requirements of these observers and to resolve the cost uncertainties which make it difficult for the Council to restructure the Observer Program (Item C-8(a)(2)). No response has been received to date.

b) Preliminary review of analysis to restructure the funding and deployment mechanism in the North Pacific Groundfish Observer Program

The Council has been working for the past two years to develop a new system for observer funding and deployment in the North Pacific Groundfish Observer Program (Observer Program). 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 identifies data quality and disproportionate cost issues resulting from the current program structure, in which vessels and processors contract directly with observer providers to meet coverage requirements fixed in regulation. Concerns with the existing program arise from the inability of NMFS to determine when and where observers should be deployed, inflexible coverage levels established in regulation, disproportionate cost issues among the various fishing fleets, and the difficulty to respond to evolving data and management needs in individual fisheries.

The proposed amendment is thus intended to address a variety of longstanding issues associated with the existing system of observer procurement and deployment. The Council's Observer Advisory Committee (OAC) drafted a problem statement to guide the amendment, which was approved by the Council in February 2003:

Observer Program Restructuring Problem Statement

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

The existing Observer Program, in place since 1990, establishes coverage levels for most vessels and processors based on vessel length and amount of groundfish processed, respectively. In designing the original program, the Council had limited options because the MSA did not provide authority to charge industry fees to pay for the cost of observers, and no Federal funds were provided. Because of the critical need for observers

and the data they provide, the Council and NMFS proceeded with the Observer Program regulations (Amendments 13/18) that are largely unchanged today. These regulations were considered 'interim' at the time of implementation, as NMFS and the Council began to develop a new program (Research Plan) which would require all participants in the fisheries to pay a fee based on ex-vessel revenue from their catch, with NMFS contracting directly with the observer providers. Collection of the fee under the Research Plan was authorized by an amendment to the MSA (Section 313(b)(2)). The Council adopted this plan in 1992 and NMFS implemented the program in 1994. However, due to several concerns primarily related to observer costs to industry, the Council voted to repeal the program in 1995. Therefore, the 1990 interim regulations continue to authorize the existing Observer Program today. These regulations have been extended several times, with the most recent amendment extending the program until December 31, 2007.

The current observer coverage requirements in Federal regulations (50 CFR 679) are provided in the table below.

Table 1. Current observer requirements in Federal regulations

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

The alternatives and options under consideration for this amendment were developed through several Council and OAC meetings. Since earlier attempts to restructure the program were unsuccessful, the Council, NMFS, and the OAC originally considered a step-wise approach, focusing primarily on those regions and fisheries in which the data quality and disproportionate cost issues identified in the problem statement were most acute. The intent was to restructure the program primarily for the Gulf of Alaska, and then the Council could decide whether to extend the new system to the BSAI through a subsequent amendment process. The initial alternatives reflected this approach, and thus included only GOA groundfish vessels and all halibut vessels. In December 2003, the Council reviewed a preliminary draft analysis of the impact of those alternatives.

As NMFS began to evaluate the alternatives, however, it became concerned about operational and data quality issues that would potentially arise under a 'hybrid' system, in which GOA groundfish vessels and halibut vessels would be operating under a direct contract system funded by an ex-vessel fee, and BSAI vessels would continue to operate in the existing 'pay-as-you-go' system. NMFS identified several problems inherent in the current service delivery model in a letter to the Council in December 2003, including: 1) the agency's inability

to determine when and where observer coverage takes place in the less than 100% covered fisheries; 2) the inability to match observer skill level with deployment complexity; and 3) the inability to modify observer coverage due to the inflexible coverage levels in regulation. The NMFS letter also raised concerns regarding the consequences of possible differences in observer wages under a 'hybrid' system.

In February 2004, NMFS provided a subsequent letter to the Council stating that the agency had determined that effective procedures for addressing both observer performance and data quality issues could only be addressed through a service delivery model that provided direct contracts between NMFS and observer providers. NMFS thus recommended that the Council include a program-wide alternative in the analysis, which would apply the new system of direct contracting to all BSAI and GOA vessels and processors in Federal waters. Rationale for consideration of a program-wide alternative was based on the operational and data quality factors, as well as the concerns raised by the NMFS policy memo on observer wages. In February, the Council scheduled a March OAC meeting to consider inclusion of a program-wide alternative.

As requested, the OAC held a meeting on March 11 - 12, 2004, to discuss the potential inclusion of a program-wide alternative. While the committee recommended the addition of two new alternatives which included specific BSAI sectors, it did not recommend a program-wide alternative. Members generally expressed concern that there had not been sufficient rationale provided for this change, and there was a general disinclination to add new fleets into a direct contract system which would invoke the SCA and may increase costs. Other members thought that adding in the BSAI fleets would delay the amendment and thus delay a better system for the GOA. In April 2004, the Council reviewed the OAC's recommendations, as well as another letter from NMFS reiterating its concerns with implementing separate observer programs in the BSAI and GOA. The Council ultimately approved both the OAC's new proposed alternatives and NMFS' program-wide alternative for consideration in the analysis.

In June 2004, the Council also approved options proposed by staff to consider a daily observer fee (as an alternative to the ex-vessel value based fee) for fisheries that require at least 100% coverage under Alternatives 6 and 7. These fisheries require individual vessel or cooperative level monitoring, and thus require at least 100% coverage as mandated by law or the provisions of their specific management program. For these fisheries, the Council approved analyzing a daily observer fee that could exactly match the costs of observer coverage, similar to how the program works today, except that NMFS would contract with the observer provider. This type of fee would mitigate the risk of falling short of coverage levels in the 100% and 200% fisheries due to revenue shortfalls. These options were incorporated to create the existing suite of alternatives and options under consideration in the analysis. A preliminary draft analysis of this suite of alternatives was last presented to the Council in December 2004.

The Council's action at this June meeting is to review the most recent preliminary draft of the analysis. The executive summary of the draft analysis, which includes the suite of alternatives and a list of primary decision points, is attached as **Item C-8(b)(1)**. The analysis was sent to you on May 11.

Schedule

Due to additional work that needs to be completed, specifically on implementation issues, initial review will likely be scheduled for late this year or February 2006. The current program expiration is December 31, 2007. Final action to extend the current program (status quo) would be necessary by April 2007, but final action on a restructured program would likely be necessary by April 2006 for implementation by January 1, 2008.

Note that the potential for permanently extending the current pay-as-you-go program to sectors not covered by the action alternative has been incorporated in Option 8 of the analysis, such that if the Council determined at final action that some portion of the fleet should continue to be in the existing system, a new analysis and amendment would not be necessary to prevent the current program from expiring. In addition, staff will

explore ways to modify Option 8 such that it would allow the Council to rollover the existing program temporarily for all sectors (including those in the new fee program) in the case that there is a lag in implementation between the time of Council final action and the program expiration of December 31, 2007.

c) Review of Observer Advisory Committee report

At the Council's request, the Observer Advisory Committee (OAC) met to review the preliminary analysis on May 12 – 13 at the Alaska Fisheries Science Center in Seattle. The draft OAC report is provided as **Item C-8(c)(1)**. The committee made several minor suggestions for the analysis, such as wording changes, additions, and clarifications, that staff will attempt to incorporate for the initial review draft. The list of those suggestions is provided as Attachment 1 of the OAC report. The committee also made several recommendations related to two broad categories: 1) potential MSA reauthorization and policy issues; and 2) changes to the preliminary draft analysis, as follows:

MSA and policy recommendations:

- If any ambiguity remains about releasing non-aggregated observer data then it should be resolved under the MSA reauthorization such that non-aggregated data is classified as confidential and cannot be released. The confidentiality policy should apply whether the data is collected by a human observer or via technological monitoring.
- Request agency determination that North Pacific groundfish observers are classified as professionals (not technicians) via the memo sent from Dr. Balsiger to Dr. Hogarth (2/4/05).
- Support an amendment to the MSA that defines North Pacific groundfish observers as professionals under the Fair Labor Standards Act.
- Request that staff provide documentation and rationale on why the NPGOP should receive Federal start-up funding and/or ongoing funding. Provide this information to the committee and in the analysis.

Recommendations on the analysis:

- Provide data on the distribution of catch by vessel length for catcher processors, to determine whether there is a more appropriate threshold to determine which catcher processors need at least 100% coverage for management purposes (Tier 2).
- Provide expanded rationale in the analysis for the agency proposal to require at least 100% coverage on all catcher processors.
- Explore a more appropriate delineation between vessels classified as Tier 3 (regular coverage) and Tier 4 (infrequent coverage), other than whether observer data is currently used for inseason management. Explore a threshold based on capacity, and not whether vessels have had required coverage in the past. Make it explicit that vessels in Tier 4 can be required to carry observers at the request of NMFS.
- Provide estimates of the upper bounds of current observer costs, especially for 'short pulse' fisheries whose actual costs may exceed the calculated averages.
- The committee recommended that it convene again prior to the Council's initial review of the analysis and also prior to final action.

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210



February 22, 2005

Helen Hurcombe, Director
Acquisitions and Grants Office
National Oceanic and Atmospheric
Administration (NOAA)
1335 East West Highway, Suite 6300
Silver Spring, Maryland 20910.

Dear Ms. Hurcombe:

This is in response to your letter of February 16, 2005, requesting guidance on the application of the Fair Labor Standards Act (FLSA) and the McNamara-O'Hara Service Contract Act (SCA) to NOAA contracts for fishery observation services. In a meeting between respective staffs on February 17, 2005, it was agreed that only three questions, i.e., two questions listed in your correspondence and one question raised at the meeting, would be addressed by this letter. We understand that your agency will be forwarding additional correspondence to the Wage and Hour Division's Deputy Administrator for guidance.

- Q. 1 The DOL Prevailing Wage Resource Book states that when a collective bargaining agreement (CBA) is in effect for workers under an SCA contract, the CBA wage supersedes any alternative wage determination that might have been made by the DOL. Is this the case only when the CBA is higher than the DOL-determined prevailing wage? Or do CBA wages supersede DOL prevailing wage determinations even if the result of the DOL prevailing wage determination is higher than the CBA wage?
- A. 1 The SCA requires that service employees engaged in the performance of a covered service contract receive no less than the minimum monetary wages and fringe benefits determined by the Secretary of Labor. The SCA wage determination shall reflect the wage rates and fringe benefits prevailing in the locality where the contract service work is to be performed, unless the provisions of section 4(c) of the Act apply. Section 4(c) of SCA provides special minimum wage and fringe benefit requirements applicable to every contract which succeeds a contract subject to the Act and under which substantially the same services as under the predecessor contract are furnished in the same locality. Under section 4(c), no successor contractor shall pay any of its service employees less than the wages and fringe benefits provided for in a CBA as a result of arms-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor

contract, including accrued wages and fringe benefits and any prospective increases provided for in the CBA. (SCA Regulations, 29 CFR § 4.163(a))

There is no provision under Section 4(c) that would prevent the issuance of collectively bargained rates that are lower than those otherwise prevailing in the same locality for the same classes of workers. As noted in the Regulations (§ 4.165(c)), "an applicable determination," which refers to the wage determination issued for a covered contract, sets the minimum rates to be paid service employees engaged in the performance of the contract. If the "applicable" wage determination reflects CBA rates issued for the contract pursuant to section 4(c) of the Act and the CBA rates are lower than those contained in an SCA prevailing wage determination for like services in the locality, the contractor is required to pay at least the CBA rates as they are the minimum rates required under SCA for the contract. Similarly, if an SCA prevailing wage determination is issued for a contract that reflects lower rates than those contained in the contractor's CBA, the Act would neither require nor preclude the contractor from paying the higher CBA rates, as the lower prevailing rates in that instance would be the "applicable" minimum rates for the contract. Thus, the SCA wage determination issued for the contract is controlling for determining the minimum rates that must be paid to service employees employed on the contract.

- Q. 2 What occurs when the union is decertified before or after an SCA-covered contract is in place?
- A. 2 As mentioned in the first answer, the provisions of Section 4(c) require that the CBA negotiated between a contractor and its employees or their representatives be reached as a result of arm's-length negotiations for application as the minimum rates for the successor contract. If the union is "decertified" as a result of a decertification election, i.e., the union members revoke the union's "certification" to be "the exclusive bargaining representative," before the start of the successor contract (contract options and renewals are considered successor contracts [§§ 4.143 ~ 4.145]) and the provisions of the CBA are no longer binding on the signatory parties, then the CBA rates will not be applicable to the successor contract pursuant to section 4(c). In this circumstance, SCA would require the issuance of a prevailing wage determination. However, if the union is "decertified" after work has commenced on the contract, the CBA rates would continue to be the minimum rates to be paid until such time as a new wage determination would be required (e.g., exercise of an option).

Q. 3 Can workers bargain away their right to overtime pay under the FLSA if they chose to do so under a CBA? Under certain circumstances, employee may prefer to work under a fixed daily wage rate rather than an hourly wage with overtime. Are workers forced to accept an hourly scale with overtime if they are non-exempt under the FLSA or can they negotiate alternative pay scales as part of a CBA?

A. 3 The Supreme Court has held that an employee may not waive his or her rights to compensation due under the FLSA. (*Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945). The Court observed that "while in individual cases, hardship may result, the restriction will enure to the benefit of the general class of employees in whose interest the law is passed, and so to that of the community at large (citations and internal quotations omitted)." *Id.* at 713. Similarly, in *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), the Court held that a labor organization may not negotiate a contract provision that waives employees' statutory rights under the FLSA.

An employee entitled to receive overtime may be paid in various ways, such as an hourly wage, a daily or shift rate, a piece rate, or a weekly, monthly or annual salary. (See FLSA Regulations, 29 CFR §§ 778.107-114.) No matter what the manner of payment, the nonexempt employee is entitled to one and one-half times the regular rate of pay for all hours worked in excess of 40 in a workweek. The regular rate of pay is always used to compute overtime, and is computed by various methods depending upon the form of payment, as described in the regulations cited above.

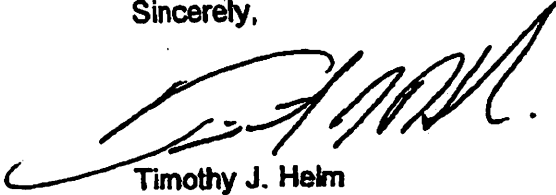
Day rates and job rates (§778.112) - If an employee is paid a flat sum for a day's work, or for doing a particular job without regard to the number of hours worked in the day, and if the employee received no other form of compensation for services provided, the employee's "regular rate" is determined by totaling all the sums received in the workweek at the day or job rates divided by the total hours actually worked. For example:

A fisheries observer is paid \$144.00 per day to observe commercial fishing activities on a vessel. This workweek, the observer worked five days for a total of 50 hours.

Straight time:	$\$144.00 \times 5 \text{ days} = \720.00
Regular rate:	$\$720.00 / 50 \text{ hours} = \$ 14.40$
Overtime due:	$\$ 14.40 \times \frac{1}{2} \times 10 \text{ (overtime hours)} = \72.00
Total Compensation:	$\$720.00 + \$72.00 = \$792.00$

The above information should be viewed as general guidance based upon the limited information contained in your letter. If we may be of further assistance, do not hesitate to contact Ms. Michelle M. Bechtoldt at telephone number (202) 693-0510.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. J. Helm', with a large, sweeping flourish extending to the left.

Timothy J. Helm
Office of Enforcement Policy
Government Contracts Team

February 16, 2005

TO: Timothy J. Helm, Team Leader
Government Contracts Team
Wage and Hour Division
U.S. Department of Labor

FROM: Helen Hurcombe, Director *Helen Hurcombe*
Acquisitions and Grants Office
National Oceanic and Atmospheric Administration

RE: Clarification of the Applicability of the Service Contract Act and Fair Labor Standards Act regarding Fisheries Observers

This letter is an urgent request for clarification on the applicability of the Service Contract Act (SCA) and Fair Labor Standards Act (FLSA) to fisheries observers employed by observer service providers contracted by the National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NOAA Fisheries).

Background:

The Magnuson-Stevens Fishery Conservation and Management Act and the Marine Mammal Protection Act require NOAA Fisheries to collect data on activities that affect living marine resources. Use of fishery observers is often the best means to obtain reliable data on the impacts of fishing activities on these resources. Fisheries observers monitor and record catch data of commercial fishing activity from U.S. vessels and processing facilities. The observers may collect data on species composition of the catch, weights of fish caught, disposition of landed species and protected species interactions. The duties and responsibilities of fishery observers involve adhering to routine sampling protocols that are planned and managed by professional employees. Fishery observers perform these duties unsupervised, but all work is carefully reviewed for completeness and accuracy by professional biologists.

In previous correspondence with your office, NOAA Fisheries provided details regarding the three service delivery methods currently used to procure fisheries observers services, e.g., observer employer engaged in a direct contract with the federal government, observer employer engaged in a cooperative agreement with the federal government, observer employer permitted by the federal government. I have provided as an attachment a copy of the correspondence.

In November 2003, NOAA Fisheries provided guidance to NOAA contract offices stating their current practices, which considered fishery observers to be technicians for the purposes of the SCA. In the past, when fishery observers were hired directly by NOAA Fisheries, they were hired as Biological Technicians.

Due to ongoing litigation regarding the status of fisheries observers as they relate to hours worked and applicability of the SCA and FLSA, we are requesting a response to the following questions listed below:

1. The length of the fisheries observer working day varies by deployment and, to some extent, capability of individual observers. In some cases it is possible to define the work day as 12, 16, or some other stretch of consecutive hours, in other cases observers may be allowed to take breaks during the day but may be required to wake up to sample catches after their several-hour-long breaks. What regulatory factors (such as tracking of work and non work hours, differentiating between regular time and overtime, etc.) need to be taken into account when dealing with these types of assignments, and how might they affect observer remuneration under each of the service delivery model types?

2. Observers may be deployed to collect data at sea or at fish processing plants onshore. They may also be involved in training, debriefing, awaiting debriefing, travel to the worksite, or awaiting deployment on a vessel or at a plant. While deployed on a vessel, they may be traveling to the fishing grounds or standing by during periods of adverse weather. Are there statutory requirements regarding remuneration for each of these activities, and do they differ from those that apply during data collection at sea or in processing plants?

3. What is the definition of the US continental shelf as it pertains to the SCA and FLSA?

4. The applicability of FLSA is subject to certain limitations and exemptions. Given the duties and responsibilities of fisheries observers, please explain the applicability of exemptions relating to fish harvesting and processing operations, and other marine employment categories. Please also explain the applicability of FLSA provisions to work that is carried out offshore of the territorial sea, and provide guidance in this regard for situations in which individuals carry out identical work within and outside the territorial sea during a single deployment. Are there similar limitations and exemptions associated with other relevant statutes, and how would they come into play under the above-mentioned scenarios?

5. On NOAA research vessels, scientists are usually paid 12 hours a day independent of weather or if fish/sampling is available (they may be steaming to another location and sampling is not possible). How would observers differ from NOAA's current practices used on research vessels to compensate scientists? They are largely collecting the same kind of information just on different platforms and are not employed by the U.S. government. Can observers be paid an average daily wage while at sea given their unpredictable work schedule?

6. The DOL Prevailing Wage Resource Book states that when a collective bargaining agreement (CBA) is in effect for workers under an SCA contract, the CBA wage supersedes any alternative wage determination that might have been made by the DOL. Is this the case only when the CBA wage is higher than the DOL-determined prevailing wage? Or do CBA wages supersede DOL prevailing wage determinations even if the result of the DOL prevailing wage determination is higher than the CBA wage?

7. Can workers bargain away their right to overtime pay under the FLSA if they chose to do so under a Collective Bargaining Agreement (CBA)? Under certain circumstances, employees may prefer to work under a fixed daily wage rather than an hourly wage with overtime. Are workers forced to accept an hourly wage scale with overtime if they are non-exempt under the FLSA or can they negotiate alternative pay scales as part of a CBA?

Summary:

We urgently request that the Department of Labor clarify, as appropriate the provisions of the SCA and FLSA as they apply to contracted fisheries observers. A prompt response would be most helpful in resolving questions raised by observer provider companies, and to assist us in providing further clarification and guidance to contractors in agency-issued Statements of Work.

Please contact me at 301.713.0325, if you have any questions or require further information.



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

February 4, 2005

*Agenda B-1
 Supplemental
 February 2005*

MEMORANDUM FOR: William T. Hogarth, PhD
 Assistant Administrator for Fisheries

FROM: *For* James W. Balsiger *Arnold J. Berg*
 Regional Administrator

For Douglas P. DeMaster *Arnold J. Berg*
 Science and Research Director, Alaska Region

SUBJECT: Status of North Pacific Groundfish Observers under the Fair Labor Standards Act (FLSA)

We are requesting your concurrence in our determination that North Pacific Groundfish Observers should be classified as professionals under the FLSA. This determination properly recognizes the professional nature of the work conducted by these observers and resolves some outstanding issues which make it difficult for the North Pacific Fishery Management Council (Council) to restructure the North Pacific Groundfish Observer Program (NPGOP). Incorporating accurate estimates of observer labor rates is important for restructuring alternatives for consideration by the Council. This cannot be achieved while the FLSA status of North Pacific Groundfish Observers remains uncertain.

The National Observer Program Advisory Team (NOPAT) discussed the status of contracted observers under FLSA and the Service Contract Act (SCA) at its October, 2001 and February, 2002 meetings. Positions can be classified as "technical" or "professional" under FLSA. This classification determination can have substantial consequences with respect to remuneration of observers, costs to those who employ observers or contract for observer services, benefits, and other factors. The applicability of SCA to fisheries observers was of particular concern to NOPAT, because SCA provisions place wage rate, overtime, and benefit requirements on employers. The SCA is applicable only to contracted employees whose work is classified as technical. Furthermore, the SCA applies only to employees who are employed to perform services by companies who contract directly with the Federal government to provide those services.

NPGOP observers are not contracted directly by NOAA Fisheries. Rather, they are employed by private companies who contract with fishing companies to provide observer services. Prior to the October 2001 NOPAT meeting, the Department of Labor (DOL) provided an oral determination that the SCA did not apply to NPGOP observers. This



determination was verified in a letter sent to Ms. Victoria Cornish of NOAA Fisheries by Mr. Timothy J. Helm of DOL in June 2003.

In comparison, NPGOP observers' duties are different, more complex, and demanding than the duties of observers deployed in other regions by NOAA Fisheries. Education and training requirements for NPGOP observers are the most comprehensive in the nation. Their responsibilities cover a broad range of requirements for scientific information, inseason target and bycatch quota management, compliance monitoring, and catch accounting to support privileged access to harvesting or processing operations, e.g., IFQ or coops allocation. More detailed position descriptions can be provided upon request.

The minutes of the February 2002 NOPAT meeting indicate that NPGOP observers were not included in the technician classification decision:

The position descriptions should focus on the duties and responsibilities of fisheries observers as technicians. There may be observers working on a professional level [i.e., NPGOP observers], but these would not be included in the DOL catalog since they are exempt from the Service Contract Act.

Your correspondence with Terry Hart Lee of DOC GC (December 2003) indicated that NOAA Fisheries had made the determination that observers should be considered as technicians under the FLSA. We ask that this correspondence be reviewed and that it be pointed out to Ms. Lee that this determination did not apply to NPGOP observers.

At its December 2004 meeting, the North Pacific Fishery Management Council (Council) discussed potential future changes to the NPGOP. Testimony provided during this discussion included a request that NOAA Fisheries consider classifying North Pacific Groundfish Observers as professionals under FLSA. Even though the Council did not take formal action to request this determination, it broadly supported this position during discussion.

The Council is planning to conduct an initial review of alternatives for reconstruction of NPGOP at its June 2005 meeting. We ask, therefore, that this request for concurrence be considered as soon as possible with the goal of completing the determination by early May 2005.

Staff at the NMFS Alaska Regional Office (Sue Salveson, 907-586-7775) and the Alaska Fisheries Science Center (Bill Karp, 206-526-4194) are available to provide input and assistance during this process.

cc: Chris Oliver, NPFMC

Executive Summary for the Preliminary Draft Environmental Assessment/Regulatory Impact Review for a Fishery Management Plan Amendment to Establish a New Program for Observer Procurement and Deployment in the North Pacific

This draft Environmental Assessment/Regulatory Impact Review (EA/RIR) examines the environmental and economic effects of an FMP amendment to restructure the North Pacific Groundfish Observer Program (Observer Program). The proposed action is intended to address a variety of longstanding issues associated with the existing system of observer procurement and deployment. At its February 2003 meeting, the Council approved the following problem statement for restructuring the Observer Program:

Observer Program Restructuring Problem Statement

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

Since earlier attempts to restructure the program had not been successful, NMFS, Council staff, and the OAC began to consider a stepwise approach. This was based on the concept that it might be effective to undertake a less ambitious restructuring effort focused primarily on those regions and fisheries where the problems of cost-equity and coverage are most acute. The intent was that once a restructured program had been implemented successfully for some fisheries, the Council could decide whether or not to proceed with expanding the program to include additional fisheries. The initial alternatives approved by the Council in April 2003 reflected this approach, and focused primarily on the groundfish and halibut fisheries of the GOA, with options to include BSAI groundfish vessels that currently have less than 100% coverage requirements. In December 2003, the Council reviewed a preliminary draft analysis of the impact of those alternatives that were focused primarily on the GOA.

As NMFS began to evaluate alternatives under this scenario, however, concerns arose that certain operational and data quality issues would be difficult to resolve under a "hybrid" system and that, in fact, some of these problems would likely become exacerbated under such a system. NMFS identified a range of operational and data quality issues associated with the current model. These included the agency's inability to: determine where and when observer coverage takes place on less-than-100% observed sectors of the fleet; match observer skill level with deployment complexity; reduce observer coverage for sectors of the fleet that are now subject to 100% or greater coverage levels; and implement technological innovations which might meet monitoring needs while reducing observer coverage costs and expenses.

At the February 2004 Council meeting, NMFS described the above concerns and informed the Council that the agency had determined that effective procedures for addressing observer performance and data quality issues could only be addressed through a service delivery model that provided direct contractual arrangements between NMFS and the observer providers. NMFS thus recommended that the Council include an additional alternative to the draft analysis that 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 through direct contracts with NMFS.

At its June 2004 meeting, the Council approved the suite of seven alternatives contained within this analysis (which includes the comprehensive alternative recommended by NMFS) as well as options for two types of fees: 1) an ex-vessel value fee and 2) a daily observer coverage fee. All of the action alternatives would replace the current pay-as-you-go system (in which vessels contract directly with observer providers to meet coverage levels specified in regulation) with a new program, supported by broad-based user fees and/or direct Federal subsidies, in which NMFS would contract directly for observer coverage and would be responsible for determining when and where observers should be deployed. Under this proposed program, vessel operators in fisheries with less than 100% coverage would no longer be responsible for obtaining certain levels of observer coverage specified in regulation, but instead, will be required to carry observers when requested to do so by NMFS. Vessels and processors in fisheries that require 100% or 200% coverage will continue to operate much the same as they do today, except that NMFS will be responsible for observer procurement rather than the fishing companies themselves.

Summary of the Alternatives

The six action alternatives are distinguished primarily by which fisheries would be included in the new program, and are organized in ascending order from the smallest to the largest in terms of scope. Each alternative represents a comprehensive program constructed from the **following five program elements**:

- **Scope:** Which vessels and processors would be included in the program?
- **Coverage requirements:** What levels of coverage would be required for each vessel, processor, or fishery category?
- **Funding mechanism:** How would the costs of observer coverage be funded?
- **Technological/equipment requirements:** What types of equipment and technologies would vessels be required to deploy in order to facilitate coverage by observers?
- **Contracting process:** How would NMFS contract with observer providers to obtain observer coverage?

The alternatives under consideration 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. Regulations authorizing the current program expire at the end of 2007, meaning that no action is not a viable alternative over the long-term. For this reason, NMFS recommends the addition of an option to extend indefinitely the existing program for all fisheries not covered by the preferred alternative. See Option 8 below.

Alternative 2. *GOA groundfish vessels only.* Under this alternative, a new fee-based program would be established for GOA groundfish vessels, including GOA groundfish vessels <60'. Regulations that divide the fleet into 0%, 30%, and 100% coverage categories would no longer apply to vessels in the program, and vessel operators would no longer be responsible for obtaining their own observer coverage. Under the new program, NMFS would determine when and where to deploy observers based on data collection and monitoring needs and would contract directly for observers using fee proceeds and/or direct Federal funding. 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 vessels and halibut vessels only.* This expands on Alternative 2 by including halibut vessels from all areas off Alaska. Fees would be collected from halibut landings as well as groundfish landings through annual billing by NMFS, and NMFS would have the authority to place observers on halibut vessels as well as groundfish vessels.

Alternative 4. *GOA groundfish vessels, halibut vessels and GOA-based groundfish processors.* This alternative expands on Alternative 3 by including GOA-based groundfish processors. However, in contrast to Alternatives 2 and 3, fees would be collected by processors at the time of landing, and fee proceeds would be submitted to NMFS on a quarterly basis.

Alternative 5. *GOA groundfish vessels, halibut vessels, GOA-based groundfish processors, BSAI fixed gear catcher vessels (CVs), jig vessels, and BSAI pot vessels.* This alternative expands on Alternative 4 by including BSAI fixed gear CVs (longline and pot), jig vessels, and BSAI pot catcher processors (CPs).

Alternative 6. *GOA groundfish vessels, halibut vessels, GOA-based groundfish processors, all BSAI groundfish vessels <125', and all BSAI pot vessels.* This alternative expands on Alternative 5 by adding BSAI trawl CVs under 125', and BSAI trawl and longline CPs <125'. Under this alternative, vessels with 100% or greater coverage requirements would pay a daily observer fee and vessels with coverage requirements less than 100% would pay an ex-vessel value fee.

Option 1: *Include longline CPs ≥125'.* This suboption would expand Alternative 6 by including longline CPs ≥125' operating in the BSAI.

Option 2: *Include non-AFA trawl CPs ≥125'.* This suboption would expand Alternative 6 by including non-AFA trawl CPs ≥125'.

Option 3: *Include BSAI trawl CVs ≥125'.* (Staff recommends inclusion of this option). Adding this option would allow all CVs operating in the BSAI to be covered under a single uniform program. Without this option, the predominantly AFA CV fleet (<125' and ≥125') operating in the BSAI would be split between two separate observer programs despite the fact that the two classes of vessels would in many cases be fishing side-by-side and delivering to the same processors.

Alternative 7. *Comprehensive alternative: All groundfish vessels and processors and all halibut vessels.* This alternative would establish a new fee-based Observer Program in which NMFS has a direct contract with observer providers for all GOA and BSAI groundfish

and halibut vessels in the Federal fisheries. Under this alternative, vessels with 100% or greater coverage requirements would pay a daily observer fee and vessels with coverage requirements less than 100% would pay an ex-vessel value fee.

In developing the alternatives, the Council also included several options that may be applied to more than one alternative:

- Option 4:** **Exclude GOA-based inshore processors.** (Alternatives 5 and 6). This option would exclude GOA-based inshore processors from the program under Alternatives 5 and 6. The effect of the alternative would be to establish a vessel-only program for the covered fisheries in the GOA and BSAI.
- Option 5:** **Establish an opt-in, opt-out provision for BSAI-based inshore processors.** (Alternatives 4 through 6). This option applies only if Option 4 is rejected. This option would allow each BSAI-based processor to determine for itself whether to opt-in or opt-out of the program. Processors opting into the program would pay observer fees on all groundfish and halibut landings they receive and would receive their observer coverage through the program. Processors electing to opt-out would pay observer fees on only those landings received from vessels that are participating in the program and would pay no fees on landings from vessels that are not participating in the program.
- Option 6:** **Include CDQ fishing for participating vessels** (Alternatives 5 and 6). Under this option, vessels that participate in the program when fishing in non-CDQ fisheries would continue to be included in the program when fishing CDQ. This option would allow vessel operators to obtain their coverage through a single program throughout the fishing year and would allow them to switch back and forth between CDQ and non-CDQ fisheries without changing observers. Without this option, vessel operators could be forced to switch observers and observer providers when switching between CDQ and non-CDQ fishing and would be obligated to pay two separate types of fees depending upon whether the vessel is fishing CDQ or non-CDQ.

An additional option applies to the type of fee program selected.

- Option 7:** **Uniform fee program.** (Alternatives 6 and 7) Under this option, a uniform ex-vessel value fee would be required for all vessels and processors covered by the program in place of the two separate fee programs that are contained in Alternatives 6 and 7. Adoption of this option in conjunction with Alternative 7 would establish a program similar to the Research Plan that was implemented in 1994 and repealed in 1995.

Finally, NMFS recommends inclusion of an option to address the expiration of the existing program for fisheries not covered under the preferred alternative.

- Option 8:** **Remove 2007 expiration date for no-action fisheries.** Under this option, the December 31, 2007 expiration date for the current program would be removed. This means that under Alternatives 2 through 6, the Council's preferred alternative would establish two permanent programs: (1) a new program for those vessels or fisheries covered by the action alternative, and (2) the permanent extension of the existing program for fisheries not covered by the action alternative.

Major decision points

In developing a preferred alternative, the Council is faced with a series of decision points which are summarized below.

Decision Point 1: **Scope. Which vessels and processors would be included in the new program?**

This decision point addresses which vessel and processor classes would be included in the new program. Table ES-1 provides a summary of the vessels and processors included under each alternative.

Table ES-1 Vessels and processors included under each of the action alternatives

<i>Vessel/Processor class</i>	<i>Alt. 2</i>	<i>Alt.3</i>	<i>Alt. 4</i>	<i>Alt. 5</i>	<i>Alt. 6</i>	<i>Alt. 7</i>
GOA groundfish vessels	Yes	Yes	Yes	Yes	Yes	Yes
Halibut vessels (all areas)		Yes	Yes	Yes	Yes	Yes
GOA-based inshore processors			Yes	Yes (with Option to exclude)		Yes
BSAI fixed gear CVs				Yes	Yes	Yes
BSAI pot vessels				Yes	Yes	Yes
BSA-based I inshore processors			Each processor may elect to opt-in or opt-out			Yes
BSAI trawl CVs <125'				Yes	Yes	Yes
BSAI trawl CV ≥125'					Option to include	Yes
BSAI longline CPs <125'					Yes	Yes
BSAI trawl CPs <125'					Yes	Yes
BSAI longline CPs ≥125'					Option to include	Yes
BSAI non-AFA trawl CPs ≥125'					Option to include	Yes
AFA inshore processors			Each processor may elect to opt-in or opt-out			Yes
AFA motherships						Yes
AFA CPs						Yes
CDQ vessels and processors				Option to include vessels and processors that are included in the program for their non-CDQ activity		Yes

Decision Point 2: Coverage requirements. How would coverage be assigned to each class of vessel and processor?

The issue of coverage levels arises with the implementation of a program that rescinds the current coverage levels based on vessel length and processing volume and replaces them with one in which NMFS has more flexibility to decide when and where to deploy observers. However, some type of organizational structure is still necessary to categorize vessels and processors for the purpose of determining coverage levels. As a replacement for the existing vessel-length based categories, the following four tier system of coverage is proposed. Vessels and processors would be placed into one of the four coverage tiers based on their fishery and operating mode. The purpose of designing this four tier coverage system is to establish clear and uniform criteria for determining what level of coverage is required in each fishery. **The determination of which fishery sectors are placed into which tier is a decision point at final action.**

The establishment of uniform criteria for determining coverage requirements will also assist the Council in determining what levels of coverage are necessary when new management programs are proposed. Note that placement of a particular fishery or vessel class into a particular coverage tier may, or may not, affect the type or amount of fee that would be assessed. As provided in more detail in Section 2.4, the Council has the option of establishing a uniform ex-vessel value fee that applies to all fisheries within the program, or to establish separate fee programs (an ex-vessel based fee and a daily observer fee) for fisheries in the different coverage tiers.

The following is a description of the four proposed coverage tiers:

- **Tier 1 fisheries (200% coverage).** These are fisheries in which two observers must be present so that observers are available to sample every haul on processors or delivery on vessels. Tier 1 fisheries are generally those in which observers are directly involved in the accounting of individual vessel catch or bycatch quotas.
- **Tier 2 fisheries (100% coverage).** These are fisheries in which one observer is deployed on each vessel and processor. In contrast to Tier 1, it is recognized that the observer will likely be unable to sample all hauls or deliveries due to workload constraints and will, therefore, follow random sampling procedures so that the vessel or processor will not know in advance which hauls or deliveries will be sampled. Under certain circumstances, vessels that would otherwise qualify for Tier 1 coverage could operate with a single observer in Tier 2 if they are operating under restricted hours, or under an alternative monitoring plan approved by NMFS in which alternate technologies are used to monitor scales when the observer is absent.
- **Tier 3 fisheries (regular coverage generally less than 100%).** *(This tier replaces the old 30% coverage requirement).* These are fisheries in which NMFS is dependent on observer coverage for inseason management but in which 100% coverage on every vessel is unnecessary because observer data is aggregated across a larger fleet. Vessels participating in Tier 3 fisheries can expect to receive coverage on a regular basis and will be required to carry observers when requested to do so by NMFS. However, the actual coverage that each vessel receives will depend on the coverage priorities established by NMFS and the sampling plan developed for the individual fishery in which the vessel is participating. The actual coverage a particular vessel or processor receives could range from zero to 100%, but on a fleet-wide basis, coverage levels are more likely to average closer to 30%.
- **Tier 4 fisheries (infrequent coverage).** These are fisheries in which NMFS is not dependent on observer data for inseason management. Coverage levels in Tier 4 fisheries are expected to be

low and infrequent and used for special data needs and research rather than inseason management. Halibut vessels, jig vessels, and groundfish vessels <60' are likely to fall into Tier 4. In these fisheries, NMFS could deploy observers on vessels when necessary to collect needed baseline data or to respond to specific data needs, but would not deploy observers on a regular basis to collect inseason management data. Vessels participating in Tier 4 fisheries would be required to carry observers when requested to do so by NMFS but such requests are unlikely to occur on a regular basis.

Under this four tier structure, the coverage levels would remain unchanged from the status quo for most vessels and processors that currently have 100% or 200% coverage requirements. The biggest change would occur for vessels that currently have 30% coverage requirements or no coverage requirements. Under the four tier structure, most current 30% vessels would fall into Tier 3 and can expect regular coverage at a level less than 100%. Most vessels that currently have no coverage requirements will fall into Tier 4 and will be required to carry an observer when requested, but can expect such coverage to be a relatively rare occurrence.

This analysis does not propose an annual mechanism through which a fishery would change from one tier to the next if it is determined that coverage levels need to be increased or decreased. Currently, all coverage levels are established in regulation and any changes to existing coverage requirements must be implemented through notice and comment rulemaking. The Council and NMFS may wish to consider whether a more flexible, frameworking process is warranted or possible, and legal guidance has been requested from NOAA GC on this issue (December 29, 2004). However, this analysis assumes that formal rulemaking would be necessary to change fisheries from one tier to another under the new system. Flexibility would still be substantially increased through the proposed system, however, as the coverage levels for fisheries within Tiers 3 and 4 could be shifted and modified on an inseason basis. Table ES-2 provides a summary of the proposed tier classifications for each class of vessel and processor.

Table ES-2 Proposed tier classifications for vessels and processors

<i>Vessel/processor/fishery</i>	<i>Current coverage requirement and future coverage requirements proposed under other programs</i>	<i>Proposed tier classification</i>
AFA CPs	200% coverage	Tier 1
CDQ CPs	200% coverage	Tier 1
AFA motherships	200% coverage	Tier 1
AFA inshore processors	1 observer for each 12 hour period (i.e. 2 observers if plant operates more than 12 hours/day)	Tier 1
non-AFA trawl H&G vessels $\geq 125'$ in the BSAI	100% coverage currently. 200% coverage under Amendment 79 groundfish retention standard (GRS)	Tier 2
CPs fishing for Atka mackerel in the Aleutian Islands Subarea	200% coverage	Tier 1
non-AFA Trawl H&G vessels $< 125'$ in the BSAI	30% coverage currently. However, 200% coverage would be required under proposed BSAI Amendment 80 if these vessels joined fishery cooperatives.	Tier 2
non-AFA Trawl H&G vessels $\geq 125'$ in the GOA	100% coverage	Tier 2
CVs $> 60'$ and pot CPs fishing CDQ	100% coverage	Tier 2
non-AFA Trawl H&G vessels $< 125'$ in the GOA	30% coverage	Tier 2
non-AFA inshore processors	0%, 30%, or 100% based on processing volume	Tier 3
Trawl CVs $\geq 125'$ (Including CDQ and AFA)	100% coverage	Tier 2 or Tier 3 with possible video monitoring requirement.
Trawl CVs 60'-125' (Including CDQ and AFA)	30% coverage	Tier 3
Longline CPs $\geq 125'$	100% coverage	Tier 2
Longline CPs 60'-125'	30% coverage	Tier 2
Longline CVs 60'-125'	30% coverage	Tier 3
Longline CVs $\geq 125'$	100% coverage	Tier 3
Pot vessels $\geq 60'$	30% coverage	Tier 3
Halibut vessels	no coverage	Tier 4
Jig vessels (all sizes)	no coverage or 30% depending on vessel length	Tier 4
Groundfish vessels $< 60'$	no coverage	Tier 4

Decision Point 3: Funding mechanism. Type of user fee and the initial fee percentage

All of the alternatives contained within this analysis anticipate funding the new observer program through some combination of user fees and direct Federal funding. Federal funding may be necessary to get the program up and running, cover some direct coverage costs if industry fees are inadequate, and cover agency costs associated with implementing and maintaining the program (see above). Therefore, any decisions related to the type of user fee would not preclude the possibility of obtaining Federal funding to cover observer deployment costs. There are several decisions related to the funding mechanism under each alternative. Section 2.4 outlines the primary issues and concepts relevant to the funding mechanism:

- Types of fee (ex-vessel value or daily observer fee)
- Uniform or variable fees
- Supplemental fee options for special programs
- Initial fee percentage
- Process for adjusting fee percentages
- Fee collection mechanism
- Start-up funding and Federal funds
- Restriction on the use of fee proceeds

Two primary types of fee programs are proposed: 1) an ex-vessel value based fee and 2) a daily observer coverage fee. Fees based on the ex-vessel value of landed catch are the most common type of fee currently used in the North Pacific. The most viable alternative to a fee based on ex-vessel value is a daily coverage or observer fee based on coverage costs. This approach would to some extent mirror the existing "pay-as-you-go" program, except that vessel owners would be billed by NMFS for their coverage instead of contracting directly with an observer provider. This approach is likely only feasible for vessels and processors with 100% or greater coverage. Such a fee could be designed to exactly match the direct costs of observer coverage, as is currently the case with the existing pay-as-you-go program, or the fee could be set at a lower level than actual coverage costs if Federal funds are available to support the program.

Regardless of the alternative chosen, setting an initial fee percentage is an important decision for the Council for any alternatives that use an ex-vessel value fee. The fee percentage (and the level of Federal funding) would determine the program's budget and would directly affect coverage levels in the fisheries covered by the program and costs paid by industry. The issue of how much coverage is necessary or optimal to manage particular groundfish and halibut fisheries is complex and goes beyond the scope of this analysis. The process proposed to determine coverage levels in the fisheries that will have less than 100% coverage requirements (Tier 3 and 4) is described in the RIR.

Most of the fisheries in question are currently evolving, as a rationalization program is under development for the GOA groundfish fishery and various bycatch management cooperative proposals are under development for the BSAI groundfish fisheries, and future coverage needs are unknown. It is also beyond the scope of this analysis to determine what levels of coverage would ultimately be necessary to implement the various rationalization and bycatch management proposals that are currently under development. **For this reason, this analysis is limited to considering the fee percentages necessary to maintain existing levels of coverage overall (with the flexibility to shift coverage among the Tier 3 and 4 fisheries as necessary) and provide some resources to expand the program into fisheries that currently have no coverage (the halibut and <60' groundfish fleets) in the absence of any direct Federal funding.** To the extent that Federal funding becomes available, fee percentages could be

reduced or coverage increased. Therefore, three fee levels (upper, middle, and lower endpoints) are proposed for Council consideration under each alternative in the RIR.

Option 1: Maintain the existing number of deployment days (lower endpoint). Under this option, the fee percentage would be set at the level necessary to provide an equivalent number of coverage days that are currently provided under the status quo. NMFS would have roughly the same number of observers to work with as are available under the status quo, but would have the flexibility to deploy these observers in a more rational fashion to maximize the utility of the data collected. Under this option, any deployment of observers in the halibut fishery and on groundfish vessels <60' would come at the expense of existing coverage levels on shoreside processors and groundfish vessels ≥60'. Under all of the alternatives, the average costs of observer coverage for vessels that currently carry observers would go down under this endpoint because the status quo number of coverage days would be supported by revenues from a wider fleet than under the status quo.

Option 2: Establish a fee percentage that accommodates 100% coverage for trawl and longline CPs <125' while maintaining the existing number of observer days for the remaining fleets covered by the program (mid-point). Under this option, all trawl and longline CPs <125' would be assigned to Tier 2, and fees would be increased relative to Option 1 to accommodate this increase in coverage without affecting coverage levels in other fisheries.

Option 3: Establish a fee percentage that is self-supporting at current coverage levels for sectors that currently have coverage and apply the same fee percentage to all new fisheries into which the program expands (upper endpoint). Under this option, the fee percentage would be set at a level necessary for fee revenues from the currently covered sectors of the industry (groundfish vessels ≥60' and shoreside processors) to fund the current number of deployment days in those sectors. Each new sector that is not currently covered that comes into the program will generate additional fee revenues so that expansion of coverage into the <60' groundfish and halibut fleets would not necessarily come at the expense of existing coverage for vessels ≥60'. Because the average daily revenues generated by halibut vessels and groundfish vessels under 60' are lower than the average daily revenues generated by groundfish vessels ≥60', and because observer costs per deployment day are generally higher for small vessels that operate out of more remote ports, fee revenues generated by halibut vessels and groundfish vessels under 60' would not be adequate to extend coverage to those vessels at levels currently in effect for groundfish vessels ≥60'. A precise estimate of the level of coverage that the upper endpoint fee would provide for halibut and groundfish vessels <60' will be difficult to make because data on the average number of fishing days for such vessels is unavailable.

Table ES-3 provides estimates of the low, mid, and high fee endpoints for each alternative. These estimates are based on current estimates of daily coverage costs. Estimated fee percentages range from 0.48% for the Alternative 3 low endpoint fee percentage to 1.86% for Alternative 6 (all options) high endpoint fee percentage. The fee percentages vary substantially from alternative to alternative because as each group of vessels is included in the program, they bring with them both a revenue base, in terms of the ex-vessel value of their landings, and coverage needs. However, the coverage needs relative to revenue base for each group of vessels varies substantially.

Table ES-3 Estimated observer days, coverage cost, and fee percentages for low, mid, and high endpoint fee options based on 2000-2003 average coverage days and ex-vessel revenues

Alternative	Observer days			Observer cost			Estimated fee %		
	Low	Mid	High	Low	Mid	High	Low	Mid	High
Alt. 2	3,809	5,711	5,937	\$1.35	\$2.03	\$2.11	0.94%	1.41%	1.47%
Alt. 3	3,809	5,711	11,714	\$1.35	\$2.03	\$4.16	0.48%	0.72%	1.47%
Alt. 4	5,584	7,485	11,213	\$1.98	\$2.66	\$3.98	0.52%	0.70%	1.05%
Alt. 5	9,481	11,382	15,803	\$3.37	\$4.04	\$5.61	0.69%	0.83%	1.15%
Alt 6	11,611	18,483	18,810	\$4.12	\$6.56	\$6.68	0.81%	1.28%	1.31%
Alt 6-option 1	18,485	25,357	28,239	\$6.56	\$9.00	\$10.02	1.16%	1.59%	1.77%
Alt 6-option 2	15,647	22,519	23,953	\$5.55	\$7.99	\$8.50	0.99%	1.42%	1.51%
Alt 6-option 3	15,587	22,459	23,257	\$5.53	\$7.97	\$8.26	0.93%	1.34%	1.39%
Alt 6-all options	26,497	33,369	36,745	\$9.41	\$11.85	\$13.04	1.34%	1.69%	1.86%
Alt 7-tiers 3,4 only	9,481	11,382	15,803	\$3.37	\$4.04	\$5.61	0.69%	0.83%	1.15%
Alt 7-all tiers	36,585	43,457	45,301	\$12.99	\$15.43	\$16.08	1.28%	1.52%	1.58%

Finally, there are two major issues discussed in the analysis for which the Council is not being asked to make decisions at this time: 1) technological requirements and 2) the contracting process.

Technological requirements: Electronic fishing logs, electronic reporting requirements, and VMS.

The analysis contains extensive discussions of a variety of technological requirements that will facilitate implementation of a restructured observer program. These include:

- **Electronic fishing logbooks** so observed and unobserved vessels can report fishing activity electronically from the fishing grounds.
- **Revised electronic reporting requirements** for processors that will facilitate the collection of ex-vessel fees.
- **VMS requirements** to enable NMFS to monitor and enforce compliance with check-in/check-out requirements.

While the above technological requirements may represent decision points for the Council at a future date, they are not currently presented as decision points for the Council in this analysis. This is primarily because all three types of technological requirements are part of larger program initiatives that will be developed on separate tracks. Therefore, this analysis does not propose making decisions related to these issues at this time.

Contracting process

Under all of the alternatives under consideration, private contractors would continue to be the source of observers deployed under the restructured program. The main difference from the status quo is that NMFS would be the entity responsible for contracting for observer coverage rather than the vessel owner. Complicated regulations and procedures already govern the Federal contracting process. Therefore, this

analysis does not examine alternatives to the process that would govern direct Federal contracting for observer services. The existing Federal contracting process is described in Section 4.8 to provide the Council and the public with an understanding of how the program would operate, should one of the action alternatives be adopted. This section also explores the role of contractors under a new program, and whether single or multiple contracts, and single or multiple contractors, are preferable.

Several different contract modules are possible but are difficult to develop until the scope of work is defined. In essence, there are several ways to accomplish any task and distribute work. Contracting is flexible and will accommodate various desired scenarios. For example, the work can be broken into components regionally (BSAI or GOA), by gear type, or by vessel size class. Various combinations are possible. It is also possible to develop different types of work modules. One module could be for overall coverage planning and another for the provision of observers to obtain that coverage. Once the scope of work and funding are identified, NMFS can further develop alternative contract modules for consideration. Details are provided in Section 4.8.

Because Federal contracting must follow well-established procurement processes, the Council is not being asked to make decisions related to the contracting process at this time. Rather, NMFS will keep the public and the Council informed about the process as the scope of work becomes better defined.

**Draft Observer Advisory Committee Report
May 12 - 13, 2005**

Alaska Fisheries Science Center
7600 Sand Point Way, NE, Seattle
Building 4, Room 1055
8:30 am - 5 pm

Committee: Joe Kyle (Chair), Julie Bonney, Peter Risse, John Gauvin, Tracey Mayhew, Paul MacGregor, Bob Mikol, Susan Robinson, Jerry Bongen, Arni Thomson, Brent Paine

Not present: LeeAnne Beres, Kim Dietrich, Rocky Caldero, Kathy Robinson

Staff: NPFMC - Chris Oliver, Nicole Kimball, Kent Lind (contractor)
NMFS/AFSC - Bill Karp, Martin Loefflad, Bob Maier, Todd Loomis
NMFS AK Region - Jason Anderson
NOAA Office for Law Enforcement (Alaska Division) - Mark Kirkland

Other participants: Earl Krygier, Anne Vanderhoeven, Mary Schwenzfeier, Lori Swanson, Eric Olson, Lisa Butzner, Mark Buckley, Bob Alverson, Michael Lake, Tim Meintz, Peggy Parker

AGENDA:

- I. Review and approve agenda
- II. Update on status of Federal Observer Compensation Act (FOCA)
- III. Update on Fair Labor Standards Act (FLSA) issues
- IV. Review preliminary draft analysis to revise the funding and deployment mechanism of the North Pacific Groundfish Observer Program
- V. Other issues
- VI. Committee recommendations

I. Review and approve agenda

Introductions were made, and the Chair noted that the committee last convened in March 2004. The agenda was approved with one addition. The committee approved adding a discussion on recent litigation related to observer data confidentiality. The Chair noted that the primary purpose of the meeting was to review the preliminary draft analysis to change the funding and deployment mechanism in the North Pacific Groundfish Observer Program (Observer Program) and recommend any changes or additions to the analysis or the analytical approach. This task is in preparation for the Council's review of the preliminary analysis at its June 2005 Council meeting. The analysis was provided to the OAC prior to the meeting to facilitate its review.

II. Update on status of Federal Observer Compensation Act (FOCA)

Martin Loefflad and Bob Maier (NMFS) provided an overview of and update on the status of FOCA. This proposed legislation is intended to reduce the costs for observer insurance, limit vessel liability in the case of negligence claims, and provide a more comprehensive program for compensating observers in the event of work-related illness or injury. The most recent FOCA language available to the public (QuanTech report, March 2003) was provided to the committee, and staff noted that the National Observer Program (NOP) related that no significant changes to the substance of the bill have been made since the March 2003 version. The proposal continues to undergo internal agency review. As part of this review, the NOP has initiated a contract to analyze the financial impacts of implementing FOCA.

III. Update on Fair Labor Standards Act (FLSA) issues and discussions with the Department of Labor

Dr. Bill Karp (Observer Program Leader, NMFS) provided a brief overview of the NOP and recent changes in staff, direction, and policy. Lisa DeFosse is the new NOP Team Lead, and the NOP will meet in Seattle in June. Dr. Karp also described the purpose of the National Observer Program Advisory Team (NOPAT), which consists of one member from each region, and a headquarters and NOP representative. NOPAT works to address issues of common concern to the regional programs, and to address policy and financial issues and provide advice to the NOP.

Dr. Karp also presented a brief overview of the past two years' correspondence related to observer compensation issues and the status of observers with regard to the requirements for overtime pay included in the Fair Labor Standards Act (FLSA). This issue was brought to the forefront by a memo from Dr. Bill Hogarth in November 2003, which stated that NMFS maintains that fisheries observers are biological technicians and therefore eligible for overtime compensation under the FLSA. That memo raised several questions with regard to the status of observers in the North Pacific, although it was initiated due to issues surrounding an agency-funded observer program in Hawaii that required documentation of the agency's position.

In order to help clarify the issue, the Department of Labor (DOL) scheduled two public workshops in February 2005. These workshops were subsequently cancelled and have not been rescheduled, likely due in part to the complexity of the questions that DOL staff realized were likely to be asked. Dr. Karp met with the DOL in February in order to determine how to proceed with a request for answers to these outstanding questions regarding the applicability of exemptions under the FLSA.¹ Initiating the formal process requires a formal request from the Dept. of Commerce to the Dept. of Labor, and is estimated to take about six months. This request has not yet been drafted by NOAA and DOC.

The applicability of the FLSA and Service Contract Act (SCA) hinges on whether observers are determined to be technicians and not professionals.² NOPAT discussed this issue in 2002 – 2003, and the record indicates that while there was agreement in most cases that observers were likely to be classified as technicians, this was not likely the case in the North Pacific. A letter from Dr. Balsiger to Dr. Hogarth was sent on February 4, 2005, requesting concurrence in the determination that North Pacific groundfish observers should be classified as professionals under the FLSA, in order to properly recognize the professional nature of the work conducted by these observers and resolve the outstanding issues and cost uncertainties which make it difficult for the Council to restructure the Observer Program. No response has been received to date. Another viable alternative mentioned was to clarify that North Pacific observers are professionals in the Maguson-Stevens Act reauthorization.

One committee member also discussed the possibility of requesting the DOC to control or define the work hours that the observer works. While this would not clarify the overtime compensation issue, it was offered as a potential solution to control costs. It was also noted that the current collective bargaining agreement assumes a 12 hour workday for observers and compensates them for that workday, and not on an hourly basis.

¹Letter from Helen Hurcombe, Director, Acquisitions and Grants Office, NOAA, to Timothy Helm, Team Leader, Government Contracts Team, Wage and Hour Division, U.S. Department of Labor, February 16, 2005. Response letter from Timothy Helm to Helen Hurcombe, February 22, 2005.

²The SCA establishes wage rate determinations and is only applicable to contracted employees whose work is classified as technical. Unlike the SCA, the FLSA issue is applicable under any service delivery model. The FLSA provides an exemption to its overtime pay requirements for employees whose specific duties and salary meet the threshold for a professional employee.

IV. Review of preliminary draft analysis to revise the funding and deployment mechanism of the North Pacific Groundfish Observer Program

Kent Lind (contractor) provided an overview of the preliminary draft analysis provided to the committee for review. Under the system proposed in the analysis, NMFS would contract directly with observer providers for observer coverage, funded by a broad-based user fee and/or direct Federal subsidy. Vessels and processors not covered under the new program would continue to operate under the existing program, whereby vessels contract directly with observer providers. The alternatives for the new program vary with regard to scope (i.e., which fleets or sectors are included in the new program and which remain in the current pay-as-you-go program). The action alternatives range from including all Gulf of Alaska (GOA) groundfish vessels to a comprehensive alternative that would include all vessels and processors fishing groundfish or halibut in Federal waters of the North Pacific. The following sections highlight committee discussion on specific issues within the analysis.

Tier classifications

The issue of coverage levels arises with the implementation of a program that rescinds the current coverage levels based on vessel length and processing volume and replaces them with one in which NMFS has flexibility to decide when and where to deploy observers. As a replacement for the existing vessel-length based categories, a four-tier system of coverage is proposed, in order to establish clear and uniform criteria for determining what level of coverage is required in each fishery. The intent is that all fishery sectors included under the new program would be placed in one of four tiers at final action, and a change from one tier to another would require a subsequent amendment and rulemaking process.

The OAC discussed the 'tier system' at length, specifically Tiers 3 and 4, in which NMFS has the flexibility to deploy observers according to a scientific sampling plan. Tier 3 would include sectors with characteristics that make regular, but less than 100%, observer coverage necessary to manage the fishery. Tier 4 would include sectors that currently do not have observer coverage (e.g., halibut and <60' catcher vessels). In this tier, coverage levels would be less than Tier 3, and more oriented around fishery research or specific data needs than inseason management needs. The committee noted that the description of these tiers may need to be modified, such that it is clear that NMFS would have the authority to put observers on vessels in Tier 4. In addition, the OAC noted that there are some vessels in the <60' fleet that harvest a significant portion of the overall catch for certain fisheries. These vessels may be candidates for Tier 3 rather than Tier 4 status – despite the fact that they are currently unobserved. The committee wanted to ensure that this action will meet the need identified in the problem statement to eliminate the coverage levels based on vessel size in order to increase the quality and utility of observer data.

It was emphasized that within Tier 3 and Tier 4, the primary advantage is the flexibility for NMFS to put observers when and where they are needed, as coverage levels within the tier are not fixed for any one vessel or fleet. The difference, however, is the expectation of regular coverage in Tier 3 versus more limited coverage in Tier 4. It was noted that the distinction between Tiers 3 and 4 may not be as important as the fee percentage selected, since the fee percentage dictates the number of observer coverage days NMFS has to work with. The committee also agreed that the analysis would benefit from a more comprehensive discussion of the data problems that are intended to be resolved in each tier and where the program might be 5 – 10 years from now in light of upcoming rationalization programs. One member also noted that another criterion for being in Tier 3 should be 'minimal species composition diversity.'

The committee also noted that the analysis states that NMFS proposes that all catcher processors that are included in the new program have at least 100% coverage regardless of length, which puts them in either Tier 1 (200%) or Tier 2 (100%) depending on their other characteristics. The OAC requested additional rationale be provided in the analysis to justify this change.

Fee basis and percentage

The alternatives and options for analysis currently include two fee systems: 1) a uniform annual fee based on a percentage of ex-vessel value for every sector included in the new program, and 2) a uniform annual fee based a percentage of ex-vessel value for sectors in Tiers 3 and 4 (less than 100% coverage needs) and a daily observer fee for sectors in Tiers 1 and 2 (at least 100% coverage) included in the new program. The committee discussed the fee systems and recognized that the fee percentage depends on the sectors included in the new program and assessed an ex-vessel value fee. For instance, if sectors are brought in that have high coverage needs (100%) but relatively low revenues, the fee for all sectors increases. If large sectors with high revenues and low coverage needs are brought in, the fee for all sectors decreases. The committee noted that some sectors would be subsidizing other sectors under an ex-vessel fee program, yet the problem statement notes that part of the purpose of the new program is to address the disproportionate costs that some sectors currently pay for observer coverage. All sectors included in the ex-vessel value fee program would be assessed the same fee percentage, and that fee would be selected at final action. The intent is that the fee would not be subject to change until a subsequent amendment and rulemaking process were completed.

The committee also recognized the reason for including a daily observer fee for vessels that are in Tiers 1 and 2 that require 200% and 100% coverage, respectively. In this case, vessels would not be contributing to the fee percentage, but would pay for their observers similarly to how they do now, except they would be paying NMFS directly instead of the observer contractor. The primary reason the Council added the option to assess a daily fee for these sectors was to ensure that funds are available to exactly match the costs of coverage for fisheries that require 100% and 200% coverage. A fee based on ex-vessel value is subject to several variables, such as TACs, ex-vessel prices, and harvest levels. The revenue generated by a fee of this type is less certain on a year to year basis. Thus, it makes more sense to assess an ex-vessel value fee on fisheries in which 100% coverage is not absolutely necessary to manage the fishery. In effect, the daily fee is necessary if one wants to be certain that revenue shortfalls do not prevent the coverage needs from being met.

One member questioned whether the data used to determine prices (and thus the ex-vessel fee) is sufficiently representative for all fleets. A public participant noted that CDQ harvests included in the tables showing *current* observer coverage costs in terms of a percentage of ex-vessel revenues will elevate the average costs for the fleet (which consists of CDQ and non-CDQ vessels).

Standard prices versus actual prices

The committee also discussed whether standard prices could be used to determine the annual ex-vessel based fee, or whether actual prices are necessary. Members agreed that standard prices are accurate for the halibut fleet, and that the cost associated with tracking actual prices is higher than the benefit one might recoup if actual prices were used. The analysis indicates that in 2004, 95% of IFQ permit holders chose to use standard, rather than actual, prices. It was noted that the halibut fleet sells into a fairly homogenous market. Other fisheries may not be as well suited to standardized ex-vessel values. Currently, Alternatives 2 and 3 use standardized prices to determine the fee for all vessels, and Alternatives 4- 7 use actual prices for the catcher vessel fleets.

Start-up funding

The committee agreed that it is appropriate for the Federal government to provide funds to start the new observer program and/or to provide ongoing subsidies. The committee discussed the potential for requesting Congressional funding and/or NOP funding, either by apportioning existing funds or new monies to the North Pacific. The NOP budget has increased in recent years, which may represent a potential source of start-up funding. It was noted that it is not feasible to expect industry to pay 'double'

for even a limited period of time (e.g., pay for observers to operate in the current program and provide start-up funding for the upcoming fee program). It was also noted that the North Pacific continues to face resistance for Federal funding support, and the rationale provided has primarily been focused on the success and level of coverage in the current industry-funded program and the notion that new funding should fund new observer days in regions that do not have coverage. However, the rationale for Federal funding in the North Pacific may be strengthened by the extension of the new observer program to fleets that currently do not have any observer coverage. Another possibility is to approve the new observer program on the condition that Federal start-up funding (or an on-going Federal subsidy) is provided. Under all alternatives, NMFS would continue to be responsible for administrative costs.

Technological monitoring options

The committee hopes NMFS will aggressively pursue technological monitoring options, and expressed concern that those options appear to be underplayed in the preliminary analysis. Staff noted that while VMS, electronic logbook, and a joint electronic reporting system are discussed in the analysis and Appendix I, none of these technologies are currently mandated under any particular alternative. There is a decision point in the analysis to determine whether there should be a restriction on fee proceeds to limit its use to pay for costs directly associated with coverage by human observers. However, the program could be designed such that some fee proceeds could be used to subsidize or pay for alternative monitoring technologies that could be required in the future. Some committee members voiced concern that one or more of these technologies should be in place when the new program is implemented. It was noted that these technological concepts are being considered as part of a larger effort within the agency, and may be more appropriately addressed on a separate track. Yet if the agency determines that a particular technology is necessary to implement one or more of the alternatives in the observer amendment, this determination should be explicit and analyzed in this package prior to final action. NMFS will further consider these issues prior to release of the next draft.

Deployment of observers

NMFS staff provided an overview of Section 4.3, which describes how NMFS would deploy observers under the alternatives. The agency noted that it intends to meet with industry in the future to receive feedback on potential implementation structures and expand this section for future drafts.

In Tiers 1 and 2, NMFS described the need for the vessel to provide: an annual fishing or operation plan; the date and location the vessel wants observers to board a minimum of 10 days prior to that date; and 48 hour departure notification. In addition, the agency is exploring the use of VMS as a compliance tool for departure notification requirements (see above section). The committee expressed concern with the ability to provide 48 hour notice in a limited access (versus rationalized) fishery and the need for VMS as an enforcement tool if you have 100% or 200% coverage requirements. One member noted that NMFS could work through the cooperative managers for the AFA fleet to increase efficiency and avoid having to coordinate with each individual vessel.

In Tiers 3 and 4, in which less than 100% coverage is required, the choices surrounding observer deployment are more complex. NMFS described two potential bookends that could be used to determine annual deployment decisions: Bookend 1) an annual coverage decision making model; or Bookend 2) a real-time coverage decision making model. Observers would be deployed on a random or systematic basis under the annual model, but would use the annual planning process to direct that deployment throughout the year. The observer provider would likely be responsible for deploying observers according to the annual plan. The real-time model would require more information on a rapid basis, as NMFS would attempt to match real-time fleet information to fishing effort and determine where to put observers based on target fishery, temporal, and spatial fishing patterns. NMFS would thus have more day to day responsibility for determining where to place observers under Bookend 2. The committee recognized

advantages and disadvantages with both bookends, understanding that some combination of the two could also be developed.

Supplemental fees

The committee discussed the concept of supplemental fees, should some fisheries shift into a rationalization program that would necessitate higher coverage levels than exist now. The committee recognized that if supplemental fees become necessary in the future, they would fit within the service delivery model proposed in the amendment package (direct contracting model) and not require any fundamental changes to the program structure. Under a new rationalization program (such as Gulf groundfish), the monitoring requirements will have to be developed specific to that program during the development of that analysis. The committee discussed the possibility that vessels included in that program would change tier levels (e.g., to one that requires at least 100% coverage) and continue to pay the fee percentage selected under the observer amendment. While the observer coverage levels increase, additional fee revenues would likely also be generated due to the added value expected through the rationalization regime. Alternatively, supplemental fees may need to be assessed on only those vessels that benefit from the rationalization program. It was also noted that the ability to pay for the monitoring requirements associated with each rationalization alternative may drive the selection of the preferred alternative in new rationalization programs.

Contracting process

NMFS provided a review of the Federal contracting process and the Indefinite Delivery/Indefinite Quantity (IDIQ) contract approach that appears to be viable under the restructured program (Section 4.8 of the analysis). NMFS noted that under any of the action alternatives, private observer companies will continue to be the source of all observers deployed under the new system, the difference being that NMFS would be the entity contracting with the company and responsible for coverage rather than the vessel owner. The primary advantage to the IDIQ approach is that it is a relatively flexible framework that would allow NMFS to identify a body of work and award it to multiple vendors if desired. There are also no requirements for start-up funding to initiate an IDIQ contract; however, issuing task orders would require funding to cover that specific task order. Task orders are developed as necessary.

NMFS also noted that it would likely take about a year to award the contract, so that time needs to be included in the estimated timeline for implementation. NMFS plans to expand Section 4.8 of the analysis to include some potential contract constructs that may better show how the actual modules would operate. The analysis states that one potential task that could be included in the contract is the requirement that the observer company maintain a system of tracking vessels; one member noted that it may be problematic to shift this responsibility to the contractor.

Crossover issues – Hybrid program

The committee reviewed the issues in Section 4.9 associated with administering two separate programs under Alternatives 2 – 6, in the case that not all sectors are included in the restructured program. In effect, a hybrid program would mean implementing one program based on Federal contracts for observer services and one program through regulations similar to the existing program (pay-as-you-go). Alternative 7 is the only alternative which includes all vessels and processors fishing in Federal waters under the restructured program. Generally, the committee believed this section needed additional work if NMFS wants to justify the difficulty in implementing a hybrid program. NMFS concerns are generally related to tracking government funds and data quality. With regard to tracking government funds in a hybrid program, NMFS noted difficulty in verifying that invoices received from contractors cover only services provided to the government and not any portion of costs that are attributable to the industry contract. With regard to data quality, NMFS stated that it is unable to adequately: 1) match deployment

complexity to observer skill level; 2) address the potential bias associated with non-random placement of observers in the <100% covered fleet; and 3) control data quality through standards for the observer provider.

The committee did not comment on the concern with tracking government funds. The committee noted that the agency's concerns with a hybrid program, while not ideal for the agency, should be manageable. Furthermore, the committee notes that a hybrid program meets the objectives of the problem statement by increasing data quality relative to the status quo. The committee requested additional information on why the issues identified by NMFS cannot be resolved through policy or regulation for those sectors that may not be included in the new system and questioned whether there are solutions that the agency could explore that would facilitate implementation of a hybrid program.

Enforcement

The committee reviewed the current enforcement duties associated with the existing program, and how those duties may change under the restructured program. Mark Kirkland from NOAA Enforcement noted that while the focus of enforcement activity would shift from compliance with coverage requirements to compliance with notification requirements, the overall enforcement burden would not likely change to any great extent. In addition, Enforcement would continue to enforce regulations protecting observers from harassment and interference with their work as is currently the case today.

Schedule

Staff reviewed the schedule for completing the analysis. Initial review will likely be scheduled for late this year or February 2006. The current program expiration is December 31, 2007. Final action to extend the current program (status quo) would be necessary by April 2007, but final action on a restructured program would likely be necessary by April 2006 for implementation by January 1, 2008.

Staff noted that the potential for permanently extending the current pay-as-you-go program to sectors not covered by the action alternative has been incorporated in Option 8 of the analysis, such that if the Council determined at final action that some portion of the fleet should continue to be in the existing system, a new analysis and amendment package would not be necessary. In addition, staff will explore ways to modify Option 8 such that it would allow the Council to rollover the existing program temporarily for all sectors (including those in the new fee program) in the case that there is a lag in implementation between the time of Council final action and the current program expiration of December 31, 2007.

V. Other issues: briefing on recent litigation related to observer data confidentiality

Paul MacGregor (Mundt MacGregor LLP) briefed the committee on recent litigation related to the confidentiality of observer data. Last April, his firm was retained to file suit against the DOC on behalf of various industry sectors involved in the Alaska groundfish and crab fisheries. In that suit, the plaintiff fishing groups challenged DOC's decision to release non-aggregated observer data in response to a FOIA request by Oceana. Following a hearing on the industry's motion for a temporary restraining order, the judge granted a temporary order enjoining the DOC until a full hearing could be held. Oceana subsequently withdrew its FOIA request and the suit was dismissed, but without any final ruling by the court on the confidentiality issue. NMFS noted that the confidentiality issue is likely to be addressed in the MSA reauthorization proposal the agency plans to submit to Congress. This package is not yet available to the public.

VI. Recommendations

The committee made several recommendations related to two broad categories: 1) potential MSA reauthorization and policy issues; and 2) changes to the preliminary draft analysis. The committee also made several minor suggestions for the analysis, such as wording changes, additions, and clarifications, that staff will attempt to incorporate for the initial review draft (see [Attachment 1](#)). The committee was advised that these types of changes did not necessitate a formal committee recommendation.

MSA and policy recommendations:

- If any ambiguity remains about releasing non-aggregated observer data then it should be resolved under the MSA reauthorization such that non-aggregated data is classified as confidential and cannot be released. The confidentiality policy should apply whether the data is collected by a human observer or via technological monitoring.
- Request agency determination that North Pacific groundfish observers are classified as professionals (not technicians) via the memo sent from Dr. Balsiger to Dr. Hogarth (2/4/05).
- Support an amendment to the MSA that defines North Pacific groundfish observers as professionals under the Fair Labor Standards Act.
- Request that staff provide documentation and rationale on why the NPGOP should receive Federal start-up funding and/or ongoing funding. Provide this information to the committee and in the analysis.

Recommendations on the analysis:

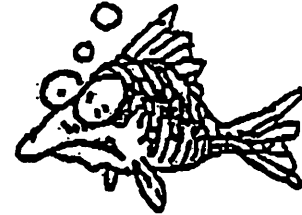
- Provide data on the distribution of catch by vessel length for catcher processors, to determine whether there is a more appropriate threshold to determine which catcher processors need at least 100% coverage for management purposes (Tier 2).
- Provide expanded rationale in the analysis for the agency proposal to require at least 100% coverage on all catcher processors.
- Explore a more appropriate delineation between vessels classified as Tier 3 (regular coverage) and Tier 4 (infrequent coverage), other than whether observer data is currently used for inseason management. Explore a threshold based on capacity, and not whether vessels have had required coverage in the past. Make it explicit that vessels in Tier 4 can be required to carry observers at the request of NMFS.
- Provide estimates of the upper bounds of current observer costs, especially for 'short pulse' fisheries whose actual costs may exceed the calculated averages.
- The committee recommended that it convene again prior to the Council's initial review of the analysis and also prior to final action.

Finally, the committee discussed the need to initiate a subcommittee of the OAC or a separate Council committee to address technological monitoring options in a comprehensive fashion. The intent is that this committee would review the MRAG report on technological monitoring approaches (Appendix I), discuss practical and logistical issues associated with technological monitoring, and make recommendations as to how technology can be integrated into our current and proposed monitoring programs. The committee recognized that significant consideration should be given to the representation on the committee and the agency staff that would need to be involved. There was also consensus among committee members that the OAC should be better integrated into the developmental process for new rationalization programs.

List of modifications to the analysis requested by the OAC

1. Revise text so that Tier 4 is not characterized as 'rare and infrequent' coverage. Make it explicit that NMFS will have the authority to place observers on vessels in Tier 4, and that Tier 4 vessels will be paying the same fee percentage as all other tiers included in the ex-vessel value based fee program.
2. Add discussion of goals that the agency wants to resolve related to inseason management by allowing placement of observers on Tier 4 vessels.
3. Change 'Alaska Fishermen's Union' to: Alaska Fisheries Division of the United Industrial Workers.
4. Confirm with NMFS whether the price data used to determine the ex-vessel revenues for each sector used a specific price for yellowfin sole or whether all flatfish prices were aggregated.
5. Provide footnote to Table 4.4-2 explaining that the inclusion of vessels fishing CDQ will increase the estimates for the current average observer costs, specifically for the <125' longline CP sector.
6. Be explicit about technological monitoring requirements if they are included within specific alternatives in the future.
7. Add a description in Chapter 4 of what is meant by 100% (one observer) and 200% (two observers) coverage requirements.
8. Modify language on p. 99 related to at-sea discards of pollock in the AFA catcher vessel fleet.
9. Follow through with statement on p. 105 to have NMFS work with the industry and observer providers on proposed requirements (e.g. departure notification, fishing plans, etc.) to facilitate observer deployment under the new program.
10. Delete second paragraph under Section 4.3.3 (editing error).
11. Add discussion in Section 4.4 on caveats to the average costs provided in Tables 4.4-1 and 4.4-2, specifically for the 30% fleet. Travel and room and board expenses pro-rated over the daily rate increase the overall rate. Work with the observer providers to groundtruth the average cost per day for the various sectors. Show upper bounds in text.
12. Amend Tables 4.4-3 through 4.4-6 to show which fleets are included under each alternative. Add footnote that these tables include CDQ fishing.
13. Change name to Digital Observer, Inc. where found throughout analysis.
14. Provide footnote to Tables 4.4-1 and 4.4-2, that the prices for individual vessels in the non-AFA trawl catcher processor sector may vary substantially from the average.
15. Consider adding tables that would show the fee percentage if the Federal government funded some portion of the fee and/or start-up funding for the first year.
16. Highlight known future rationalization programs where appropriate (GOA groundfish rationalization, BSAI Amendment 79/80).
17. Add a second version of Table 4.4-2 (status quo coverage costs in terms of percentage of ex-vessel revenues) assuming that all non-AFA catcher processors are required to have 200% coverage.
18. Clarify in text that no frameworking mechanism is proposed to allow the fee to be increased without undergoing an analytical and rulemaking process.
19. Change table reference on p. 122 to Table 4.2-7.
20. Provide a table on p. 121 that shows the high endpoint fee that would be assessed if all catcher processors were required to have 100% coverage (e.g., midpoint between Table 4.4-4 and 4.4-5).
21. Provide additional discussion in Section 4.9 to clarify NMFS's concerns with administering a hybrid program.

**North
Pacific
Longline
Association**



"Let them eat cod"

AGENDA C-8
JUNE 2005
Supplemental

Agenda C-8

May 24, 2005

Mrs. Stephanie Madsen, Chair
North Pacific Fishery Management Council
605 W. 4th Avenue
Anchorage, AK

RE: Proposal to Place All Freezer-Longliners in Tier 2

Dear Stephanie:

It would seem at the outset that resolution of the overtime pay issue is necessary before we can make much progress on NPGOP restructuring. The cost implications are significant.

In the May 2005 EA on NPGOP restructuring NMFS proposes that all freezer-longliners be placed in Tier 2, which requires 100% observer coverage. The proposal is based on "concerns about the ability to obtain viable data on CP's" particularly those "built right up to the 125' size limit" (EA, p. 100 – note that most of the vessels were built or rebuilt before the advent of the observer program; there was no intent to avoid observer coverage). We would like to suggest that 100% coverage may be unnecessary, particularly in the BSAI.

The original intent of the restructuring was to provide increased observer coverage on vessels in the GOA to resolve data gaps – no such gaps have been identified in the BSAI, to our knowledge. Freezer-longliners in the GOA sometimes experience variable halibut bycatch, but in the BSAI are remarkably consistent in their take of all species – target and bycatch (Fisheries Information Services, personal communication). Tier 3 may be appropriate for these vessels.

Several other factors merit consideration:

1. Inseason management is straightforward because fishery rates are consistent and predictable – we have no history of overruns;
2. We have no halibut PSC problems;
3. Cod stocks are fished conservatively and there is no indication that there is any threat of overfishing;

4. Of 41 freezer-longliners only 9 are less than 125', and only 4 are built "right up to the 125' size limit." There may not be much of a "problem;" and
5. Freezer-longliners under 125' have one of the highest observer coverage costs, at 4.20% of groundfish ex-vessel value (EA, p. 113). Logically, increasing their coverage from 30% to 100% would push that cost to 14% of ex-vessel value – a possible show-stopper.

The original decision to separate the fleet at 125' for observer coverage purposes was not arbitrary, strictly speaking. The original proposed rule implementing the current system stated that larger vessels take more fish and gave percentages of harvests by the larger vessels for two years. This aggregate measure does not necessarily reflect individual vessel performance, and we have found no analysis of the economic impacts of the size split. Certainly a careful analysis should be produced before any decision is taken on the issue.

It is our hope that the Council will consider the above and decide to place all freezer-longliners in Tier 3.

Thank you for your attention.

Sincerely,



Thorn Smith
Executive Director

**FISHING VESSEL OWNERS' ASSOCIATION
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N.P.F.M.C.

Ms. Stephanie Madsen, Chairwoman
North Pacific Fishery Management Council
605 W. 4th Avenue, Suite 306
Anchorage, AK 99501-2252

RE: Observer Plan Amendments

Dear Chairwoman Madsen:

The Fishing Vessel Owners' Association (FVOA) represents about 90 vessels, all of which hold some level of halibut and sablefish IFQs. We also represent several Pacific cod longliners that deliver to shorebased Alaska processors and three vessels that process at sea. The following comments reflect the concerns of those operators. These comments from FVOA are on the preliminary draft of May 6, 2005, for amendments to the observer program.

The analysis divides the fleet into four tiers for observer considerations. In Tier 2, the vessels are to have 100% observer coverage. The vessels included in this category are the large to smaller sized catcher processors that may currently be 30% covered. The need for 100% coverage for processors is not a fair standard. The 100% requirement should be based on some level of production such as being in the upper 60% of production for a given industry sector. If they are less than this, they should be covered at the 30% rate. The current operational definition of who gets 100% coverage is too rigid and would be more cost effective if based on a performance standard of production.

With regard to Tier 3 and 4 vessels, they should be designated the appropriate tier based on some performance standard of production. We have one member in our Association that has 30,000 lbs of sablefish and the vessel is 62 feet long. We have other members with a couple hundred thousand pounds of sablefish IFQs, but have 59 foot vessels. Under current regulations, the 62 foot vessel gets an observer and because he catches the fish in one trip, he essentially has 100% coverage. The standard for being in Tier 3 should be based on some level of production. The requirement to have a log book should similarly be based on some production standard.

If a vessel produces 30,000 pounds or more of sablefish and/or halibut, they should be required to fill out a log book. This represents for most vessels a 3-5 days fishing trip. The requirement for being available for an observer in Tier 3 should be based on some production performance standard. This would make a new observer program more cost efficient for all concerned.

Sections 2.3.7 and 4.3.3 both deal with vessel and observer deployment on tier 3 and 4 vessels. One of the advantages to the current IFQ program for halibut and sablefish operations is that the vessel owner and crew can make decisions on when to fish based on market opportunities, weather, and the personal commitments of the crew and vessel owner. The current observer program provides maximum flexibility for our fishermen. The analysis does not discuss how deployment will be handled between NMFS and the contractor or between the contractor and the vessel owner. It would be helpful for the analysis to discuss this logistical design

We have a number of members who hold permits off the Washington, Oregon, and California coast for sablefish. Under the observer program for the lower coast, the permit holders are contacted in the fall of the preceding year about their coverage requirements. NMFS does not dictate when the coverage is required. The vessel owner then plans the oncoming year knowing he has coverage responsibilities and coordinates with an assigned person from NMFS. This system seems to be working—however, it is a small observer program compared to the NPFMC program.

We would like to see a more amplified discussion on deployment logistics for the less than 100% covered vessels. That discussion should include what will be the vessel owner's responsibilities, who do they coordinate with, and when will the vessel owner know the observer requirements for the new year. It would be best to have a system where the vessel owner knows their coverage requirements in the late fall preceding the new fishing year.

Types of Fees (page 25). This section discusses basically two types of fees. The fee that vessels currently not taking 100% coverage would pay would be an ex-vessel delivery fee, which is authorized under the research plan from the Magnuson-Steven's Act. The other type of fee discussed is a fixed-rate fee for those operations that currently have 100% or 200% coverage. We have the following request and general comments:

- a. There is considerable discussion in the analysis attempting to justify fixed rate charges for the factory operations (CPs). The analysis attempts to suggest that fixed fees for the factory operations are reasonable because (i) "many operations have no price transactions (at sea Processor)". This is true, but currently CP's under AFA pay a raw fish tax based on shore-based ex-vessel prices. The point is the ability to develop a rate-based fee on ex-vessel prices should not be a mysterious process for the at-sea processors. (ii) Post season adjustments occur, that do not appear on fish tickets. This occurs within all the fleets. This is not just isolated to at-sea processors. It occurs within the IFQ fleet with operations such as from the Seafood Producers' Coop in Sitka. (iii) Using actual prices would encourage price

reduction (or under reporting). This is fear mongering. There is no evidence of this for the fee structured for the halibut and sablefish IFQ program. The underreporting argument is not a legitimate argument for not having an option for CPs that is exvessel price oriented. This has not been a problem with the AFA exvessel price assessment so why is it a problem for CPs? The Council has at least two fee assessments going on at this time—the IFQ fee and the AFA fees, and there is no evidence of under reporting of prices, and will have a fee based for the crab buy-back program.

Pages 120 through 121 have a series of tables that show the costs of the different options. Several of the options suggest a vessel sector or individual vessel may have the option of paying a fixed fee or a percentage ex-vessel fee. We object to this option. Either the whole group of vessels in an industry sector should be in the ex-vessel fee category or none. Groups identified as having this option to opt in or out are found on page 14. they include BSAL trawl CV>125'; BSA based inshore processors; BSAL Longline CPs> 125', and BSAI non-AFA trawl CP's >125'.

The only reason a vessel will be part of the ex-vessel fee is if their unit costs based on the values and volume of fish are high. If the vessel is a low producer, it will bring its disproportionately high cost into the pool of fishermen paying an ex-vessel percentage. All the vessels with lower costs will exclude themselves and pay the fixed fee, thus decreasing their costs while increasing the cost of those in the pool paying a percentage fee. The opt in and out options put a significant financial burden on those vessels that deliver to shorebased operations.

If one of the reasons these amendments are being proposed is to make a more equitable fee for everyone, why is it equitable for one group that has lower costs to help out another group that has higher costs, such as the IFQ halibut fleet helping the GOA trawl fleet, but to allow the CPs to have a fixed rate and not contribute any additional value to those that are currently being disadvantaged? How does this meet the "fair and equitable" national standard? Why should the CP fleet that extracts the majority of value get a special break with fixed fees and not contribute a similar percentage as the smaller operations are proposed to pay?

Depending on which number of vessels chose to stay in or out, the tables on page 120-124 suggest cost between option 5 and 6 could be 100% more for those paying an ex-vessel percentage fee. The cost rises in order to absorb the higher costs of those opting in. Those who opt out will take their fish out of the overall pool, therefore, increasing the cost of the remaining operations.

Page 123, Table 4.4-7 deals with CDQ fisheries. The current levels of coverage required on CDQ fisheries were allegedly designed for a grand experiment. The truth is there was no hypothesis and never a laid-out experiment with the use of the excessive observer coverage. The CDQ observer coverage requirements has resulted in some fishermen paying 20.44% and 29.47% of their ex-vessel value to observers. These coverage levels are no longer warranted and probably never were. The monitoring of CDQ fish is no different than the monitoring of non-CDQ fish or IFQ fish or AFA Co-op fish.

The problem now is, under the proposed amendments, if the CDQ operations can opt into the pool of vessels paying an ex-vessel percentage fee, they bring everyone else's costs up in order to subsidize CDQ coverage requirements. The CDQ costs should be brought in line with non-CDQ operations. The CDQ excessive coverage requirements should be dropped and the vessels assigned to the appropriate tiers just like everyone else. There is no reason to impose these types of costs on others let alone the CDQ participants when there is no grand ongoing experiment.

In summary, FVOA recommends the following.

1. For 100% covered processors that this be based on some performance standard of harvested fish. If a vessel falls into a 50-60% percentage of production for their sector of the industry, the 100% requirement would apply. If they do not exceed the 50% or 60%, they would drop to 30% coverage.
2. Whether a vessel is considered for observer coverage in Tiers 3 and 4 should be based on some level of production. Our production recommendation in (1) above should be analyzed for Tier 3 and 4 vessels. For logbook requirements, we recommend a 30,000 lb. threshold which represents a basic 4 to 6 day fishing trip for all vessels in Tiers 3 and 4.
3. There needs to be further discussions of the logistical design between the responsibilities of the vessel owner, contractor, and NMFS for the less than 100% covered vessels.
4. The option that allows sectors or individual vessels to opt in or out of the pool of vessel owners paying the ex-vessel landing fee should be restructured to either let everyone from a particular sector opt in or opt out. Only providing those vessels with high unit costs to opt in is not fair to those required to participate in the pool and do not have an option to opt out.
5. The current observer requirements for CDQ operations should be dropped and the vessels used in the CDQ program assigned to the appropriate tier groups. If this is not done and the CDQ operations are allowed to opt into the pool program paying the ex-vessel fee, it results in a significant subsidization of CDQ observer costs for which there is no clear rationale.

Sincerely,



Robert D. Alverson
Manager

**FISHING VESSEL OWNERS' ASSOCIATION
INCORPORATED**

ROOM 232, WEST WALL BUILDING • 4005 20TH AVE. W.
SEATTLE, WASHINGTON 98199-1290
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May 11, 2005

Ms. Stephanie Madsen, Chairwoman
North Pacific Fishery Management Council
605 W. 4th Avenue, Suite 306
Anchorage, AK 99501-2252

Dear Chairwoman Madsen:

Upon review of the observer RIR, and the different options being suggested to the Council to amend the observer program, the members of the Fishing Vessel Owners' Association have this request. We would like to have someone on the Committee with a significant halibut/sablefish IFQ constituency.

It is apparent that in the Gulf of Alaska, the options for funding the observer program, if based on an ex-vessel landing fee, will result in the halibut/sablefish fishery funding up to 60% to 70% of the Gulf observer commitments. The Gulf, according to the "November" analysis, is valued at \$125 million ex-value. This does not include the under 60-foot vessel values for landed pollock and cod from the EEZ, nor the halibut values of \$125 to \$150 million. Of the \$125 million values in the November report, \$60 million comes from the sablefish IFQ program.

If the Council intends to amend the current program with these potential impacts on the IFQ halibut/sablefish fishery, we request additional representation on the committee. We put forward Robert Alverson's name for consideration. He is currently our manager.

Sincerely,



Eric Olsen
President

PROWLER FISHERIES

P.O.Box 1364
Petersburg, Alaska 99833

May 23, 2005

Phone (907) 772-4835
Fax (907) 772-9385

Stephanie Madsen, Chair
NPFMC
605 W. 4th Avenue
Anchorage, AK 99833

Re: C-8: Observer Program: Decision Point 2: Tier Structure

Madame Chair and members of the NPFMC,

Please consider the following comments: 1.) I would request the Council to consider returning H&L CPs to Tier 3 as was contained in the previous documents. 2.) As cost is a relevant factor in this program, resolution of the overtime issue is essential to any meaningful analysis.

Tier Structure: The four-fold tier structure determines the level of coverage for a fishery. The preliminary draft of the EA/RIR includes a significant change from all previous documents in the proposed tier structure.

One significant change would be a mandatory Tier 2 for all H&L CPs >60' which would then require 100% coverage for those vessels. This appears to be a very premature determination that appears to conflict with major portions of the problem statement including: 1.) the intent to have flexibility in determining and achieving appropriate coverage levels on a scientific basis, and 2.) the intent to remedy disproportionately high costs relative to gross revenues for smaller vessels,

Coverage Levels: In previous documents, freezer-longliners were proposed for Tier 3 coverage where coverage rates could fall anywhere from zero to 100%. *"Vessels participating in Tier 3 fisheries can expect to receive coverage on a regular basis and will be required to carry observers when requested to do so by NMFS. However, the actual coverage that each vessel receives will depend on the coverage priorities established by NMFS and the sampling plan developed for the individual fishery in which the vessel is participating."* [December 2004, preliminary review].

I would ask the Council to consider returning H&L CPs to Tier 3. One of the major criticisms of the existing program from the scientific community is the potential source of bias that could affect the reliability and expansion of the data. One of the issues that has been raised in this regard is the delivery service model. Presently 30% vessels determine when to take an observer in order to satisfy complicated and rigid coverage regulations. In the proposed delivery service model as in Tier 3, NMFS would determine when an observer would be deployed. This "random" deployment factor is to address bias and statistical expansion issues. For example, in the GOA pilot program for observer deployment in trawl fisheries, this delivery model resulted in a higher percentage of observed catch but at the same coverage level. [personal communication with J. Bonney].



Frozen at Sea Longline Caught Fish

Maintaining CP H&Ls (both <125' and >125') in Tier 3 would allow the appropriate level of coverage and sampling plan to be determined from a scientific and statistical basis (0 to 100% coverage). Maintaining the CP H&L sector in Tier 3 does not necessarily preclude 100% coverage. However, if all CP H&Ls are placed in Tier 2 (100%) at the outset of this analysis, that determination of the appropriate coverage under the new deployment model would not be made or known. Recall that on a separate but similar issue (the LOF and marine mammal takes), the SSC had numerous comments on sample size, expansion factors and methodology.

After the determination of the appropriate coverage level for reliable data, NMFS management will likely identify other issues and possible coverage options for a fishery, i.e. measures that would be in addition to that which is needed for statistically reliable data. For clarity, it would seem best to keep these issues and proposed remedies somewhat distinct. In the end a sampling plan would be developed for a fishery/sector but it should be clear what is being done for what reason. That clarity would not be found if all H&L CPs are lumped into Tier 2 at the outset of the analysis. The mandate of 100% coverage precludes consideration of the use of other solutions such as video monitoring.

For example, an analysis could show that a 50% observer coverage level would result in an adequate amount of catch being sampled. NMFS might raise an additional concern, however that concern might be addressed by alternate means other than 100% coverage. By placing all CP H&Ls in Tier 2 at the outset of the analysis, the flexibility in solutions that the problem statement calls for is essentially eliminated.

Disproportionate Costs: Currently, freezer longliners >125' have 100% coverage and vessels >60' and <125' have 30% coverage. As with the rest of the fishing community, the freezer-longline sector has previously expressed some misgivings about the anticipated costs of the proposed observer program restructuring due to the unknown costs stemming from the unresolved overtime issue, unknown new administrative costs, and unknown federal funding sources. However, freezer-longliners still supported looking at alternatives since this sector currently has some of the highest observer costs relative to gross revenues for all sectors in the BSAI [from Table 4.4-2, p. 113].

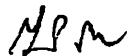
BSAI SECTOR	COVERAGE COST AS % OF EX-VESSEL VALUE (2000-03 AVERAGE)
AFA CPs	1.52%
LL CPs <125' (30% coverage)	4.20%
LL CPs >=125 (100% coverage)	4.42%
Pot CP	4.27%
Trawl CP <125'	2.37%
Trawl CP >=125'	2.70%
AFA Trawl CVs >= 125'	1.72%
AFA Trawl CVs <125'	1.02%
LL CVs >60'	6.13%
Non-AFA Trawl >60'	3.20%
Pot >= 60'	2.86%

In general, the fixed gear sector has incurred higher observer costs in part due to: smaller size/capacity of vessels; the long length of trips (for CPs); and from the lower and slower catch rates inherent to fixed gear. Ironically, the same attributes that are encouraged under SSL measures (low and slow) are penalized under the current observer program and fee structure. In the freezer-longline sector, the slow and consistent harvest rate in the fishery also results in a very predictable season for in-season managers.

In the table above, note that the freezer-longline vessels <125' that are currently at 30% coverage already have one of the highest percentage costs of any sector in the BSAI. The proposed revised tier structure that would place these vessels at the 100% coverage (Tier 2) would result in even greater disproportionate costs – at least double (depending on the fee mechanism). This would seem to be in conflict with problem statement.

Conclusion: Please retain CP H&Ls in Tier 3 as the re-categorization into Tier 2 appears to be a premature determination with insufficient rationale. Additionally, Tier 2 will increase disproportionate costs (particularly for CP H&Ls <125'); prevent or obscure the analysis of a scientific sampling plan for the sector, and; removes any options for flexible solutions.

Thank you for consideration of these comments.



Gerry Merrigan

Government Staff
Prowler Fisheries

C-8

HALIBUT AND SABLEFISH IFQ PROGRAM
AMENDMENT PROPOSAL

North Pacific Fishery Management Council
Fax: (907) 271-2817

Name of Proposer: LUDGER DOCHTERMANN Date: 6-6-2005
Address: P.O. Box 714 WALTER SARGENT
KODIAK, AK 99615 1830 MISSION, KODIAK 907-486-3371
Telephone: 907-486-5450 - FAX 486-2272

Brief Statement of Proposal:

FOR 2006 - HAVE OBSERVER COVERAGE 100% ON ALL VESSEL OVER 32f.
PARTICIPATING IN THE GROUND FISH FISHERIES OF THE G.O.A.

ALL BYCATCH MUST BE WEIGHED BY SPECIES,
EXCEPTION LIVE BYCATCH OF HAL. SABLEFISH CRAB + SALMON - ESTIMATE
AFTER QUICK RELEASE.

Objectives of Proposal (What is the problem?):

SINCE 30% OBSERVER COVERAGE IN THE BYCATCH INTENSIVE FISHERIES
FOR THE LARGER THEN 60' VESSELS AND NONE FOR THE VESSELS LESS THEN
60' IS UNRELIABLE. REALISTIC + ACCURATE BYCATCH DATA MUST BE
GATHERED BEFORE ANY RATIONALIZATION CAN PROCEED IN THE GULF OF ALASKA

Need and Justification for Council Action (Why can't the problem be resolved through other channels?):

THERE IS ONLY SCETCHY UNRELIABLE DATA AVAILABLE ASSESSING THE
TRUE AMOUNT OF DISCARDS + WASTAGE. IN ORDER TO HAVE MEANINGFULL
BYCATCH CAPS - THE RELIABLE DATA MUST BE GATHERED

Foreseeable Impacts of Proposal (Who wins, who loses?):

NO ONE LOSES.
CONSERVATION WINS. ONCE THE TRUE DATA IS ANALYZED THE
PROCESS FOR CAPS AND REDUCTION HANDWATER CAN GO FORWARD

Are there Alternative Solutions? If so, what are they and why do you consider your proposal the best way of solving the problem?

TAKE ONE (1) % OF THE TDTR VALUE OF THE NET STOCK OF A GROUND FISH
FISHERY PARTICIPANT AND FUND A HANDATED OBSERVER PROGRAM

CONSERVATION OF THE RESOURCES.

EFFORTS WILL BE MADE BY BYCATCH INTENSIVE FISHERS
TO CLEAN UP THEIR WASTEFULL FISHING PRACTICES

Supportive Data and Other Information (What data are available and where can they be found?):

COMPARE LOG BOOKS NOW AND AFTER A YEAR OF
100% OBSERVATION TO H

Signature

HALIBUT AND SABLEFISH IFQ PROGRAM
AMENDMENT PROPOSAL
North Pacific Fishery Management Council
Fax: (907) 271-2817

Name of Proposer: *WUDGER DOCHTERMANN
WALTER SARGENT*

Date: *6-6-2005*

Address: *P.O. Box 714
1830 MISSION RD. KODIAK, AK 99615*
Telephone: *907-486-5450*
L.D. *907-486-3371*
W.S. *907-486-3371*

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Brief Statement of Proposal:
OBSERVER COVERAGE IN THE SABLEFISH IFQ FISHERY IS DESIGNATED BY VESSEL SIZE - CHANGE COVERAGE FROM LENGTH BASED TO IFQ POUNDAGE BASIS. ANY VESSEL FISHING FOR MORE THEN 50,000 lbs of GROSS WEIGHT (OR less lbs.) IFQ MUST COMPLY WITH 30% OBSERVER COVERAGE. ANY VESSEL WITH LESS THEN 50,000 lbs needs not to take an observer

Objectives of Proposal (What is the problem?):
MUCH OF THE SABLEFISH QUOTA IS CAUGHT WITH VESSELS UNDER 60 feet. MANY VESSEL LARGER THEN 60 feet HAVE ONLY ENOUGH QUOTA TO PROSECUTE THEIR HALIBUT IFQ FISHERY AND PREVENT WASTE FULL DISCARDING OF SABLEFISH. INADVERTENT FISHING OVER THE 3 DAY OF UNOBSERVED SABLEFISH RETENTION RESULTS IN COSTLY NHFS FINES AND

Need and Justification for Council Action (Why can't the problem be resolved through other channels?):
CONTRADICTS THE REASON FOR THE HALI SABLEFISH PROGRAM. TO PREVENT WASTAGE THE NPFC IS THE VEHICLE THE CHANGE THE REGULATION.

Foreseeable Impacts of Proposal (Who wins, who loses?):
CONSERVATION WINS - NO DISCARDS OF SABLEFISH IN THE HALIBUT IFQ FISHERY WHEN RETENTION OF SABLEFISH IS POSSIBLE AFTER THE QUARTERLY 3 days expire.

Are there Alternative Solutions? If so, what are they and why do you consider your proposal the best way of solving the problem?
SELLING THE QUOTA FOR THOSE OF US WHO CATCH THEIR SABLEFISH STRICTLY AS BY CATCH IN THE HALIBUT IFQ FISHERY IT BE MORE ECONOMICAL TO PROSECUTE THE FISHERY WITH WASTAGE.

Supportive Data and Other Information (What data are available and where can they be found?):
Logbooks of the HALIBUT + SABLEFISH FISHERS

Signature: *Wudger Dochtermann*