


MEMORANDUM

TO: Council, AP and SSC Members

FROM: Clarence G. Pautzke   
Executive Director

DATE: November 26, 1990

SUBJECT: Domestic Observer Program

**ACTION REQUIRED**

1. Continue discussion of insurance coverage for observers on fishing vessels and the concept of pooling vessels for the purposes of sharing observer coverage and costs.
2. Consider emergency action to implement the 1991 changes to the NMFS Observer Plan.
3. Data Committee report.

**BACKGROUND**

1. Insurance Issues

Earlier this fall, the Council began discussing the concept of sharing observers and their costs, particularly as they relate to the pooling of vessels which fall in the 30% observer coverage category (e.g. 60'-124'). NMFS and NOAA-General Counsel were requested to comment on the merit and legality of such an approach.

Following the September Council meeting, Congress approved amendments to the Magnuson Act. A new Section 313 was added entitled "North Pacific Fisheries Research Plan," which allows this Council to establish a fee system to support observers. A provision of the plan directs the Secretary to review the feasibility of establishing a risk-sharing pool through a reasonable fee to protect vessels and owners against liability from civil suits by observers. If the Secretary determines that such an insurance pool is feasible, he is to take steps to establish such a program.

The Council also requested a legal opinion from NOAA-GC on requiring a minimum level of insurance coverage for observers, the cost to be paid by the observer contractor. An additional question was raised with regard to whether observers could be considered seamen and crewmen for insurance purposes. Vessel owners have suggested that such a classification would allow insurance coverage of the observer within the vessel's existing P&I package with little additional cost.

2. Emergency Action to Implement Changes to 1991 Observer Plan

In September the Council approved three changes to the NMFS Observer Plan for 1991:

- (1) Delete the 1,000 to 10,000 mt and the 10,000 mt and over annual thresholds for requiring observers in shorebased processing plants, but retain the monthly thresholds of 500 mt for 30% coverage and 1,000 mt for 100% coverage;
- (2) Extend observer requirements of shorebased processors to mothership processors and floating processors; and
- (3) Require vessel operators in the groundfish fishery to allow their vessel's observed bycatch rates of prohibited species to be released publicly.

These revisions will require a regulatory amendment. Given other Council priorities, the Regional Office was unable to complete the amendment analysis in time for it to be implemented by January 1, 1991. Therefore, at NMFS's request, consideration of emergency action was placed on your agenda as a method of ensuring implementation by 1991. A status report on the amendment and NMFS recommendations will be available.

3. Data Committee Meeting

On November 20 the Data Committee met in Seattle to review the domestic observer program and initiate the development process for a federal user-fee system to be implemented for 1992. A copy of their report and recommendations is provided as item C-3(a). Item C-3(b) is the new Section 313 of the Magnuson Act that enables the Council to establish a fee system.

## Data Gathering Committee

The Data Gathering Committee met on November 20, 1990 in Seattle, Washington. Council members in attendance were Ron Hegge, Larry Cotter, Dave Hanson; Council staff, Steve Davis; National Marine Fisheries Service, Jim Brooks and Russ Nelson. Industry representatives John Iani and Arni Thomsom also attended portions of the meeting.

### 1990 Program

Russ Nelson reviewed the 1990 observer program. Five hundred and thirty-four observers were trained and employed. Eighty percent of these individuals were new to the observer program. Observers were placed on 227 vessels, with 110 on vessels larger than 125 feet, 161 on vessels with lengths between 125 feet and 60 feet, and 6 on vessels shorter than 60 feet. Observers were also placed in 29 processing plants. The final report will be available in April 1990.

### 1991 Program

NMFS will soon be starting two new observer classes to be ready for 1991. Gearing up the observer program to implement the "Penalty Box" has taken up a great deal of time. In 1991, weekly summaries will be prepared in Seattle, rather than at sea. This should help reduce the number of mathematical errors. The error rate was up to 25 to 30 percent in 1990, when the calculations were done at sea. Total fish taken will be divided into two reportable components--kept and discarded. The observer data will be given to the vessel operator on a daily basis. Observer discretion in sampling procedures is also being limited in 1991.

The Committee spent a great deal of time discussing the various types of variability that are inherent in the program. NMFS is pursuing methods to reduce variability to improve the ability to use the data on a more timely basis.

### Committee Recommendations

1. For vessels under 125 feet, the option of when to carry an observer should be placed with NMFS, rather than with the vessel operator. This may help remove some of the perceived problems in the database.
2. The Council needs to review the bycatch mortality data from 1990 to determine if any changes should be made for the 1991 season. 1990 data is available from the first quarter and part of the second.
3. The Council should discuss the desirability of placing observers on boats down to 55 feet in any fishery where an incentive program is being utilized.

### User-Fee System

Steve Davis has been in contact with NMFS, DC, and has apparently secured the help of some of their staff to start drafting the new user-fee system as approved by Congress.

The Committee felt a first draft should be ready for public review by April 1991, for potential adoption by June 1991. Steve Davis feels this schedule can be met.

The Committee identified many questions which it felt must be answered in the near future:

1. Does the Council wish to have the observers be federal employees or private employees working under a government contract? Russ Nelson informed the Committee it may take up to one year to get a contract approved.
2. What is the definition of administrative fees?
3. Is the one percent cap value limitation to be placed on fish caught or fish kept?
4. Where will the Council secure startup funds for the program? One potential may be to use a vessel's catch from the previous year as an estimate for the coming year and billing based on that estimate if the Council chooses to use a prorated-fee system.
5. The Council needs to clearly state its objectives for this program.
6. Could this system be set up as a separate plan and not part of the Groundfish FMP? This may make it easier to make changes in the future.
7. Can individuals or vessels be charged a flat fee, rather than a fee which is a percentage of the fish caught?

The Committee recommends that the Council seek to answer, or secure answers to, these questions at its December meeting so work can begin as soon as possible.

**NORTH PACIFIC FISHERIES RESEARCH PLAN**

**SEC. 313. NORTH PACIFIC FISHERIES RESEARCH PLAN.**

(a) **IN GENERAL.**--The North Pacific Fishery Management Council may prepare, in consultation with the Secretary, a fisheries research plan for all fisheries under the Council's jurisdiction except salmon fisheries which--

(1) requires that observers be stationed on fishing vessels engaged in the catching, taking, or harvesting of fish and on United States fish processors fishing for or processing species under the jurisdiction of the Council, including the Northern Pacific halibut fishery, for the purpose of collecting data necessary for the conservation, management, and scientific understanding of any fisheries under the Council's jurisdiction; and

(2) establishes a system of fees to pay for the costs of implementing the plan.

(b) **STANDARDS.**--

(1) Any plan or plan amendment prepared under this section shall be reasonably calculated to--

(A) gather reliable data, by stationing observers on all or a statistically reliable sample of the fishing vessels and United States fish processors included in the plan, necessary for the conservation, management, and scientific understanding of the fisheries covered by the plan;

(B) be fair and equitable to all vessels and processors;

(C) be consistent with applicable provisions of law; and

(D) take into consideration the operating requirements of the fisheries and the safety of observers and fishermen.

(2) Any system of fees established under this section shall--

(A) provide that the total amount of fees collected under this section not exceed the combined cost of (i) stationing observers on board fishing vessels and United States fish processors, (ii) the actual cost of inputting collected data, and (iii) assessments necessary for a risk-sharing pool implemented under subsection (e) of this section, less any amount received for such purpose from another source or from an existing surplus in the North Pacific Fishery Observer Fund established in subsection (d) of this section;

(B) be fair and equitable to all participants in the fisheries under the jurisdiction of the Council, including the Northern Pacific halibut fishery;

(C) provide that fees collected not be used to pay any costs of administrative overhead or other costs not directly incurred in carrying out the plan;

(D) not be used to offset amounts authorized under other provisions of the law;

(E) be expressed as a percentage, not to exceed one percentum, of the value of fish and shellfish harvested under the jurisdiction of the Council, including the Northern Pacific halibut fishery;

(F) be assessed against all fishing vessels and United States fish processors, including those not required to carry an observer under the plan, participating in fisheries under the jurisdiction of the Council, including the Northern Pacific halibut fishery;

(G) provide that fees collected will be deposited in the North Pacific Fishery Observer Fund established under subsection (d) of this section;

(H) provide that fees collected will only be used for implementing the plan established under this section; and

(I) meet the requirements of section 9701(b) of Title 31, United States Code.

(c) **ACTION BY THE SECRETARY.--**

(1) Within 60 days after receiving a plan or plan amendment from the North Pacific Council under this section, the Secretary shall review such plan or plan amendment and either (A) remand such plan or plan amendment to the Council with comments if it does not meet the requirements of this section, or (B) publish in the Federal Register proposed regulations for implementing such plan or plan amendment.

(2) During the 60-day public comment period, the Secretary shall conduct a public hearing in each State represented on the Council for the purpose of receiving public comments on the proposed regulations.

(3) Within 45 days of the close of the public comment period, the Secretary, in consultation with the Council, shall analyze the public comment received and publish final regulations for implementing such plan.

(4) If the Secretary remands a plan or plan amendment to the Council for failure to meet the requirements of this section, the Council may resubmit such plan or plan amendment at any time after taking action the Council believes will address the defects identified by the Secretary. Any plan or plan amendment resubmitted to the Secretary will be treated as an original plan submitted to the Secretary under paragraph (1) of this subsection.

(d) **FISHERY OBSERVER FUND.**--There is established in the Treasury a North Pacific Fishery Observer Fund. The Fund shall be available, without appropriation or fiscal year limitation, only to the Secretary for the purpose of carrying out the provisions of this section, subject to the restrictions in subsection (b)(2) of this section. The Fund shall consist of all monies deposited into it in accordance with this section. Sums in the Fund that are not currently needed for the purposes of this section shall be kept on deposit or invested in obligations of, or guaranteed by, the United States.

(e) **SPECIAL PROVISIONS REGARDING OBSERVERS.**--

(1) The Secretary shall review--

(A) the feasibility of establishing a risk sharing pool through a reasonable fee, subject to the limitations of subsection (b)(2)(E) of this section, to provide coverage for vessels and owners against liability from civil suits by observers, and

(B) the availability of comprehensive commercial insurance for vessel and owner liability against civil suits by observers.

(2) If the Secretary determines that a risk sharing pool is feasible, the Secretary shall establish such a pool, subject to the provisions of subsection (b)(2) of this section, unless the Secretary determines that--

(A) comprehensive commercial insurance is available for all fishing vessels and United States fish processors required to have observers under the provisions of this section, and

(B) such comprehensive commercial insurance will provide a greater measure of coverage at a lower cost to each participant.