

MEMORANDUM

TO: Council, SSC and AP Members

FROM: Chris Oliver *Chris*
Executive Director

DATE: January 17, 2003

SUBJECT: Observer Program

ESTIMATED TIME 2 HOURS

ACTION REQUIRED

- (a) Review discussion paper on alternatives for restructuring the North Pacific Groundfish Observer Program
- (b) Review Observer Advisory Committee report and provide further direction

Background

In July 2002, the Observer Advisory Committee (OAC) met in Seattle to consider the need to restructure the North Pacific Groundfish Observer Program (Observer Program), based on direction from the Council and issues stemming from NMFS, industry, observer providers, and observers. The overriding goal of restructuring the program would be to increase the quality of observer data to more effectively accomplish inseason management and conservation goals in the North Pacific groundfish fisheries. As a result of that meeting, the OAC concluded that it supports full Federal funding of the Observer Program, but it would consider support of a program design that includes a blend of Federal funding and a fee plan. In addition, the OAC agreed that the Council should focus first on addressing the problems in the unobserved and 30% fleet. The committee recognized the difficulty in recommending restructuring alternatives in light of the uncertainty surrounding potential Magnuson-Stevens Act reauthorization, industry efforts to secure Federal funding for the Observer Program, and the direction of developing rationalization programs.

At its October 2002 meeting, the Council reviewed the OAC report from July and noted that it supports the continuing work of the committee. It further tasked the committee to develop a problem statement and alternatives to be presented at the February Council meeting. In order to facilitate further progress by the committee, NMFS and Council staff developed an outline for a discussion paper which proposes a problem statement, scope, and general alternatives and issues for long-term, significant revisions to the Observer Program. NMFS also drafted a summary of a potential pilot project to test deployment of observer resources to determine catch composition and bycatch rates in a specific fishery. These draft outlines were presented to the Council at the December meeting and a January OAC meeting was scheduled to present the discussion paper to the committee for review and feedback.

- (a) Review discussion paper on alternatives for restructuring the Observer Program

The draft discussion paper was completed in January and reviewed by the OAC prior to this meeting. The discussion paper outlines five primary issues relevant to restructuring the Observer Program, including a

proposed problem statement, scope, funding mechanisms, coverage and deployment issues, and the role of observer providers and contracts. Staff anticipates that these issues would be developed into a full analysis at some point in the future, should the Council provide such direction. Thus, the discussion paper is provided to show the general direction of proposed changes to the Observer Program and to provide a starting point for discussion of a problem statement and alternatives for analysis. Item C-7(a).

(b) Review Observer Advisory Committee report and provide further direction

The OAC convened on January 23 - 24, 2003 in Seattle to review the discussion paper mentioned above, with the primary focus of the committee on refining the scope of the proposal, the problem statement, and if time permits, the alternatives and options for a potential formal analysis. The committee also discussed a NMFS proposal for a short-term pilot project intended as a step toward determining appropriate coverage levels and improving catch accounting and PSC estimation, as well as testing deployment and contracting aspects. **The full committee agenda is attached as Item C-7(b), and the summary of the pilot project is attached as Item C-7(c).**

The draft OAC report from January will be distributed at the Council meeting. This report will summarize the work of the committee and its feedback on the discussion paper and other agenda items. Should the Council choose to initiate an analysis of the effects of a new program design, the next likely steps would be to approve a problem statement and alternatives for analysis. The Council may initiate these steps at this meeting and/or provide further direction.

DISCUSSION PAPER ON OPTIONS FOR OBSERVER PROGRAM RESTRUCTURING

NMFS Alaska Region
January 21, 2003

The following discussion paper was prepared to summarize the results of an agency meeting held in Juneau October 28-29 to discuss various ideas for restructuring the North Pacific Groundfish Observer Program (Observer Program). At that meeting, NMFS and Council staff developed a proposal to establish a new observer funding mechanism involving some combination of fees and federal subsidies, and a contracting system in which NMFS rather than industry would contract for observer services. Although many of the details of the proposal remain subjects for further discussion and analysis, NMFS and Council staff generally agreed that due to the cost and complications associated with a total overhaul of the Observer Program, it may be more practical to undertake a project that, at least in the first stages, is limited in scope to certain fisheries and/or vessel classes. For example, a new funding and contracting system could be limited to the Gulf of Alaska (GOA) or to vessels that currently have less than 100% observer coverage requirements.

In general, NMFS and Council staff agree that limiting the initial restructuring of the program to specific areas, fisheries, or vessel classes has considerable merit. First, a limited program restructuring is a more likely candidate to receive federal funding. For example, the costs of federally funding observer coverage in the GOA would be comparable to the amount of federal funds spent on observer coverage in other individual regions of the United States, whereas complete federal funding of all observer coverage off Alaska could exceed the total cost of all other observer programs nationwide. Second, a program restructuring limited to specific fisheries and areas would be less disruptive to industry and contractors than an attempt to overhaul the entire groundfish Observer Program off Alaska. Finally, a limited program restructuring would provide a transition period during which the bulk of coverage could continue under the existing "pay-as-you-go" system while staff, contractors, and observers gain operational experience under a new system.

1.0 Draft problem statement

As part of this effort, NMFS and Council staff prepared the following draft problem statement to support efforts to obtain federal funding and program restructuring:

The North Pacific Groundfish Observer Program (Observer Program) faces a number of longstanding problems that result primarily from the current "pay-as-you-go" funding mechanism and associated program structure. The program 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 tailored to respond to the specific management needs and circumstances of individual fisheries. In addition, the existing program in which vessel operators rather than fishery managers control

when and where observers are deployed contains potential sources of bias that 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 coverage rules for 30% vessels have lead to observer availability and coverage compliance problems. Altering the funding mechanism and program structure will provide the flexibility to solve many of these problems associated with data quality and cost equity. The development of a fee-based funding mechanism in conjunction with federal funding can address the data quality and disproportionate cost problems identified above and allow NMFS and the Council to more effectively accomplish the management and conservation goals for the North Pacific groundfish fisheries.

2.0 Project scope: Which areas, fisheries, or vessels would be included?

Previous attempts by the Council to restructure the Observer Program and/or develop an alternate funding mechanism (i.e. the Research Plan and JPA) were comprehensive in scope in that the proposals would have encompassed all groundfish fisheries off Alaska. However, given the diversity of fisheries and observer program issues off Alaska, and the cost and complication of a total program overhaul, it may be more practical to undertake a project that, at least in the first stages, is limited in scope to certain fisheries and/or vessel classes. The possible scope for such a project could range from as small as a short-term pilot project in a single fishery to test to test new deployment models, to as large as a comprehensive restructuring of the entire observer program off Alaska. Ultimately, the scope of the proposed observer program restructuring represents a tradeoff between cost and complexity on the one hand, and comprehensiveness on the other.

Two general options exist for limiting the scope of program restructuring: (1) The program restructuring could be limited to a specific area or fishery such as the GOA groundfish fishery, or (2) the program restructuring could be limited to certain vessel classes such as the existing 30% fleet (generally vessels under 125 ft).

2.1. Program restructuring limited to a specific area such as the GOA

Under this proposal, a new program structure and funding mechanism would be developed for GOA groundfish fisheries, while the groundfish fisheries of the BSAI would continue to operate under the existing program. Problems that have been identified with the current program, such as establishing appropriate coverage levels and disproportionate costs of observer coverage, are most associated with the GOA groundfish fisheries. Consequently, a program restructuring that is limited to the GOA would be able to address many of the problems with the current program, without disrupting the larger fisheries of the BSAI where such problems may be less acute.

A restructuring proposal limited to the GOA also may be a more viable candidate for federal funding for a variety of reasons. First, the cost of funding a new program in the GOA would only be a fraction of the cost of a program that includes the BSAI because the existing level of observer deployment days in the GOA fisheries is so much lower than in the BSAI. Second, in contrast to the BSAI, the groundfish fisheries of the GOA are similar in character to fisheries in other regions of the United States that have federally funded observer programs. As is the case in with the groundfish fisheries of the Northwest and New England, most of the groundfish fisheries of the GOA are shore-based fisheries in which the primary purpose of observer coverage is to generate fleetwide estimates of catch composition and prohibited species bycatch. In addition, the size and type of vessels that predominantly operate in the GOA are similar in character to those operating in the New England and the Northwest groundfish fisheries. This

is in contrast to many of the fisheries in the BSAI where catcher/processors predominate and observers play a much larger role in generating the vessel-by-vessel catch data that is used to manage limited access quotas such as in the AFA and CDQ fisheries.

The development of a new funding mechanism and program structure for GOA groundfish fisheries would allow NMFS to undertake a comprehensive evaluation of data needs in the GOA groundfish fisheries and develop observer coverage and deployment mechanisms to most efficiently meet those data needs. Such a proposal would also allow NMFS to tailor coverage to meet specific data needs on a fishery-by-fishery or area-by-area basis.

Finally, a new funding mechanism and program structure for GOA groundfish fisheries should be an integral part of the Council's GOA rationalization program. GOA rationalization will require changes to observer coverage in the GOA because the data needs in a rationalized fishery are substantially different than in an open access fishery. A new funding mechanism and program structure for GOA groundfish fisheries may be the only way to develop the data collection program that will be required for GOA rationalization.

Possible decision points for a program limited to the GOA include the following:

Should the program be limited to vessels over 60 ft or be expanded to include vessels under 60 ft and/or the halibut IFQ fishery?

Limiting the program to vessels with existing coverage requirements (30% and 100% vessels) would make it easier to implement the new program because observers would only be deployed on vessels that must currently carry observers under the existing program. However, a federally-funded or fee-based program in the GOA could be subsequently expanded to provide coverage on under 60 ft vessels where such coverage may be appropriate or necessary to gather management data. Vessels less than 60 ft and halibut vessels (which are generally less than 60 ft) have been excluded from observer coverage requirements in the past primarily for economic reasons. The financial burden on the smaller vessels to pay for their observer coverage has been considered to be too great to require them to carry observers. Data that observers could provide in the Pacific halibut and small vessel groundfish fisheries include information on groundfish bycatch, particularly of rockfish and prohibited species such as salmon, halibut and crab. Additionally, observer data would provide information on vessel/seabird interactions, particularly in the longline fisheries where such interactions are known to occur with regularity. Interactions with the endangered short-tailed albatross are of special concern. On the whole, observer data from these small vessels would contribute significantly to incidental mortality estimates, which increasingly pose serious conservation and management concerns, particularly for long-lived and low abundance rockfish species. One option would be to begin with only vessels over 60 ft, with the idea that under 60 ft vessels could be added to the program later.

Should the program be limited to vessels or include processors?

One option would be to establish a new program for vessel observers only and require processors to continue to obtain observers through the current "pay-as-you-go" program. Another option would be to include all GOA processors in the new program. Limiting the program to vessels would obviously cost less, but could be more complicated to operate if vessels and processors operating in the same fishery receive observers through different programs. A program restructuring that includes both vessels and processors in the GOA would allow for more efficient use of observers because observers could be freely moved between vessels and processors operating in the same area. This could reduce travel costs and

observer down time relative to a system in which vessels and processors operating in the same area obtain observers through separate programs.

Should the program include certain BSAI fisheries?

A new funding mechanism and program developed for the GOA groundfish fisheries could also be expanded at some point in the future to include some or all groundfish fisheries in the BSAI. However, because existing coverage levels and the number of observers deployed in the BSAI are so much greater than the GOA, including all BSAI fisheries would greatly escalate the program's cost and complexity. In addition, compared to the GOA, the groundfish fisheries of the BSAI and observer coverage requirements are becoming increasingly more complex and specialized. In the BSAI, NMFS is also becoming increasingly reliant on observers as the sole source of management data compared to the GOA where landings data reported by processors still plays a central role.

Two hundred percent coverage is now required on most CDQ vessels, and also on all AFA inshore processors, motherships, and catcher/processors in the BSAI. The prohibited species-based cooperatives under consideration for the H&G trawl fleet could result in increased coverage levels for those vessels as well. The necessity and benefit of developing a new program and service delivery model for most BSAI fisheries where 100% or 200% coverage levels are mandated by law may be less than in the GOA where coverage levels of 30% or less are the norm. In other words, a change in the contracting system and additional flexibility in the manner in which observers are deployed may have limited benefit in fisheries with 100% or 200% coverage requirements.

Nevertheless, certain BSAI fisheries may share enough characteristics with GOA fisheries to warrant their inclusion in a new program based primarily in the GOA. For example, some of the smaller fixed gear fisheries in the BSAI could be included in a GOA-based program without greatly increasing program cost or complexity.

2.2 Program restructuring limited to certain vessel classes such as 30% vessels

Under this proposal, NMFS would develop a new funding mechanism and program for the existing 30% fleets in both the BSAI and GOA. Vessels between 60' - 125' LOA, and all vessels fishing with pot gear, that participate in the groundfish fisheries off Alaska are required to carry observers for 30% of their fishing days. This represents approximately 245 vessels and 9247 observer days in the Gulf of Alaska and Bering Sea together in 2001. Under the current program structure, operations requiring 30% observer coverage determine when and where to carry observers, resulting in uneven and unpredictable observer coverage by time and area, with a potential for some significant biases in the resulting data. Additionally, the current system makes enforcement of observer coverage compliance very difficult. NMFS enforcement estimated that non-compliance with coverage requirements for the 30% fleet in the first quarter of 2000 to be around 50%.

Under this proposal, the cost of observer coverage for such vessels could be covered with a federal subsidy, a new fee program, or a combination of the two. Vessels that currently have 100% or 200% coverage requirements would continue to obtain observers through the current "pay-as-you-go" program. This proposal would address the issue of disproportionate observer coverage costs that are most acute for many smaller vessels in the under 125 ft class. Such a program also would allow NMFS to implement more efficient or appropriate coverage levels and deployment patterns for vessels with less than 100% coverage. However, this proposal could be significantly more complicated to administer than a program

that is restricted to a certain area such as the GOA because it would result in two different service delivery models in most fisheries, one for vessels over 125 ft and one for vessels under 125 ft.

A program limited to a certain class of vessels also could be based on other distinguishing characteristics such as gear type or processing mode. For example, a new fee-based program could be developed for catcher vessels, while catcher/processors could continue to operate under the existing program. Alternatively, trawl vessels could operate under one system for observer coverage while fixed-gear vessels operate under another.

To provide information on the relative magnitude of the above proposals, Table 1 provides estimates of the observer deployment days and costs for the 30% and 100% fleets and shoreside plants. In Tables 2 and 3, the estimates for vessels are provided separately for the GOA and BSAI and the estimates for inshore processors are provided by processor category, respectively. Estimates of observer deployment days and costs for vessels by gear and coverage level are in Table 4. As Table 1 illustrates, the percent of observer deployment days accounted for by 30% vessels, 100% vessels, and inshore processors, respectively, was typically about 25%, 63% and 12% during 2000-2002. The estimates in Table 2 indicate that typically BSAI vessels accounted for about 88% of the observer deployment days on vessels.

3.0 Funding

The estimated number of observer deployment days in the GOA and BSAI groundfish fisheries decreased from about 35,100 in 2000 to about 34,100 in 2002 and averaged about 34,900 for 2000 through 2002 (Table 1). With an estimated cost of \$335 per day, including transportation costs, the annual direct cost to the industry decreased from \$11.8 million in 2000 to \$11.4 million in 2002 and averaged \$11.7 million. In 2001, the most recent year for which an estimate of gross ex-vessel earnings is available, the estimated cost of \$11.9 million was almost 2.2% of the \$542 million gross ex-vessel earnings from the GOA and BSAI groundfish fisheries. The estimates of gross ex-vessel earnings used in this discussion paper do not include the value added by at-sea processing. As noted above, estimates of observer deployment days and the direct cost of the observer deployments on vessels by observer coverage levels and area are presented in Table 2. Comparable estimates for inshore processors are in Table 3.

The estimates of the observer costs as a percent of gross ex-vessel earnings differ substantially among vessel classes and within each vessel class (Tables 5 - 5.2). For example, the weighted averages in 2001 ranged from 1.2% for mid-size, trawl, catcher vessels with 30% coverage requirements to 4.3% for large, longline catcher processors with 100% coverage requirements. However, among the mid-sized trawlers, the observer cost ranged from 0% to 7.3% of gross ex-vessel earnings. These estimates are based on an average cost per observer deployment day of \$335. NMFS does not have the information necessary to estimate the differences in the cost per day by vessel class or by vessel.

Based on the average number of observer deployment days in 2000 - 2002 and an increased cost per day of \$355, the projected cost for 2003 is \$12.4 million. Observer providers have indicated that the cost per day is expected to increase in 2003 due to increased insurance costs and wages for observers.

3.1 Full federal funding

To fully fund the current number of observer deployment days (i.e., the 2000-2002 average), an additional appropriation of \$12.4 million would be needed in 2003. If the cost per deployment day or the number of deployment days increases, the required annual appropriation would increase. Despite the fact that most observer programs are fully funded by NMFS, the Alaska Region was not successful in obtaining full federal funding for FY 2003 and it is not clear that it will be successful in the future.

Obviously the additional appropriation that would be necessary for full federal funding will depend on the scope of the program for which there would be full funding. For example, to fully fund the current number of observer deployment days (i.e., the 2000-2002 average) for the vessels with 30% coverage requirements, an additional appropriation of just over \$3.1 million would be needed in 2003. That estimate is based on 8,843 deployment days (Table 1). Alternatively, the projected cost for only GOA vessels that currently have coverage requirements is about \$1.3 million

Full federal funding for only the GOA or BSAI or for just some classes of vessels and processors would change the vessels and processors for which there would be disproportionate observer costs.

3.2 Fee Options

Research plan (partial or total)

In 2001, a research plan fee of 2%, the maximum currently authorized under the Magnuson-Stevens Act would have generated almost \$11.2 from the GOA and BSAI groundfish fisheries and another \$2.2 million if it also had been applied to the halibut fishery. The total of \$13.4 million would have exceeded both the \$11.9 million estimated cost of the actual observer deployment days in 2001 and the previously mentioned \$12.4 million projection for 2003. In 2001, the surplus of \$1.5 million could have funded almost 4,500 additional observer deployment days or a fee of 1.8% would have covered the estimated cost of \$11.9 million. Estimates of the potential fee revenues and observer costs for 2001 by type of operations are summarized in Table 6.

The estimates in Table 6 indicate that the current disproportionately high costs for some types of operations as a whole and for some vessels in each vessel category could be eliminated by imposing a fee of less than 2% on the groundfish landings of vessels less than 60' and on halibut landings. If a fee of 2% were imposed on those landings, in addition to addressing the disproportionately high cost problem for some vessels, the deployment days could be increased.

The following problems would be associated with most any fee collection program based on gross ex-vessel earnings: (1) there would be an accounting and collection burden for those who submit the fees to NMFS (under the Research Plan Fee Collection Program that was in place for less than a year, processors collected the fees and submitted them to NMFS); (2) a fee collection program will have administrative costs; (3) the issues of calculating standard ex-vessel prices and deciding whether to use actual ex-vessel prices when they are available have to be resolved; (4) there would be a need for federal funding to allow NMFS to enter into contract with observer providers before the fee revenues have been collected; and (5) the redistribution of observer costs would benefit some fishing and processing operations at a cost to others.

NOAA General Counsel, Alaska Region (GCAK) has not determined if the research plan fees can be applied to only a subset of the vessels in the fisheries for which the Council and NMFS have the authority to establish a fee program.

IFQ fees (under GOA rationalization)

In 2001, the estimated gross ex-vessel earnings from GOA groundfish landings were about \$122 million. Therefore, an IFQ fee of 3% of gross ex-vessel earnings would have generated almost \$3.7 million. It is not known either how much of that revenue would be required to cover IFQ management and enforcement costs or how the level of observer deployment days would change. However, the expectation is that some of the IFQ fees would be available to support observer coverage in the GOA.

The expected timing of the implementation of a GOA rationalization program is an important factor in determining whether improvements to the observer program for the GOA should be pursued as part of the rationalization program or separately.

New fees (requires Magnuson-Stevens Act authorization)

As noted above, GCAK has not determined if the research plan fees can be applied to only a subset of the vessels in the fisheries for which the Council and NMFS have the authority to establish a fee program. Therefore, it is possible that the Magnuson-Stevens Act would have to be modified to allow the partial implementation of research plan fees. A Magnuson-Stevens Act amendment would be required to authorize a fee collection program that is not based on gross ex-vessel earnings.

TAC/PSC Set aside

One alternative that has been discussed, and which is used in the State managed crab fisheries, is to set aside a portion of the TACs which could be auctioned to generate revenues to fund observer coverage. On the surface this alternative is attractive in that it requires no fee assessment on vessels or processors, it requires no accounting and collection burden placed on processors (as was the case under the original Research Plan), and it eliminates the issues associated with using standard and actual ex-vessel prices. However, there are some significant complicating factors associated with this alternative.

In essence, this is an indirect form of a fee percentage. For example, if 5% of the TACs and PSC limits were auctioned off to fund observers, the catch and revenue available to vessels which did not buy TACs and PSC limits would be reduced by 5%. This decreases their net revenue by less than 5% if it results in a decrease in fishing effort and costs. The fishing operations that purchase part of the TACs and PSC limits would be expected to offset some of the loss they would otherwise have. Therefore, it is unlikely that this type of 'fee' would be borne proportionally across the fleet(s). Unless fishing operations are willing to pay at least the ex-vessel value of the catch they could harvest with the TACs and PSC limits they purchase, more than 2% of the TACS and PSC limits would have to be auctioned to collect as much revenue as would be generated by a 2% fee on gross ex-vessel earnings.

It will also be difficult to estimate how much of the TACs and PSC limits would have to be auctioned to generate sufficient revenue to pay for or subsidize the costs of observer coverage. The cost of conducting the auction could be reduced by auctioning TAC/PSC shares for several years at a time. However, that would make it more difficult for fishing operations to determine the value of such set-asides. An additional complication is the bundling of TACs and PSC limits that a fishing operation would need to prosecute in a particular fishery or set of fisheries. Amendments to the Magnuson-Stevens Act would likely be required to implement this type of fee approach. Such an option would be more feasible for fisheries where rationalization programs are in place, such as the BSAI pollock fisheries (where bycatch bundling is also less of a complicating factor). However, reserving part of the BSAI pollock TAC for this purpose may not be possible under the AFA.

4.0 Coverage and Deployment Issues

4.1 Proposals to improve existing 30% coverage

One of the most acute problems with the existing "pay-as-you-go" system is that the resulting coverage patterns in the 30% fleet are neither random nor comprehensive. Current regulations require that all 30% vessels carry an observer for 30% of their fishing days in each fishery on a quarterly basis and vessels are free to choose when and where they will carry observers as long as those requirements are met. Several

problems arise from this system. First, the time period that observers are carried is not random. Vessel operators tend to want to defer their coverage until the latter part of each fishery or quarter so that they are more certain of how many days are needed to achieve 30% coverage. This can result in fishing weeks during which no observers are present in a given fishery. For example, if 20 vessels are participating in a given fishery and the fishery lasts 3 weeks, it would be possible under the existing regulations for all 20 vessels to choose to take observers during the final week of the fishery meaning that NMFS would receive no management data from the first 2 weeks of the fishery and would be unable to track PSC rates.

Second, this system may not result in random or comprehensive spatial distribution of observer coverage. Fishing in certain areas may be highly observed while fishing in other areas may be entirely unobserved. This could happen as a result of deliberate action on the part of the fleet if, for example, vessels generally avoided high-bycatch fishing grounds when observers are on board. It could also happen as a consequence of geography if, for example, it is more economical to carry observers on fishing trips close to port rather than on trips that involve longer running times. In any event, the current system provides NMFS with no ability to affect the temporal and spatial distribution of observer coverage in fisheries in which 30% coverage boats predominate. The quality of data and NMFS' ability to manage the fisheries suffers as a result.

A new system in which NMFS (rather than vessel owners) directly contracts for observer coverage would provide the means to greatly improve the usefulness of data provided by the current 30% covered fleet. This could be accomplished in a variety of ways. For example:

- 30% of vessels in a fishery could carry observers 100% of the time. This method would ensure that the level of coverage is fairly uniform over time. If funding for observers is provided by a fee program paid for by all vessels, or by federal funding, such a system would not be overly burdensome on the vessels chosen for 100% coverage. A fee program could also be designed to provide some level of fee rebate to vessels required to carry observers to compensate them for increased costs.
- Random distribution of coverage among vessels to achieve 30% by fishery. Under such a system, NMFS could devise a system to randomly rotate observers among vessels in a fishery. Under such a system, some vessels may receive little or no coverage and other vessels could receive coverage significantly in excess of 30% so long as the overall objective of 30% is met on a fishery-by-fishery basis.
- Targeted deployment of observers by NMFS to achieve coverage by time/area cells so that each fishing area receives coverage at all times. Under such a system, NMFS could monitor fleet-wide fishing patterns on a real-time basis using technologies such as electronic fishing logs and VMS. Observers could be rotated among vessels on short notice to ensure that adequate coverage is provided in each area that vessels are fishing.
- Test fishing by vessels under contract by NMFS to produce catch composition and bycatch rates for each fishing area. Under such a system, NMFS could monitor fleet-wide fishing patterns on a real-time basis using technologies such as electronic fishing logs and VMS. Under such a system, NMFS would contract with certain vessels in a fishery to carry observers and the vessels would fish in certain areas at the direction of NMFS to ensure that coverage is comprehensive. For example, if VMS and electronic fishing logbooks show that a number of unobserved vessels are fishing in a given area, NMFS could direct an observed vessel to that area to ensure that bycatch and catch composition data is being collected in that area.

4.2 Alternate coverage levels for fisheries

Under a new program structure, optimal coverage levels would be determined for each fishery based on the management objectives for each fishery. Research projects as described above may provide a useful statistical basis for establishing target coverage levels for different fisheries. Determining the coverage level for a given fishery could be done on an annual basis, or to respond to rapidly developing events in individual fisheries.

5.0 Contracting and the role of observer providers

Under all alternatives to the status quo, NMFS intends to directly contract with one or more contractors to recruit, hire, and place observers in the field. NMFS does not intend to convert observers into federal employees. However, NMFS will supplement the contracted observers by occasionally deploying staff to assist in solving field problems, and to keep staff current with field operations. NMFS intends to contract for observer work because contractors have demonstrated high competence and efficiency in completing this work in Alaska and throughout the U.S. In addition, the contracting process allows for open competition which will work to keep costs controlled.

Under a NMFS contract, NMFS would be the direct client of the contractors awarded the contract. NMFS envisions that a pool of money would be available to fund the contract. This money would flow from NMFS to the contractor for performance under the contract. Our experience with well managed contracts is that the contractor and NMFS become business partners in completing the work. This fosters good working relationships and good communications which help make an effective Observer Program.

5.1 Overview of NMFS contracting

NMFS is serviced for its contracting needs by staff in NOAA's Western Administrative Support Center (WASC) located in building one at Sand Point. While WASC provides the service, contracting is a shared responsibility because it is incumbent upon NMFS to articulate what it needs in a contract, to provide funds, and to monitor technical progress. The essential elements of the federal contracting process are outlined in the attached Gantt chart which outlines a hypothetical NPGOP observer acquisition process. WASC staff prepared this Gantt chart using a hypothetical contract worth \$2-4 million annually, issued for 1 year with 2 option years. The Gantt chart identifies the key steps, responsible parties, and tentative timelines for each step. Items in Red are primarily a NPGOP responsibility. Items in Black belong primarily to WASC contracting. Green items represent schedule impacts that are fixed by regulation. Blue are legal review at the Department of Commerce level.

Please note that this example is presented to give the reader an overview of the procurement process with a realistic timeframe for developing and awarding a contract. While this may serve as a planning guide, each contract is different and the timeframe will be influenced by the dollar size of the contract and the overall complexity of it.

5.2 Additional tasks lending themselves to contracting

Under the current program, the tasks necessary to run the observer program are split between NMFS, observer providers, and industry. NMFS trains, debriefs, and manages the information provided by observers. The observer providers recruit, hire, deploy, insure, and pay salaries for observers. They also compete with each other for industry business. The industry pays the direct costs of providing observers, accommodates them on their vessels and in their plants, and provides room and board. They select a

contractor(s) to provide the observer and coordinate their scheduling needs with them. The industry is responsible for obtaining mandatory coverage needs.

Under a direct contracting system, there is an opportunity to shift some of these responsibilities onto the contractor. NMFS intends to continue to train, debrief and manage the information provided by observers as these are essential quality control steps. But, additional tasks, dependent on the contract scope may be included in the contract. For example, a different deployment scheme could require the contractor to maintain a system of tracking vessels so coverage decisions could be made.

5.3 Hypothetical contract modules.

Several different contract modules are possible, but it is difficult to develop them 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. For example, 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.

5.4 Discussion of contract benefits.

Managing an observer system through contracts offers some advantages and disadvantages to the status quo system. We recognize different stakeholders may have various perspectives on these issues. NMFS's perspective on them is as follows:

Contract Advantages

- Professional contract management assistance and support from WASC.
- Contracting would replace most of the cumbersome regulatory processes used to manage under the status quo. In previous OAC meetings, NMFS staff explained the difficulties inherent in using regulations as the control mechanism for managing an operational program like the Observer Program.
- Contractors would be held accountable for their performance through the contract rather than through regulatory enforcement. NMFS resources dedicated to current regulatory development and compliance efforts would be available for other tasks.
- Contractors would have a better ability to manage and predict workloads during the performance period of the contract.
- The work required of the contractor could be changed, if needed, through contract modifications rather than through regulation fixes. Contract modifications can be done quickly, albeit at a cost.
- Eliminates the regulatory burden on industry to acquire its own observers. Vessels and processors would only be required to carry observers when one is provided by NMFS.
- Clarifies the chain of authority and lines of reporting for observers, contractors, industry, and NMFS.

- If well managed, contracts will help build good working relationships among constituents.
- The distribution of coverage could be changed to meet agency's data needs for conservation and management of the North Pacific groundfish fisheries.

Contract Disadvantages

- The management program for a given fishery could be placed at greater risk if a contractor fails and that contractor is the sole source of observers for that fishery. That risk can be mitigated by giving multiple awards which distribute the workload.
- It may be cost effective to limit the number of contractors awarded part of the contract. Even with multiple awards, some contractors may not be awarded part of it.
- If a sub-set of the overall program is selected for contracting, we will need to sort out how observers and contractors would shift between the new system and the current system. The contractor for the sub-set may wish to provide coverage to the market operating vessels under the current system.
- NMFS and WASC would have to staff the contract development and management process.
- Some additional requirements on industry may be needed such as providing advance notices of fishing schedules.
- A funding source must be developed to initiate a contract, and funding will need to be maintained over time.

5.5 Wage issues

In the past, the applicability of the Service Contract Act (SCA) to observer contracts has been a source of debate. The debate centered on: 1) if SCA was applicable to observer contracts and 2) what impact any applicability would have on wages and potential increases in the cost of the Observer Program. Our understanding is that the debate about the SCA is moot because of the existence of collective bargaining agreements which the Department of Labor will defer to in wage determinations. However, the Department of Labor will need to make this determination as part of the contracting process.

Table 1. Estimated observer deployment days, percent of deployment days and deployment costs (in millions) in the GOA and BSAI groundfish fisheries by type of operation and year, 2000-2002.

Year	Type of Operation	Days	% Days	Cost
2000	Vessels with 30% coverage	9,126	26.0%	\$3.1
	Vessels with \geq 100% coverage	21,442	61.1%	\$7.2
	Shore plants and floaters	4,522	12.9%	\$1.5
	Total	35,090	100.0%	\$11.8
2001	Vessels with 30% coverage	8,873	25.0%	\$3.0
	Vessels with \geq 100% coverage	22,121	62.4%	\$7.4
	Shore plants and floaters	4,463	12.6%	\$1.5
	Total	35,457	100.0%	\$11.9
2002	Vessels with 30% coverage	8,530	25.0%	\$2.9
	Vessels with \geq 100% coverage	21,392	62.7%	\$7.2
	Shore plants and floaters	4,196	12.3%	\$1.4
	Total	34,118	100.0%	\$11.4
Average	2000 - 2002	34,888		\$11.7

Notes: The cost is estimated using a cost per day of \$335. This is an estimate of the average cost per day charged by observer providers in 2000-2002. This includes a transportation cost of \$20. It is estimated that the cost per day will be \$355 in 2003. In this table, motherships are included in the vessels with at least 100% coverage requirements.

Source: NMFS observer-program. National Marine Fisheries Service, P.O. Box 15700, Seattle, WA 98115-0070.

Table 2 Estimated observer deployment days, percent of deployment days and costs (\$1,000) in the GOA and BSAI groundfish fisheries by year, vessel class and area, 2000-02.

Year	Vessel class	BSAI			GOA			All Alaska	
		Days	% Days	Cost	Days	% Days	Cost	Days	Cost
2000	Vessels with 30% coverage	6,065	19.8%	\$2.0	3,057	10.0%	\$1.0	9,122	\$3.1
	Vessels with \geq 100% coverage	20,731	67.8%	\$6.9	705	2.3%	\$0.2	21,436	\$7.2
	Total	26,796	87.7%	\$9.0	3,762	12.3%	\$1.3	30,558	\$10.2
2001	Vessels with 30% coverage	5,873	19.0%	\$2.0	3,000	9.7%	\$1.0	8,873	\$3.0
	Vessels with \geq 100% coverage	21,548	69.5%	\$7.2	565	1.8%	\$0.2	22,113	\$7.4
	Total	27,421	88.5%	\$9.2	3,565	11.5%	\$1.2	30,986	\$10.4
2002	Vessels with 30% coverage	5,862	19.6%	\$2.0	2,674	8.9%	\$0.9	8,536	\$2.9
	Vessels with \geq 100% coverage	20,680	69.1%	\$6.9	704	2.4%	\$0.2	21,384	\$7.2
	Total	26,542	88.7%	\$8.9	3,378	11.3%	\$1.1	29,920	\$10.0

Notes: The % of days is based on the total days for all vessel combined for each year. The cost is estimated using a cost per day of \$335. This is an estimate of the average cost per day charged by observer providers in 2000-2002. This includes a transportation cost of \$20. It is estimated that the cost per day will be \$355 in 2003. In this table, motherships are included in the vessels with at least 100% coverage requirements. Inshore processors, including floating processors are not included in this table. The estimates of days in this table are marginally less than the those in Table 1; however, the differences are too small to affect the estimated costs.

Source: NMFS observer-program. National Marine Fisheries Service, P.O. Box 15700, Seattle, WA 98115-0070.

Table 3. Estimated observer deployment days and deployment costs (in millions) in the GOA and BSAI groundfish fisheries by inshore processor category and year, 2000-2002.

Year	Processor Category	Days	% Days	Cost
2000	Alaska Peninsula/Aleutians	557	12.3%	\$0.19
	Bering Sea Pollock Processors	2,203	48.7%	\$0.74
	Floaters	381	8.4%	\$0.13
	Kodiak	1,083	23.9%	\$0.36
	South Central	150	3.3%	\$0.05
	St. Paul	0	0.0%	\$0.00
	Southeastern	148	3.3%	\$0.05
	Total	4,522	100.0%	\$1.51
2001	Alaska Peninsula/Aleutians	757	17.0%	\$0.25
	Bering Sea Pollock Processors	2,255	50.5%	\$0.76
	Floaters	225	5.0%	\$0.08
	Kodiak	953	21.4%	\$0.32
	South Central	85	1.9%	\$0.03
	Southeastern	154	3.5%	\$0.05
	St. Paul	34	0.8%	\$0.01
	Total	4,463	100.0%	\$1.50
2002	Alaska Peninsula/Aleutians	736	17.5%	\$0.25
	Bering Sea Pollock Processors	2,223	53.0%	\$0.74
	Floaters	155	3.7%	\$0.05
	Kodiak	858	20.4%	\$0.29
	South Central	61	1.5%	\$0.02
	Southeastern	128	3.1%	\$0.04
	St. Paul	35	0.8%	\$0.01
	Total	4,196	100.0%	\$1.41

Notes: The cost is estimated using a cost per day of \$335. This is an estimate of the average cost per day charged by observer providers in 2000-2002. This includes a transportation cost of \$20. It is estimated that the cost per day will be \$355 in 2003. The processor categories are defined as follows: (1) "Bering Sea Pollock Processors" are the AFA inshore pollock processors including the two AFA floating processors; (2) "Alaska Peninsula/Aleutian" are other processors on the Alaska Peninsula or in the Aleutian Islands; (3) "Kodiak" are processors on Kodiak Island; (4) "South Central" are processors west of Yakutat and on the Kenai Peninsula; and (5) "Southeastern" are processors located from Yakutat south.

Source: NMFS observer-program. National Marine Fisheries Service, P.O. Box 15700, Seattle, WA. 98115-0070.

Table 4. Numbers of vessels with observers, observer-deployment days, and estimated observer costs (\$1,000) in the GOA and BSAI groundfish fisheries by year and type of operation, 2000-01.

	2000			2001		
	Count	Obs. Days	Cost	Count	Obs. Days	Cost
Catcher vessels						
Hook and line (predominately 60-124')						
H&L total	87	947	317	95	930	312
Pot						
60-124	107	870	292	70	718	240
>124	31	243	81	16	117	39
Pot total	138	1,113	373	86	835	280
Trawl						
60-124	112	4,436	1,486	114	4,596	1,540
>124	30	4,193	1,405	27	3,697	1,238
Trawl total	142	8,629	2,891	141	8,293	2,778
Catcher-vessel total	367	10,690	3,581	322	10,057	3,369
Catcher/processors						
Hook and line						
60-124	12	1,841	617	12	1,724	578
>124	26	6,496	2,176	29	6,928	2,321
H&L total	38	8,337	2,793	41	8,652	2,898
Pot						
>60	11	423	142	8	526	176
Pot total	11	423	142	8	526	176
Fillet trawler						
>124	4	1,195	400	4	1,312	440
H&G trawler						
60-124	9	860	288	8	748	251
>124	15	4,532	1,518	16	4,261	1,427
Surimi trawler						
>124	11	3,645	1,221	11	4,337	1,453
Trawl total	39	10,232	3,428	39	10,658	3,570
Catcher/processor total	88	18,992	6,362	88	19,836	6,645
Motherships	8	786	263	4	1,010	338
Other vessels	16	90	30	12	82	27
All vessels	467	30,558	10,237	415	30,985	10,380

Table 5 Observer costs as a percent of ex-vessel revenue in the GOA and BSAI groundfish fisheries by vessel type and length, 2000-01.

Year/Vessel Type/Length	Min. %	Max. %	Avg. %	Wt. Avg. %
2000				
Longline catcher vessels				
60-124	.0	16.6	1.1	1.3
Pot catcher vessels				
60-124	.0	13.3	1.8	1.8
>124	.0	5.0	1.7	1.5
Trawl catcher vessels				
60-124	.0	4.2	1.4	1.1
>124	.0	3.5	1.9	1.8
Longline catcher/processors				
60-124	.0	4.9	2.6	2.9
>124	2.3	8.4	4.2	3.8
Pot catcher/processors				
>60	.0	7.6	3.5	3.6
Fillet trawl processors				
>124	-	-	1.8	1.6
H&G trawl processors				
60-124	1.0	5.4	2.9	2.3
>124	2.0	3.9	2.7	2.7
Surimi trawl processors				
>124	1.0	1.4	1.2	1.2
2001				
Longline catcher vessels				
60-124	.0	16.7	1.1	1.3
Pot catcher vessels				
60-124	.0	19.7	2.7	2.8
>124	.0	4.9	2.0	2.2
Trawl catcher vessels				
60-124	.0	7.3	1.8	1.2
>124	.0	3.1	1.6	1.5
Longline catcher/processors				
60-124	.0	6.8	3.0	3.1
>124	.0	9.9	4.5	4.3
Pot catcher/processors				
>60	.0	16.9	5.4	3.4
Fillet trawl processors				
>124	-	-	2.2	2.1
H&G trawl processors				
60-124	1.5	7.1	3.3	2.9
>124	1.6	3.6	2.5	2.3
Surimi trawl processors				
>124	1.4	2.1	1.7	1.7

Table 5.1. Observer costs as a percent of ex-vessel revenue in the Gulf of Alaska by vessel type and length, 2000-01.

Year/Vessel Type/Length	Min. %	Max. %	Avg. %	Wt. Avg. %
2000				
Longline catcher vessels				
60-124	.0	3.5	.6	.9
Pot catcher vessels				
60-124	.0	6.2	.9	1.1
>124	.0	4.0	1.1	1.6
Trawl catcher vessels				
60-124	.0	4.2	1.7	1.6
>124	-	-	.9	2.0
Longline catcher/processors				
60-124	.0	4.6	1.5	1.3
>124	1.5	5.9	2.6	2.0
Pot catcher/processors				
>60	-	-	3.7	4.2
H&G trawl processors				
60-124	-	-	3.2	2.9
>124	1.0	5.6	2.4	2.4
2001				
Longline catcher vessels				
60-124	.0	16.7	.9	1.2
Pot catcher vessels				
60-124	.0	19.7	2.5	1.5
Trawl catcher vessels				
60-124	.0	9.6	2.4	2.1
Longline catcher/processors				
60-124	.0	3.8	1.3	1.7
>124	1.3	4.3	2.6	2.2
Pot catcher/processors				
>60	-	-	3.7	2.6
H&G trawl processors				
60-124	1.5	15.9	6.6	3.1
>124	1.1	8.5	3.0	2.4

Table 5.2. Observer costs as a percent of ex-vessel revenue in the Bering Sea and Aleutian Islands of Alaska by vessel type and length, 2000-01.

Year/Vessel Type/Length	Min. %	Max. %	Avg. %	Wt. Avg. %
2000				
Longline catcher vessels				
60-124	.0	13.8	2.0	3.3
Pot catcher vessels				
60-124	.0	17.3	2.9	2.6
>124	.0	6.5	2.0	1.5
Trawl catcher vessels				
60-124	.0	5.2	1.2	.9
>124	.7	3.5	2.0	1.8
Longline catcher/processors				
60-124	2.0	6.3	4.0	3.8
>124	2.3	8.4	4.2	3.8
Pot catcher/processors				
>60	.0	7.6	3.0	3.5
Fillet trawl processors				
>124	-	-	1.8	1.6
H&G trawl processors				
60-124	1.0	19.9	4.8	2.1
>124	2.0	3.9	2.8	2.7
Surimi trawl processors				
>124	1.0	1.4	1.2	1.2
2001				
Longline catcher vessels				
60-124	.0	19.6	1.6	2.2
Pot catcher vessels				
60-124	.0	12.8	2.5	3.1
>124	.0	4.9	2.0	2.2
Trawl catcher vessels				
60-124	.0	15.5	1.4	.9
>124	.0	3.1	1.6	1.5
Longline catcher/processors				
60-124	.0	8.6	3.7	3.9
>124	.0	9.8	4.5	4.4
Pot catcher/processors				
>60	.0	16.9	5.9	3.6
Fillet trawl processors				
>124	-	-	2.2	2.1
H&G trawl processors				
60-124	1.5	7.3	3.7	2.9
>124	1.6	3.6	2.5	2.3
Surimi trawl processors				
>124	1.4	2.1	1.7	1.7

Note: These estimates are based on an estimated average cost per day of \$335. This includes the cost of observer providers and the cost of transportation. The average percent (Avg. %) is the average of the percents for all vessels in a category. The weighted average percent (Wt. Avg. %) is the weighted average for all vessels in a category. It is the total observer cost for all vessels in a category as a percent of the total ex-vessel or gross product value of all the vessels in that category.

Source: NMFS Observer Program, CFEC fish tickets, weekly production reports, Alaska state and Federal vessel-registration files. National Marine Fisheries Service, P.O. Box 15700, Seattle, WA 98115-0070.

Table 6 Estimated observer costs and potential research plan fee revenue by type of operation and year, (\$ millions).

Year/Area	Type of Operation	Cost	Potential Fee
2000 BSAI	0%	0.0	0.1
	30%	2.2	2.8
	100%	6.5	6.2
	Vessel Subtotal	8.7	9.1
2000 GOA	0%	0.0	1.5
	30%	1.1	1.5
	100%	0.2	0.2
	Vessel Subtotal	1.3	3.2
GOA-BSAI	Vessels	10.0	12.3
	Motherships	0.3	0.0
	Inshore Processors	1.5	0.0
	Halibut	0.0	2.7
	Grand Total	11.8	15.0
2001 BSAI	0%	0.0	0.1
	30%	2.1	2.7
	100%	6.7	6.0
	Vessel Subtotal	8.8	8.8
2001 GOA	0%	0.0	1.1
	30%	1.0	1.2
	100%	0.2	0.1
	Vessel Subtotal	1.2	2.4
GOA-BSAI	Vessels	10.1	11.2
	Motherships	0.3	0.0
	Inshore Processors	1.5	0.0
	Halibut	0.0	2.2
	Grand Total	11.9	13.4

Notes: The cost is estimated using a cost per day of \$335. This is an estimate of the average cost per day charged by observer providers in 2000-2002. This includes a transportation cost of \$20. It is estimated that the cost per day will be \$355 in 2003.

Source: NMFS observer-program. National Marine Fisheries Service, P.O. Box 15700, Seattle, WA 98115-0070.

NORTH PACIFIC GROL JH OBSERVER PROGRAM

ID	Task Name	Duration	Start	Finish	Predecess	Resource Names
1	ALASKA GROUND FISH OBSERVER PROGRAM	172 days	Sun 8/1/03	Tue 1/27/04		
2	DEVELOP ACQUISITION PACKAGE	47 days	Sun 8/1/03	Tue 8/5/03		NPGOP
3	DEVELOP WORK STATEMENT	60 edays	Sun 8/1/03	Thu 7/31/03		NPGOP
4	OBTAIN FUNDING DOCUMENTS	3 days	Mon 8/2/03	Wed 8/4/03		NPGOP
5	OBTAIN DAO 268-10 APPROVAL FOR SERVICES	3 days	Thu 7/31/03	Mon 8/4/03	3	NPGOP
6	SUBMIT ACQUISITION PACKAGE TO AMD	1 day	Tue 8/5/03	Tue 8/5/03	5	
7	REVIEW ACQUISITION PACKAGE	1 day	Wed 8/6/03	Wed 8/6/03	2	AMD
8	DEVELOP ACQUISITION STRATEGY	5 days	Thu 8/7/03	Wed 8/13/03	7	AMD,NPGOP
9	PREPARE & ISSUE CBD SYNOPSIS	17 days	Thu 8/14/03	Fri 9/5/03	8	AMD
10	OBTAIN WAGE RATES	30 edays	Wed 8/13/03	Fri 9/12/03	8	AMD
11	PREPARE OPTION JUSTIFICATION	1 day	Thu 8/14/03	Thu 8/14/03	8	AMD
12	PREPARE SOLICITATION (RFP)	5 days	Thu 8/14/03	Wed 8/20/03	8	AMD
13	PRE-SOLICITATION LEGAL REVIEW	14 edays	Wed 8/20/03	Wed 9/3/03	11,12	DOC OGC
14	RFP TO REVIEW BOARD	3 days	Thu 8/21/03	Mon 8/25/03	12	AMD
15	CLIENT REVIEW OF RFP	5 days	Thu 8/21/03	Wed 8/27/03	12	NPGOP
16	REVISE RFP BASED ON REVIEWS	1 day	Thu 9/4/03	Thu 9/4/03	13,14,15	AMD
17	PRINT COPIES OF RFP	2 days	Fri 9/5/03	Mon 9/8/03	16	AMD
18	ISSUE RFP	1 day	Tue 9/9/03	Tue 9/9/03	17	AMD
19	PRE-PROPOSAL CONFERENCE	1 day	Fri 12/19/03	Fri 12/19/03	18	AMD,NPGOP,OFFERORS
20	RESPOND TO OFFEROR'S QUESTIONS	2 days	Mon 12/22/03	Tue 12/23/03	19	AMD,NPGOP
21	RECEIVE PROPOSALS	45 edays	Tue 9/9/03	Fri 10/24/03	18	AMD,OFFERORS
22	SEB TECHNICAL REVIEW	14 edays	Fri 10/24/03	Fri 11/7/03	21	NPGOP
23	COST/PRICE ANALYSIS	5 days	Mon 10/27/03	Fri 10/31/03	21	AMD
24	SEB MEMO TO CO	2 days	Mon 11/10/03	Tue 11/11/03	22	NPGOP
25	DETERMINE COMPETITIVE RANGE	1 day	Wed 11/12/03	Wed 11/12/03	23,24	AMD,NPGOP
26	NOTIFY EXCLUDED FIRMS	1 day	Thu 11/13/03	Thu 11/13/03	25	AMD
27	PRE-AWARD DEBRIEF	1 day	Fri 11/14/03	Fri 11/14/03	26	AMD,NPGOP,OFFERORS
28	PREPARE PRE-NEG OBJECTIVES	3 days	Mon 11/17/03	Wed 11/19/03	27	AMD,NPGOP
29	PRE-NEG REVIEW BOARD	3 days	Thu 11/20/03	Mon 11/24/03	28	AMD
30	NEGOTIATIONS	14 edays	Mon 11/24/03	Mon 12/8/03	29	AMD,NPGOP,OFFERORS
31	REQUEST REVISED OFFERS	1 day	Tue 12/9/03	Tue 12/9/03	30	AMD
32	RECEIVE REVISED OFFERS	14 edays	Tue 12/9/03	Tue 12/23/03	31	AMD,OFFERORS
33	SEB REVIEW	2 days	Wed 12/24/03	Thu 12/25/03	32	NPGOP,AMD
34	SEB AWARD RECOMMENDATION	2 days	Fri 12/26/03	Mon 12/29/03	33	NPGOP
35	NEGOTIATION SUMMARY	2 days	Tue 12/30/03	Wed 12/31/03	34	AMD
36	RESPONSIBILITY DETERMINATION	1 day	Tue 12/30/03	Tue 12/30/03	34	AMD
37	PRICE REASONABLENESS DETERMINATION	1 day	Tue 12/30/03	Tue 12/30/03	34	AMD
38	PREPARE CONTRACT	3 days	Tue 12/30/03	Thu 1/1/04	34	AMD
39	SUBMIT AWARD TO LEGAL	1 day	Fri 1/2/04	Fri 1/2/04	35,36,37,38	AMD
40	LEGAL REVIEW OF AWARD	14 edays	Fri 1/2/04	Fri 1/16/04	39	DOC OGC
41	AWARD NOTIFICATION	1 day	Mon 1/5/04	Mon 1/5/04	39	AMD
42	UNSUCCESSFULL OFFEROR LETTERS	1 day	Mon 1/5/04	Mon 1/5/04	39	AMD
43	CBD AWARD SYNOPSIS	1 day	Mon 1/5/04	Mon 1/5/04	39	AMD
44	INCORPORATE LEGAL COMMENTS	1 day	Mon 1/19/04	Mon 1/19/04	40	AMD
45	AWARD CONTRACTS	1 day	Tue 1/20/04	Tue 1/20/04	41,42,43,44	AMD
46	DEBRIEF UNSUCCESSFUL OFFERORS	5 days	Wed 1/21/04	Tue 1/27/04	45	AMD,NPGOP,OFFERORS

North Pacific Fishery Management Council

David Benton, Chairman
Chris Oliver, Executive Director

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AGENDA C-7(b)
JANUARY 2003

Fax: (907) 271-2817

Observer Advisory Committee – Meeting Agenda

January 23 - 24, 2003

Alaska Fisheries Science Center
7600 Sand Point Way, NE, Seattle
Building 4, Room 2039
8:30 am - 5 pm

I. Review and approve agenda

Purpose of the meeting per Council direction (from October 2002 newsletter):

Note that the OAC last met on July 18 - 19, 2002. At that meeting, the OAC discussed the need to restructure the North Pacific Groundfish Observer Program based on previous direction from the Council and issues stemming from NMFS, industry, observer providers, and observers. As a result of that meeting, the OAC concluded that it supports full Federal funding of the Observer Program, but it would consider support of a program design that includes a blend of Federal funding and a fee plan. In addition, the OAC agreed that the Council should focus first on addressing the problems in the unobserved and 30% fleet. The committee recognized the difficulty in recommending restructuring alternatives in light of the uncertainty surrounding potential Magnuson-Stevens Act reauthorization, industry efforts to secure Federal funding for the Observer Program, and the direction of developing rationalization programs.

At its October 2002 meeting, the Council noted that it supports the continuing work of the OAC and further tasked the committee to develop a problem statement and alternatives to be presented at the February 2003 Council meeting. NMFS has developed a discussion paper to facilitate progress on this task.

- II. Review discussion paper. This paper outlines a proposed problem statement, scope, and general alternatives and issues for long-term, significant revisions to the North Pacific Groundfish Observer Program.
- III. Discuss NMFS proposal for a short-term pilot project to test deployment of observer resources to determine catch composition and bycatch rates in a specific fishery
- IV. Update on Federal Observer Compensation Act (FOCA)
- V. Discuss FY05 NMFS budget initiatives
- VI. Other issues as necessary: (Review schedule for future meeting)

NOAA Fisheries Alaska Region
November 15, 2002

Proposed Pilot Project: Improving Prohibited Species Catch Estimates Utilizing Electronic Vessel Logbooks and Effective Deployment of Groundfish Observers

Background. The current system for estimating prohibited species catch (PSC) aggregates observer sampling data by federal reporting area. These are large areas and may contain more specific fishing grounds with significantly different rates of PSC. In fisheries with 30% coverage vessels, vessels arrange when and where to carry observers. Some areas and time periods may have insufficient coverage as a result, others may have more coverage than is needed. New electronic vessel logbook systems may enable precise grouping of vessels by distinct fishing areas at a much finer level than federal reporting areas or even ADFG statistical areas. Unobserved vessels could be associated with observed vessels fishing in the same location, and PSC estimates made for these discrete components of the overall fishery, improving the accuracy and overall precision of PSC estimates.

Project Summary. The NOAA Fisheries Alaska Region proposes to conduct a pilot project, possibly under an Experimental Fishing Permit, in the summer bottom trawl fishery in the Central Gulf of Alaska (GOA). This fishery, primarily for rockfish and flatfish species, involves many 30% observer coverage vessels that fish in diverse locations, and the fishery is significantly limited by Pacific halibut PSC.

The project would likely require participating vessels to utilize electronic logbook systems, which may be funded by NOAA Fisheries, and to submit the logbook data in a timely manner. NOAA Fisheries will develop systems to process the logbook data and combine it with observer data to make PSC estimates for specific fishing grounds within the Central GOA.

The PSC estimation system will require that sufficient observer data be available from each fishing area. An observer deployment model that does not rely on individual vessel operators deciding when and where to carry observers is needed for this experimental fishery. Vessels fishing under the EFP will likely be exempted from the existing observer coverage requirements, and a contract with an observer provider will be used to implement the experimental deployment model.

Anticipated Benefits.

1. Development and testing of new PSC estimation procedures with potential to improve accuracy and precision of PSC estimates.
2. Testing of an observer deployment model that is more effective at utilizing observer days to collect information needed for PSC estimation.
3. Data to address questions of how much observer coverage is needed to provide a given level of precision in PSC estimates.

**PLAN TO MANAGE RISKS AND
MINIMIZE LIABILITIES ASSOCIATED
WITH THE DEPLOYMENT OF
CONTRACTED FISHERIES OBSERVERS**

NOAA Contract No. 50-DGNF-1-90089
QuanTech Contract No. 5105-100

FINAL REPORT

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January 10, 2003

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The National Marine Fisheries Service (NMFS) deploys approximately 500 observers in more than 20 fisheries nationwide, under two primary service delivery models. The first model uses observer provider companies under contract to NMFS. The second model uses NMFS-certified observer provider companies which contract directly with fishing vessels to provide required observer coverage. In either model, observers are usually hired at an entry-level position, and work independently on commercial fishing vessels for up to three months without direct supervision. They must accommodate difficult living arrangements, demanding schedules, and hazardous and unpredictable working and weather conditions inherent in commercial fishing operations. It is the responsibility of the observer provider company to obtain adequate insurance and liability coverage for observers. Reimbursement of the companies' insurance expenses is made either by the Government (in the case of a direct contract with NMFS) or by the vessel owner (in the case of a NMFS-certified observer company contracting directly with the vessel).

There are currently no minimum legal requirements as to the type of insurance that must be provided, other than general guidance provided in the Federal Acquisition Regulations. A principal reason for this is that it is not a simple matter to provide adequate workers compensation coverage to observers in the event that they are injured or killed on the job. State workers compensation programs are generally inapplicable, because most such programs do not have jurisdiction aboard vessels. Many observer provider companies carry longshore and harbor workers coverage, but it is far from clear that observers meet the status test for longshore coverage, which is designed for workers such as longshoremen, ship repairmen, shipbuilders, ship-breakers and the like. In other words, observer claims under longshore coverage might be denied by the insurer. Another coverage possibility is the Merchant Marine Act of 1920, generally known as the Jones Act, which, however, would require observers to be "seamen" under the definition of the Act. There have been various lawsuits over the years on this issue, with some courts finding observers to be seamen and others not. Observer companies have generally responded to this confusing coverage situation by purchasing all types of insurance that might possibly apply – State workers compensation, longshore and harbor workers, and Jones Act coverage. Not only is this approach extremely expensive, it may still fail to provide timely and fair compensation to an injured observer. Observers could be forced to file suit under the Jones Act against their employer, the vessel they were injured on, or both. The possibility of such suits has the additional effect of

making vessels reluctant to take observers on board.

Congress attempted to solve the observer coverage problem in the October 1996 re-authorization of the Magnuson-Stevens Fishery Conservation and Management Act, which, with the Endangered Species Act, is the authority for observer programs. The 1996 re-authorization provided workers compensation coverage to observers under FECA, the Federal Employee Compensation Act. This has turned out to be inadequate, since the basis of compensation under FECA excludes overtime (which is a significant portion of most observers' pay), and FECA does not cover observers working in processing plants, during debriefings sessions, or while in transit. Also, FECA does not prevent observers from suing the vessel or the observer provider company for additional damages, even if they are compensated under FECA.

In 2000, NMFS' National Observer Program conducted an internal Management Control Review (MCR) of observer programs, which concluded that there were varying levels of understanding of what constituted adequate and cost-effective coverage for observers, as a result of which observer coverage was costly and in some cases redundant. Also, uncertainty regarding vessel liability in the event of an injury to an observer was found to hamper efforts to deploy observers, even though NMFS offers reimbursement to vessels for Protection and Indemnity (P&I) coverage to protect themselves from suit by observers. With regard to FECA coverage, the MCR found that one injured observer obtained inadequate disability payments under FECA.

In order to obtain input from insurance and labor experts on the issues raised by the MCR, NMFS conducted an Insurance, Liability and Labor Workshop in June, 2001. In addition to the MCR issues, the Workshop considered some additional issues, including liability concerns of smaller vessels (whether insured or not), coverage for observers when not on board a vessel, and feasibility of a national insurance policy to cover observers, vessels and observer provider companies. After the Workshop, NMFS concluded that a risk management plan should be developed to provide a clear and unambiguous mechanism for furnishing insurance coverage to observers for work-related injuries, and to resolve the legal and financial uncertainties surrounding observer program insurance issues. The object of the present contract, and the subject of this report, is the risk management plan.

Introduction

The first objective of the research was to devise insurance coverage options to provide assured and adequate compensation to observers in the event of an on-the-job injury, whether sustained at sea, in transit to a deployment, or on land (such as during debriefing after a trip). Consideration was to be given not only to existing insurance options, but also to possible statutory changes/legislative initiatives to create a customized approach to observer program insurance issues. The cost, feasibility and timing of all options was to be taken into account.

A second objective was to analyze and evaluate options for reducing the risk to vessel owners from liability to observers for injuries sustained while on board the vessel acting as an observer. The reluctance of vessels to take observers because of liability concerns is an important impediment to the effective conduct of NMFS' observer programs.

A third objective was to analyze and evaluate options for managing the Government's exposure to legal and financial risks related to the training, debriefing and deployment of observers under both service delivery models and in various work situations (on board a vessel, in a processing plant, during debriefing, etc.).

The final objective of the research was to develop an effective method for the Government to monitor and manage future changes in legal and financial risks associated with observer programs.

Objectives

Review of Documentation

The first stage in the analysis was to review a considerable body of documentation on the observer programs and insurance issues furnished to us by NMFS. The documents included:

- *Management Control Review of National Marine Fisheries Service Observer Programs/Service Delivery Models* (September 2000)
- *Fisheries Observers Insurance, Liability and Labor Workshop, June 12-14, 2001* (Draft Report, November 2001)
- *Independent Review of the North Pacific Groundfish Observer Program* (MRAG Americas, Inc., May 2000)
- Contracts between NMFS and observer provider companies, and between observer provider companies and observers
- Certificates of Insurance from regional observer programs
- Observer programs' safety training protocols
- Manuals from various observer programs
- Sundry letters and memoranda relating to observer status as seamen under the Jones Act, the FECA designation of observers under the Magnuson Act, and insurers' loss experience with regard to observer injuries.

Of the three reports, the Insurance Workshop proceedings were the most useful. The other two reports addressed a large variety of issues concerning observer programs, and devoted limited space to insurance and liability issues. The reports generally confirmed the uncertain and confusing status of insurance coverage in the observer programs. There was considerable discussion of:

- the inadequacy of FECA compensation in the cases where it was actually invoked
- ambiguity of observer status under the Jones Act (sometimes found to be seamen, sometimes not) and also under the Longshore and Harbor Workers' Compensation Act (LHWCA) (may not meet the status test for coverage)
- Difficulties in providing liability protection to vessels, through P&I coverage (difficult even if vessel has insurance, impossible if it does not)

- Inadequacies of hold harmless agreements to protect vessels from liability to observers.

Many Insurance Workshop participants advocated extending LHWCA coverage to observers, after the model of the Defense Base Act, because LHWCA would provide an exclusive, assured remedy for observers (negligence does not need to be proved), and because its compensation schedule is better and more straightforward than most State worker's compensation programs. It was emphasized that LHWCA-type coverage should be status based, i.e., it should cover observers wherever they are working and whatever duties they are performing.

The various contracts provided were not particularly informative on insurance coverages, since they include either the standard FAR requirements, or a requirement to provide a variety of expensive and potentially duplicative coverages. The insurance certificates typically show General Liability and Worker's Compensation coverage, often with endorsements for Maritime Employer's Liability (MEL) and/or LHWCA coverage. The status issues with respect to the Jones Act and the LHWCA are not addressed, so it is unclear how much actual protection a seriously injured observer would have under these policies, expensive though they may be.

The observer program manuals and safety training protocols contain a wealth of information about the actual operation of observer programs, but do not address insurance or liability issues.

Analysis of Current FECA Coverage

By statute, FECA excludes overtime from the base for computation of benefits. This has a serious impact on observers, because in many cases they rely on overtime to a considerable extent. An illustrative example (based on the NE Observer Program) might be an observer with a base pay rate of \$10 per hour, who is compensated at sea on the basis of \$140 per day, computed as 8 hours at the base rate of \$10, plus 4 hours of overtime at time-and-a-half of \$15 per hour. For this observer, \$80 is base pay and \$60 is overtime. Thus, if the observer were injured, the FECA compensation calculation would award two thirds of \$80, or \$53.33 per day, which is only 38% of daily pay of \$140. An observer seriously injured in Hawaii who was a Federal employee was victimized by a

Analysis of Observer Program Insurance Issues

similar calculation resulting in such low disability benefits that he was obligated to return to work even though far from fully recovered. To add insult to injury, the desk job to which he was assigned paid far less than his job as an observer.

The problem with the FECA treatment of overtime where observers are concerned is that the nature of the job makes working more than 8 hours in a day the normal course of events, rather than an unusual occurrence such as an emergency or a tight deadline requiring long work hours over a short period of time. Thus, viewed from the perspective of an 8-hour workday, a large part of any observer's compensation is overtime. We considered the possibility that an observer's employer might be able to avoid the overtime issue if observer pay were explicitly placed on a sea-day basis, i.e., observers were paid a fixed rate per sea-day with no mention of hours worked. Thus, if a FECA claim were to be filed, there would be no mention of overtime in the observer's pay record. The problem with this approach is that observers working for Federal contractors, and also possibly observers working for certified observer companies (there is a difference of opinion between the Departments of Commerce and Labor on this issue), are subject to the Service Contract Act. This act requires payment of overtime at time-and-a-half to non-exempt employees. Thus, there would always be a risk that the examiner of a FECA claim by an observer would go behind the claimed daily rate and impute an overtime portion to the observer's pay. Hence, this approach does not meet the need to provide assured, adequate compensation to an injured observer.

Another possibility we considered is that some observer pay might fall within the definition of "premium pay" or "administratively uncontrollable overtime", which can be included in the base of compensation for FECA. Section 8114 (e) of FECA allows the government to include "premium pay under section 5445(c)(1)," 5 U.S.C. In addition, the government has construed this allowance also to apply to "administratively uncontrollable overtime" under 5 U.S.C. 5445(c)(2). FECA Program Memorandum No. 106 (provides for inclusion of premium pay under 5 U.S.C. 5545(c)(2) to be included in pay rate for compensation purposes); FECA Bulletin No. 89-26 (issued September 29, 1989) (states that by administrative determination the Office, pursuant to 5 U.S.C. 5545(c)(2), includes premium pay for administratively uncontrollable overtime in computing compensation).

Section (c)(1) provides that the "head of an agency, with the approval of the Office of Personnel Management, may provide that— * * * an employee in a position requiring him regularly to remain at, or within the confines of,

his station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter [5 USCS §§ 5541 et seq.], except for irregular, unscheduled overtime duty in excess of his regularly scheduled weekly tour. Premium pay under this paragraph is determined as an appropriate percentage, not in excess of 25 percent, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law) (or, for a position described in section 5542(a)(3) of this title, of the basic pay for the position), by taking into consideration the number of hours of actual work required in the position, the number of hours required in a standby status at or within the confines of the station, the extent to which the duties of the position are made more onerous by night, Sunday, or holiday work, or by being extended over periods of more than 40 hours a week, and other relevant factors"

Section (c)(2) provides that the "head of an agency, with the approval of the Office of Personnel Management, may provide that— * * * an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter [5 USCS §§ 5541 et seq.], except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty. Premium pay under this paragraph is an appropriate percentage, not less than 10 percent nor more than 25 percent, of the rate of basic pay for the position, as determined by taking into consideration the frequency and duration of irregular, unscheduled overtime duty required in the position."

In the Matter of GEORGE MARTINEZ, 1997 ECAB LEXIS 4431, Docket No. 96-504, December 29, 1997, the Board said: Under Sec. 5545(c)(1) of U.S.C. of Title 5 the employee receives premium pay for overtime, such as time spent on standby status, required to be spent at his duty station, as part of a regularly established, controllable, pre-set time schedule, and reduction or discontinuance of such premium pay constitutes

an adverse action. Administratively uncontrollable overtime under Sec. 5545(c)(2) applies where hours of duty may not be administratively controlled, and where substantial amounts of irregular or occasional overtime is worked at the discretion of the employee.

The 25% cap on premium pay would be a serious problem for the observer in the example quoted at the beginning of this section. His "base" pay was \$80 per day and his "overtime" was \$60 per day. Thus, counting 25% of his base pay as "premium pay" would increase his basis for FECA by \$20 to \$100 per day, resulting in a benefit of \$66.67 per day, still only 48% of his total pay of \$140 per day. While this would certainly be an improvement, it is still inadequate. Not only that, it is by no means clear that observers meet the definition of premium pay or administratively uncontrolled overtime. The "standby status" qualification for premium pay appears to be closest to the situation faced by observers at sea.

In summary, the "premium pay" and "uncontrollable overtime" provisions are not clearly applicable to observers. Indeed, since they apply directly only to Federal employees, it could well be difficult to construe them as applying to observers who are not Federal employees (except for FECA purposes). Even if these provisions were found to apply to observers, they would still not solve the problem of inadequate compensation, because of the 25% cap. However, these provisions may be worth further investigation as an interim measure to improve the current situation for observers.

FECA coverage for observers under the Magnuson Act is explicitly limited to work on a vessel. Thus, observers working in processing plants, during debriefings, or in transit to or from deployments are not covered by FECA. The intent of Congress was apparently that State worker's compensation should cover these scenarios. At a minimum, this is a potentially confusing coverage situation which is subject to misinterpretation by observer employers and could conceivably result in a gap in coverage. It is also possible that observers may void their FECA coverage by performing any duties in service to the vessel, even washing dishes or acting under the captain's orders in an emergency.

A final drawback to FECA is the lack of judicial review of the Agency's or the Department of Labor's decisions on compensation. The seriously injured observer mentioned earlier who, as a Federal employee, received such inadequate compensation he was forced to decline disability and return prematurely to work, had no recourse against the adverse decision in his case. It is clearly important in such cases that the observer have a right of appeal to the Federal courts, as well as a

provision to obtain attorney's fees if successful.

Our conclusion from this analysis of FECA as applied to observers is that there is no assured way to obtain adequate compensation for on-the-job injuries to observers within the current FECA framework. Although several methods might be tried to circumvent FECA's disallowance of overtime pay in whole or in part, none are assured of success. Short of amending the Magnuson Act or FECA itself, nothing at all can be done about the lack of coverage off-vessel or the lack of judicial review of compensation decisions.

State Workers Compensation

Most, if not all, State workers compensation statutes contain "extra-territorial" provisions whereby employees hired in the State are covered, under many circumstances, for work outside the State and even outside the United States itself. At first sight, these extra-territorial provisions make State workers compensation a potentially viable avenue for coverage of observers. Unfortunately, there are so many differences between State statutes that it is impossible to craft a workers compensation solution for observers from State law alone. In addition, State workers compensation does not address other liability concerns of observer provider companies, such as Jones Act liability.

First, a cursory review of State laws reveals that there are serious inconsistencies between State statutes as to maritime coverage. Alaska, for example, covers maritime workers with the single explicit exception of commercial fishermen (*AS 23.30.230 (a)(6)*). Florida, on the other hand, excludes any worker covered by the LHWCA, the Jones Act or the Defense Base Act (*Florida Statutes, Title XXXI, Chapter 440, Paragraph 440.09 (2)*). Hawaii covers "employees in maritime employment and their employees not otherwise provided for by the laws of the United States" (*HRS 386-7*), which comes to about the same thing as Florida. Obviously, the Hawaii and Florida statutes leave the issue of observer coverage completely unresolved under current law, and even the Alaska law is not completely clear because of the question as to whether observers are seamen.

Second, there are large differences in benefits between the States. A review of benefits for permanent total disability provided by Worker's compensation statutes in the U.S. (information on the U.S. Department of Labor website at www.dol.gov/esa/regs/owcp) indicates that, for the 23 maritime States, the weekly benefit ranges from a low of \$316 for Mississippi to a high of \$923 for New Hampshire, with an average of

\$588. This compares very unfavorably with the \$934 benefit for USL&H. There are similar differences for temporary total and permanent partial disabilities.

Third, whatever position the State statute may take with respect to maritime workers such as observers, the typical workers compensation policy does not contemplate coverage of workers at sea. In cases where there is known maritime exposure, underwriters will generally attach a policy endorsement excluding, for example, "bodily injury to a master or member of the crew of any vessel." (*The John Liner Letter, August 1986*). Thus, under current law, observer provider companies often have no practical alternative to carrying Jones Act, Maritime Liability and USL&H coverage.

Fourth, the potential liability under current law for Jones Act or LHWCA claims against the observer provider company forces the companies to carry the range of expensive and duplicative coverages mentioned before. This is the situation even in Alaska, despite the fact that Alaska workers compensation apparently does cover observers.

Vessel Liability Issues

Many vessels are reluctant to take observers on board because of liability concerns. Specifically, they fear that an injured observer may bring suit for negligence on the part of the vessel (including the owner/operator). While FECA exempts the Government, as the observer's employer, from suit, nothing prevents the observer from suing the vessel. If the facts of the case support a negligence claim against the vessel, the Government itself may file suit against the vessel to recover any payments under a FECA claim, or may require the observer to file suit. Thus, in some respects, the FECA coverage of observers exacerbates the liability concerns of vessels.

Currently, NMFS attempts to address these concerns by reimbursing vessels for additional Protection and Indemnity (P&I) insurance premiums needed to extend coverage to an observer. Still, many vessels are unwilling to go through the hassle of obtaining the additional coverage. Worse, many smaller vessels have no insurance at all, so this option is not open to them.

Another approach to this problem is for the observer provider company to enter into a "hold harmless" agreement with the vessel under which the company assumes the liability for any claim by the observer against the vessel. A similar approach is for the observer provider company to furnish insurance to the vessel to defend against a negligence claim by the observer. Under either of

these approaches, the key question is whether the observer provider company can itself obtain insurance at a reasonable cost to cover negligence suits by the observer against the vessel. First, there is a real question whether the observer provider company has any insurable interest at all in the operations of the vessel. That is, protection against liability for the actions of the vessel is the responsibility of the vessel owner/operator. Normally, one cannot insure someone else against their own negligence. The second difficulty is that, even if such insurance could be obtained, it is liable to be very expensive, because the observer provider company's liability insurer would be carrying coverage for a large population of vessels of unknown condition and ownership. Finally, it is questionable whether vessels with a liability concern would be satisfied with any representation by the observer provider company with regard to insurance or a hold-harmless agreement.

We concluded from our review of this issue that the only sure way to remove vessel concerns about liability is to exempt them from liability suits by observers. Section 114 of the Marine Mammal Protection Act of 1972 originally provided such an exemption, but it no longer applies. The Magnuson Act never addressed this issue. Of course, Federal preemption of an observer's common-law right to bring a negligence suit against the vessel must be coupled with the provision of assured and adequate compensation to observers for on-the-job injury.

Observer Provider Company Liability Issues

As discussed above, FECA exempts only the Government, as the observer's employer, from liability suits for on-the-job injuries. Even if compensation is provided under FECA, the observer could still sue the observer provider company under the Jones Act for damages, including pain and suffering. Under the Jones Act, a "seaman" is entitled to sue his "employer" for injuries he suffered "in the course of his employment." To recover under the Jones Act, a plaintiff must show, among other things, that (i) he was a "seaman" when he suffered his injury; and (ii) the defendant was his employer at the time of the injury. As discussed below there are serious questions as to whether an observer could make either of these necessary showings. Specifically, he might not be able to prove that his role as an observer qualified him as a "seaman." In addition, the Magnuson Act, which designates the observers as employees of the Federal Government, would make it difficult for the observer to prove that the contractor was his employer at the time of the injury.

(a) Requirement that the Injured or Deceased Person be a Seaman.

Whether a person is a "seaman" under the Jones Act generally is a question of fact for the jury. *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 355 (1991). The Jones Act does not define the term "seaman." Rather, the term was intended to be defined by reference to the general maritime law when the Act was passed in 1920. *Id.* at 342. Certain early cases limited seaman status to those who aided in the navigation of the ship. The narrow rule was that a seaman -- sometimes referred to as a mariner -- actually must navigate. Notwithstanding the aid in navigation doctrine, Federal courts throughout the last century consistently awarded seaman's benefits to those whose work on board ship did not involve navigation of the vessel. For example, firemen, engineers, carpenters and cooks were all considered seamen.

In 1991, the U.S. Supreme Court made it clear that a person did not need to aid in the navigation of a ship to be deemed a seaman under the Jones Act. *Id.* at 353 ("[w]e think the time has come to jettison the aid in navigation language"). In holding that a person who did not perform transportation-related functions on board the vessel could nevertheless qualify as a seaman, the Court observed that "[a]ll who work at sea in the service of a ship face those particular perils to which the protection of maritime law...is directed." *Id.* at 354. The Court added that "[i]t is not the employee's particular job that is determinative, but the employee's connection to a vessel." *Id.* The Court declined to adopt a hard-and-fast rule for determining whether a person was a seaman, but did provide the following guidance: "the requirement that an employee's duties must 'contribute to the function of the vessel or to the accomplishment of its mission' captures well an important part of seaman status"; "[i]t is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work." *Id.* at 355.

Significantly, since the decision in *McDermott*, at least two courts have held that observers are not seamen. In *O'Boyle v. United States*, 993 F.2d 211 (1993), the Third Circuit -- which appears to be the only U.S. Circuit Court of Appeals to have considered the issue -- held that an American observer placed on board a Japanese fishing vessel to enforce a U.S.-Japan treaty was not a "seaman." The plaintiff argued that he was a seaman, even though the boat's owner and crew did not want him aboard, because he was essential to the vessel's mission in that the vessel could not

engage in squid-fishing without him. The court rejected this argument, reasoning that the plaintiff was aboard the vessel "solely because the treaty required him to be there in order to observe the types of marine life encountered by the ship during its voyage," and his "mission was not to catch fish or to have anything to do with the vessel." Rather, he "was simply an employee of [the contractor], aboard a Japanese fishing vessel as a business invitee." *Id.* at 313. Similarly, in *Key Bank of Puget Sound v. F/V Aleutian Mist*, Cause No. C91-107, Order on Motion for Partial Summary Judgment dated 1/16/92 (W.D. Wash. 1992), the Federal trial court concluded that fisheries observers do not meet the test for "seamen" status because they are independent scientific personnel who do not perform crew functions.

The outcomes and rationales of *O'Boyle* and *F/V Aleutian Mist* suggest that an observer suing an observer contractor would have difficulty meeting the "seaman" status requirement for suing under the Jones Act. However, other federal trial judges have concluded that observers are seamen because their actions contribute to the functions of the vessels to which they are assigned. *See, e.g. Key Bank of Washington v. Yukon Challenger*, Cause No. C93-1157D, Order of February 22, 1994 (W.D. Wash.); *West One Bank v. M/V Continuity*, Cause No. C93-1218C, Order of January 19, 1994 (W.D. Wash.) ("[a]n observer falls within the definition of seaman"); *State Street Bank & Trust Co. v. F/V Yukon Princess*, Cause No. C93-5465C, Order of December 22, 1993 (W.D. Wash.); *Key Bank of Washington v. Dona Karen Marie*, Cause No. C92-1137R, Order of October 26, 1992 (W.D. Wash.).

Thus, while the better argument is that observers are not "seamen," there currently is no guarantee that a court or jury would make this determination.

(b) Requirement that the Defendant Have Been the "Employer" of the Injured or Deceased.

Even if an observer qualifies as a "seaman" under the Jones Act, he cannot prevail against an observer contractor unless the contractor is the "employer" of the observer. Ordinarily, the employer of a seaman under the Jones Act is the owner of the ship. However, there are circumstances in which the employer will be an entity other than the ship owner. *Matute v. Lloyd Bermuda Lines, Ltd.*, 931 F.2d 231, 236 (3d Cir. 1991).

Whether an employer/employee relationship exists for purposes of the Jones Act is usually a question of fact for the jury, so long as there is an evidentiary basis for its consideration.

Glynn v. Roy AI Boat Management Corp., 57 F.3d 1495, 1498 (9th Cir. 1995). The fact finder typically considers the following factors in deciding whether the defendant was the employer of the injured or deceased person: (i) who hired the person; (ii) who paid wages to the person; (iii) who had the power to terminate the person; and (iv) who controlled the person's conduct on the job. *Heath v. American Sail Training Ass'n*, 644 F. Supp. 1459 (D.R.I. 1986); see also Matute, supra ("The critical inquiry turns on the degree of control exercised over the [plaintiff]. Factors indicating control included payment, direction, and supervision. Also relevant is the source of the power to hire and fire").

In October 1996 Congress passed certain amendments to the Magnuson Act, including a provision which specified that observers were entitled to FECA protection. Pub. L. 104-297, Title II, section 204, Oct. 11, 1996, 110 Stat. 3609 (the "Amendment"). The application of FECA coverage to an observer means that he cannot sue the federal government for tort claims, including claims under the Jones Act. However, the immunity from suit which the government enjoys vis-a-vis persons covered under FECA is not shared by nongovernmental entities. Thus, the fact that FECA bars a person from suing the United States does not automatically mean the person cannot sue a third party, including a government contractor, to recover damages for his injuries.

Nevertheless, a critical aspect of the Jones Act may well cause the language of the Amendment to bar observers from suing a contractor under the Jones Act. Specifically, the Amendment states that

"[a]n observer on a vessel and under contract to carry out responsibilities under this chapter or the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 et seq.) shall be deemed a Federal employee for the purpose of compensation under the Federal Employee Compensation Act (5 U.S.C. 8101 et seq.)"

This language is critical because it makes the observer an employee of the federal government. This status of the observers is key because it appears that under the Jones Act, there can be only one employer. In *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783 (1949), the plaintiff alleged he was injured while on a voyage aboard a ship owned by the United States but managed by a private company, *Cosmopolitan*, under an agency agreement with the U.S. government. He sued *Cosmopolitan* under the Jones Act to recover for his injuries. The Supreme Court stated that it had "no doubt that *under the Jones Act only one person, firm, or corporation can be sued as employer*," and added that "[e]ither *Cosmopolitan* or the Government is that

employer," but not both. *Id.* at 791 (emphasis added). Other courts have held that a seaman may have but one Jones Act employer. See *Mahramas v. American Export Isbrandtsen Lines*, 471 F.2d 165 (2d Cir. 1972); *Savard v. Marine Contracting, Inc.*, 471 F.2d 536 (2d Cir. 1972).

Accordingly, given the express statement in the Amendment that the observers are "Federal employees" there is a genuinely good chance that a Jones Act claim against a contractor by an observer would run afoul of the apparent limitation that there can be only one employer under the Jones Act. Since the government is the employer of the observer, how can the contractor also be the employer under the Jones Act? However, we cannot be absolutely sure of this result because there does not appear to have been a specific holding by any court — much less the U.S. Supreme Court — that a Jones Act claim is barred against a nongovernmental entity where, as here, a Federal law specifies that the U.S. government is the employer of the plaintiff. In addition, the statement in *Cosmopolitan* that there can be only one employer in terms of the Jones Act, while helpful, was dicta (i.e., not the holding of the case) and the case itself is over 50 years old. In addition, at least one court has surmised, without holding, that "a seaman may have more than one Jones Act employer." *Spinks v. Chevron Oil Co.*, 507 F.2d 216, 225 (5th Cir. 1975) ("We see nothing offensive in suing an immediate employer under the Act, or even both employers in the alternative. The defendants can sort out which between them will bear the final cost of recovery, either through common law indemnity or contribution principles, or contractual provisions").

Nevertheless, unless a court chose to ignore the language from *Cosmopolitan* that there can be only one "employer" for purposes of Jones Act liability, the observer, as a result of the language of the Amendment, would have a difficult chore of proving that the observer company was his "employer" under the Jones Act.

In summary, while it appears unlikely that an observer could successfully sue an observer company under the Jones Act, the issue has not been tested in court. It is therefore up to an observer company to evaluate the business risk involved and to decide whether to seek insurance coverage. One possibility is to look for contingent coverage, i.e., coverage that would apply only if the observer was found not to be a Federal employee under the Jones Act. Such coverage could be less expensive than full Jones Act coverage.

The analysis presented in the previous section shows that none of the major problems involved in compensating observers for work-related injuries can be satisfactorily solved within the current framework.

First, observers are not assured of adequate and timely compensation for on-the-job injuries primarily because the compensation formula under FECA (which excludes overtime) does not properly reflect their job situation. In addition, there are potential gaps in coverage when observers are working off the vessel. The problems are compounded by the lack of judicial review of FECA compensation decisions. While there is some possibility that observers may qualify for the "premium pay" or "administratively uncontrolled overtime" exceptions to FECA's overtime exclusion, there is no guarantee that this will hold true in all cases. Even if it does, it will still result in inadequate compensation for injury because of the 25% cap on premium pay.

Second, FECA coverage for observers does not address, and may even exacerbate, the liability concerns of vessels required to carry observers. Not only does FECA not prohibit negligence suits by injured observers, the Government may sue (or require the observer to sue) to recover FECA payments from a negligent third party such as the vessel owner/operator. There is no completely satisfactory insurance solution to this issue. Reimbursement by NMFS of vessel expenses for P&I endorsements to cover observers has not been widely accepted by vessels, and does not apply at all to the large number of smaller uninsured vessels. Attempts to transfer the risk from vessels to the liability insurers of observer provider companies are problematic, both from a cost perspective and from an apparent lack of any insurable interest of the observer provider company in the operations of the vessel.

Third, observer provider companies are still subject to suit by injured observers under the Jones Act. To prevail in such a suit, an observer must establish that he/she is a "seaman" and that the observer provider company is his/her "employer". The seaman status of observers is simply unclear, with some courts ruling that observers are seamen and others not. Absent a legislative solution, only a decision of the U.S. Supreme Court could settle this issue. Because the Magnuson Act makes observers Federal employees for purposes of FECA, it is certainly problematic for an observer to prove that the observer provider company is the employer for purposes of the Jones Act. However, there is no assurance that a court would not find that the observer can have two employers for purposes of the Jones Act. The net effect of all this uncertainty is that a prudent observer provider company needs (very expensive)

Jones Act insurance under current circumstances.

As recommended in the proceedings of the *Fisheries Observers Insurance, Liability and Labor Workshop (June 12-14, 2001)* the Longshore and Harbor Workers Compensation Act (LHWCA) can provide an exclusive, assured remedy for observers under a compensation schedule that is uniform, better and more straightforward than most state Workers Compensation programs. The LHWCA allows overtime to be included in the compensation base, thereby avoiding a serious problem with FECA coverage of observers.

At present, observers probably do not meet the "status" requirement of the LHWCA. Under the LHWCA, the injured person must be an "employee", which is statutorily defined to mean "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship-breaker", but does not include a "master or member of a crew of any vessel". This language has been construed to make the LHWCA applicable only to employees whose service is of a sort performed by longshoremen and harbor workers. While observers are not expressly exempted from the LHWCA, clearly they are not like longshoremen or harbor workers and, indeed, may even be (depending on the court making the decision) "members of the crew of a vessel". Clearly, one cannot safely assume that the LHWCA is currently applicable to observers. Indeed, observer provider companies which now purchase LHWCA coverage may well be wasting their money.

Various extensions of the LHWCA have been enacted over the years in order to cover new classes of workers. These include the Defense Base Act (DBA), the Outer Continental Shelf Lands Act and the Nonappropriated Funds Instrumentalities Act. None of these acts is tailored to the unique situation of observers. For example, the Defense Base Act covers "workers engaged in employment...under contracts with the United States...for public work to be performed outside the continental United States". Many observers are not working under Government contracts, they probably do not engage in "public work", and much of their work is within the continental U.S.

These concerns mean that new legislation is needed to make the LHWCA applicable to observers. Because the LHWCA does not cover a "master or member of the crew of any vessel", it is necessary for the legislation to provide that observers shall not be considered to be seamen. This has the additional benefit of preventing Jones

Risk Management Solution

Act suits by injured observers against the observer provider company.

The proposed new legislation, dubbed "the Fisheries Observer Compensation Act" (FOCA), is presented in Appendix A. An explanatory report, discussing the objectives of FOCA and presenting a section-by-section analysis, is in Appendix B. In addition to the provisions discussed above, FOCA Section 6(b) prohibits negligence claims by injured observers against vessels, except for willful injury or death. This removes any legitimate liability concerns of vessel owner/operators required to take observers. FOCA also exempts the Government from liability for injuries to an observer, unless the Government is actually the observer's employer. Finally, FOCA repeals the FECA coverage of observers.

FOCA brings all observers working on Federal programs under the LHWCA, whether they work under contract to the Government or for certified observer provider companies contracting directly with vessels. Under the Act, observer provider companies will be required to purchase LHWCA insurance (some larger companies may be able to self-insure under Department of Labor rules). Since this insurance can be quite expensive, it is recommended that NMFS establish a single insurance contract which all observer providers will be required to use. Alternatively, NMFS may wish to consider self-insuring for LHWCA coverage. There are examples of both approaches in other Federal agencies. Whichever approach NMFS chooses, it will be important to obtain copies of the contracts used by other agencies.

Insurance Contracts

(a) U.S. Agency for International Development (USAID)

USAID uses LHWCA under the DBA to cover overseas workers. Apparently, no special legislation was needed to invoke the DBA in respect of USAID workers. DBA Section 1(a)(4) applies directly to USAID in that the agency's work is performed outside the continental U.S. under contracts "for the purpose of engaging in public works". The program is largely for consultants who don't have other types of coverage, since large contractors (such as IBM) self-insure for LHWCA.

Because of the variety of rates quoted by contractors for LHWCA insurance, USAID about 20 years ago put out a competitive procurement to establish rates. Each contract is for 5 years, with a basic rate fixed for the first 2 years. For each of the next 3 years, profit and loss formulas are applied to the insurance contractor's experience to determine revised rates (subject to a ceiling and a floor). The rate for the fourth year option of the current contract with Rutherford International of Alexandria, VA, (7/1/01 - 6/30/02) is \$1.44 per \$100 of employee remuneration. The contractor handles all claims except those covered under the War Hazards Act, which covers risks under any armed conflict (whether or not war is declared) occurring within a country in which a covered individual is serving. A special FECA fund pays any claim declared a war risk hazard.

Total policy premiums on the USAID LHWCA insurance contract for the 3.5 years from 7/1/98 to 12/31/01 were \$7,000,000. This would correspond to \$2,000,000 a year in premiums, or about \$130,000,000 a year in covered salaries, equating to 2,000 people at an average salary of

\$65,000 a year. This is several times the total observer workforce.

(b) U.S. Department of State (DOS)

The State Department has a very similar insurance contract to USAID, but rates are much higher presumably because of the more controversial nature of the State Department's overseas operations. The current DOS contract, also with Rutherford International, has rates of \$4.30/\$100 for services and \$5.56/\$100 for construction (1/22/02 - 1/21/04). As with USAID, the DBA is the direct authority for invoking the LHWCA to cover overseas State Department workers and contractors.

Self Insurance

The self-insurance approach is used by the Army and Airforce Exchange to cover approximately 40,000 employees on military bases in the U.S. and overseas. These individuals are not civilian employees of the Department of Defense, so they are not FECA covered, and do not fall under State Worker's Compensation either, because they are employed by the Federal Government. To deal with this situation, the LHWCA was extended to these employees under the Nonappropriated Funds Instrumentalities Act (NFIA) of 1952. The term "Nonappropriated Funds" part refers to the fact that these employees are paid from revenue earned rather than through funds in the Defense Budget. Employees are covered both overseas and within the U.S.

The Marine Corps/ Navy self-insure for LHWCA rather than hiring an insurance contractor like USAID and DOS. They believe that self-insurance is more cost-effective than having an insurance contractor. A Third Party Administrator (TPA) hired under contract handles all processing and adjudication of claims, and filings with the Department of Labor.

Potential Cost Savings from an Insurance Contract

It is anticipated that using a single insurance contract would provide cost savings over allowing each observer provider company to purchase LHWCA coverage independently. With a single contract, there is a larger experience base for the insurer to rate risk, and competition for the contract between insurers will also tend to reduce

Implementation of FOCA

rates. The apparently favorable rates obtained by USAID and DOS for their overseas workers further indicate the likelihood of savings.

While it is impossible to quantify in advance the possible cost savings from a FOCA insurance contract, some estimate of the size of such a contract can be made. The following are approximate sizes (measured in annual sea-days) for the principal current observer programs:

North Pacific Groundfish:	36,500 sea-days
Northeast Scallop:	300 sea-days
Northeast Groundfish:	3,700 sea-days
Southeast Pelagics:	3,400 sea-days
Southeast Trawl:	650 sea-days
Pacific Gillnet:	800 sea-days
Pacific Longline:	6,120 sea-days
Pacific Trawl:	6,500 sea-days

This gives approximately 57,000 total annual sea-days for all NOAA observer programs, whether Government funded or not. If we assume average pay of \$150 per sea-day, this gives approximately \$8.5M in total annual at-sea pay to be covered by LHWCA insurance. If the premium were, say, 10% of at-sea pay, the annual premium income on the insurance contract would be approximately \$850K and a 5-year contract would total \$4.25M. The USAID program averages about \$2M in annual premiums to the insurance contractor. Thus, while the FOCA insurance contract would likely be smaller than the USAID contract, it should still be large enough to attract meaningful competition from insurance companies. Also, it is likely that observer coverage will be increasing rather than decreasing in future years, making an insurance contract even more attractive to insurers.

Monitoring Future Changes in Legal and Financial Risks Associated with Observer Programs

Monitoring future changes in legal and financial risks is a simple matter once an insurance contract (or Third Party Administration contract in the case of self-insurance) is established. Because all observers will be covered under the same contract, comprehensive and detailed claims and premium data will be readily available for analysis by NMFS. Also, the long-term nature of the insurance contract (5 years is recommended) will provide considerable stability in the insurance rates, so that NMFS will have time to plan for any changes in the insurance climate which may affect rates and financial risks.

APPENDIX A

Proposed “Fisheries Observer Compensation Act (FOCA)”

The Fisheries Observer Compensation Act¹

(Annotated with footnotes)

§ 1. Compensation authorized

Except as herein modified, the provisions of the Longshore and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, 33 U.S.C. 901, et seq.,² shall apply in respect to the injury³ or death of any person engaged in any employment as a fisheries observer, as defined below, irrespective of the place where the injury or death occurs, and shall include any injury or death occurring to any such person while in transit to or from his place of employment, where the employer or the United States provides the transportation or the cost thereof.⁴

§ 2. Definitions. As used in this Act—

(a) The term "fisheries observer" means a person under contract or otherwise engaged in employment as an observer in connection with a fish or fisheries monitoring program created by or pursuant to a law of the United States. The provisions of the Federal Employee Compensation Act (5 U.S.C. 8101 et seq.)⁵ shall not apply to injuries or death covered under this Act occurring after the effective date of this Act, even if the injured or deceased fisheries observer is deemed a federal employee for any other purpose. A fisheries observer shall not be deemed to be a master, member of a crew, or seaman of the vessel to which the observer is assigned to perform any functions in connection with a program for the monitoring of fish or fisheries created by or pursuant to a law of the United States. A person employed exclusively to perform office, clerical, secretarial, security or data processing work shall not be deemed a fisheries observer.⁶

(b) The term "employee" means a fisheries observer, as defined above.

(c) The term "employer" means a person that contracts with or otherwise hires one or more fisheries observers, and may be the United States government, or an agency, corporation or instrumentality thereof, or a contractor, subcontractor, or an entity certified or accredited by the United States government to provide fisheries observers, or other person.⁷ Neither a vessel nor the United States government shall be deemed to be the employer of a fisheries observer unless the United States government or the vessel directly contracted with or otherwise hired the observer for the provision of his services as a

fisheries observer, and pays the salary of that observer directly to that observer.⁸

(d) The term "effective date" means 11:59 p.m., Eastern Standard Time, on the day on which the Act becomes law.

§ 3. Liability for compensation

An employer shall be liable for the payment to his employees of the compensation payable under 33 U.S.C. 907, 908, and 909, subject to the provisions of this Act.⁹ In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor. Compensation shall be payable irrespective of fault as a cause for the injury.¹⁰

§ 4. Coverage. Compensation shall be payable under this chapter in respect to disability or death of an employee if the disability or death results from an injury occurring while the employee is engaged in any employment as a fisheries observer, irrespective of the place where the injury or death occurs, and shall include any injury or death occurring to any such person (a) while that person is aboard, boarding or leaving a vessel to which he is assigned to engage in activities as a fisheries observer, (b) while that person is otherwise engaged in employment as a fisheries observer in any location, on land or otherwise, including training, or (c) while in transit to or from his place of employment, where the employer or the United States provides the transportation or the cost thereof.¹¹ No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another. Subject to the provisions of 33 U.S.C. 933 but otherwise notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this Act shall be credited against any liability imposed by this chapter. Unless provided for herein, no other provisions of 33 U.S.C. 903 are applicable to this Act. For any injury or death that occurs on or after the effective date of this Act, the liability under this Act shall become applicable to contracts and subcontracts heretofore entered into but not completed at the time of the effective date of this Act.

§ 5. Computation of benefits; application to aliens and nonnationals

(a) The minimum limit on weekly compensation for disability, established by 33 U.S.C. 906(b), and the minimum limit on the average weekly wages on which death benefits are to be computed, established by 33 U.S.C. 909(e) shall not apply in computing compensation and death benefits under this Act.¹²

(b) Compensation for permanent total or permanent partial disability under 33 U.S.C. 908(c) (21), or for death under this Act to aliens and nonnationals of the United States not residents of the United States or Canada shall be in the same amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of one year immediately prior to the date of the injury, and except that the United States Employees' Compensation Commission [Secretary of Labor] may, at its option or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens or nonnationals of the United States by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the Commission [Secretary of Labor].¹³

§ 6. Exclusiveness of liability

(a) **Liability of employer; failure of employer to secure payment of compensation.** The liability of an employer prescribed in 33 U.S.C. 904 and this Act shall be exclusive and in place of all other liability including any liability imposed by or arising out of any other workers' compensation law of such employer to the employee, his legal representative, spouse, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory or comparative negligence of the employee.¹⁴

(b) **Prohibition of Negligence Claims against Vessel.** A fishery observer who suffers injury or death aboard a vessel to which he is assigned to perform duties as a fisheries observer shall have no cause of action against that vessel¹⁵ for negligence or otherwise, except in cases where the vessel acted willfully in causing the injury or death. In no event shall the employer indemnify or otherwise be liable to the vessel for such claim, directly or indirectly, and any agreements or warranties to the contrary shall be void. No other provisions of 33 U.S.C. 905 are applicable to this Act. No provision of 33 U.S.C. 933 that is inconsistent with this subsection shall apply to this Act.¹⁶ Nothing in this subsection shall prevent recovery under this Act against a vessel that is the employer of a fisheries observer.¹⁷

(c) **Limitation on federal government liability.** Unless the United States government is the employer of a fisheries observer, it shall not be liable for any damages arising out of any injury or death to a person that occurs while the person is engaged in any employment as a fisheries observer, irrespective of the place where the injury or death occurs. In those circumstances where the United States government is the employer of the observer, the liability of the government with respect to the injury or death to that person shall be limited to the remedies available in this Act.¹⁸

§ 7. Compensation districts; judicial proceedings

(a) The United States Employees' Compensation Commission [Secretary of Labor] is authorized to extend compensation districts established under the Longshore and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), or to establish new compensation districts, to include any area to which this Act applies; and to assign to each such district one or more deputy commissioners, as the United States Employees' Compensation Committee [Secretary of Labor] may deem necessary.¹⁹

(b) Judicial proceedings provided under sections 18 and 21 of the Longshore and Harbor Workers' Compensation Act in respect to a compensation order made pursuant to this Act shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the location at which the injury or death occurs.²⁰

§ 8. Repeal of 16 U.S.C. 1881b(c). Upon the effective date of this Act, 16 U.S.C. 1881b(c) is hereby prospectively repealed, and any fisheries observer who was deemed to be a federal employee for the purpose of compensation under the Federal Employee Compensation Act (5 U.S.C. 8101 et seq.) shall no longer have such status, with respect to any injury or death which occurs on or after the effective date of this Act, but instead shall be entitled to compensation pursuant to this Act for any injury or death that occurs on or after the effective date of this Act. However, this Act shall not apply to any injury or death that occurred prior to the effective date of this Act.²¹

¹The model here is the Defense Base Act, 16 U.S.C. 1651 et seq. ("DBA"), however we have customized the language to address the situation here, where we seek to have a statute that covers observers in all aspects of their employment as observers.

²This is the U.S. Code citation for the LHWCA.

³The LHWCA defines "injury" to include "accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury * * *." 33 U.S.C. 902(2),

⁴The intention here is to cover all observers in all observer-related activities, and to treat all observers the same, regardless of whether they are hired directly by the federal government or by a contractor or subcontractor.

⁵This is the U.S. Code citation for FECA.

⁶This is included because employees exclusively engaged in clerical work are excluded from coverage under LHWCA.

⁷The intention here is to put the responsibility on procuring LHWCA insurance on the entity that hires the observers, whether that is (1) the federal government because it hired the employee, or (2) a contractor with the federal government under a contract to provide observers, or (3) a non-contractor which hires observers that have been certified or accredited by the federal government, and which vessels pay to the entity to obtain the use of the observers.

⁸This clarifies the intention that neither the vessel

nor the U.S. government be deemed the employer unless they directly hire the observer.

⁹This is adapted from 33 U.S.C. 904 of the LHWCA, and makes the payment provisions of LHWCA applicable to this Act.

¹⁰This is from 33 U.S.C. 904. It is sufficiently critical that the no-fault provision of LHWCA needs to be restated in the new Act even though it is otherwise incorporated therein.

¹¹While this is primarily based on the DBA and LHWCA, this language makes it clear that the coverage applies to all facets of the observers' duties, including land-based activities (such as a debriefing after a voyage). The intention is to have LHWCA provide all coverage and to avoid the need for state workers' compensation to apply to an observer. This is a desired result because: (1) it makes no sense to have potentially overlapping coverage under state workers compensation and LHWCA, (2) LHWCA is generally as good as or superior to all state workers' compensation programs, and (3) consistency and predictability are important objectives here.

¹²This is taken directly from the DBA. Note that these sections, which are being incorporated into this Act, also contain maximum limits, which are being adopted herein without modification.

¹³This too is taken directly from the DBA, and simplifies the payment of claims to aliens and non-nationals.

¹⁴ This reflects the LHWCA, and clarifies that the employer is liable for compensation to the employee regardless of fault and because of exclusivity, the employee is prohibited from cause of action.

¹⁵ The LWHCA defines "vessel" as follows: "Unless the context requires otherwise, the term 'vessel' means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charter, master, officer, or crew member." 33 U.S.C. 902(21).

¹⁶ This goes beyond the LHWCA, which would allow claims for negligence against the vessel (but does not allow for claims for lack of seaworthiness). Under this Act, the employee would be prohibited from cause of action against the vessel.

¹⁷This is necessary for those instances, if any, where the vessel is the employer of the observer, i.e., where the vessel is the person that contracted with the observer for services and which directly pays the salary.

¹⁸This is not in the LHWCA. It is added here primarily to preclude claims for negligent training, defective equipment and the like against the U.S. government by observers who are hired by contractors or subcontractors but trained by the government or who use government supplied equipment.

¹⁹This taken directly from the DBA, and is included because it identifies the responsible party that can extend coverage to districts beyond U.S. territorial waters, since LHWCA coverage does not extend beyond U.S. territorial waters.

²⁰ The LHWCA calls for direct appeals to the federal courts of appeal, while the DBA has a direct appeal to the federal district courts.

²¹Repeal is necessary so that observers are not covered under both FECA and LHWCA.

APPENDIX B

**Explanatory Report in Support of Enactment of
“The Fisheries Observer Compensation Act”**

Explanatory Report in Support of Enactment of "The Fisheries Observer Compensation Act"

1. Introduction.

The Fisheries Observer Compensation Act is designed to solve a number of significant problems that have been identified in insurance coverages applicable to the variety of observer programs sponsored, directly or indirectly, by the National Marine Fisheries Service (NMFS). Direct sponsorship by NMFS involves hiring observers either as Federal employees or as employees of NMFS contractors. Indirect sponsorship involves observers hired by NMFS-certified observer provider companies that are paid by fishing vessels for government-mandated observer coverage.

The most fundamental insurance problem in the observer programs is how to provide adequate workers compensation coverage to observers in the event that they are injured or killed on the job. Because observers work on fishing vessels, State workers compensation programs are generally inapplicable because most such programs do not have jurisdiction aboard vessels. Many observer provider companies carry Longshore and Harbor Workers coverage, but it is far from clear that observers meet the status test for longshore coverage, which is designed for workers such as longshoremen, ship repairmen, shipbuilders, ship-breakers and the like. In other words, observer claims under longshore coverage would likely be denied by the insurer. Only in the case of observers performing duties on fish-unloading docks or non-navigable barges is longshore coverage likely to apply. Another coverage possibility is the Merchant Marine Act of 1920, generally known as the Jones Act, which, however, would require observers to be "seamen" under the definition of the Act. There have been various lawsuits over the years on this issue, with some courts finding observers to be seamen and others not. Observer companies have generally responded to this confusing coverage situation by purchasing all types of insurance that might possibly apply - State workers compensation, Longshore and Harbor Workers, Maritime Employers Liability, and Jones Act coverage. Not only is this approach extremely expensive, it may still fail to provide timely and fair compensation to an injured observer. Observers could be forced to file suit under the Jones Act against their employer, the vessel they were injured on, or both. The possibility of such suits has the additional effect of making vessel owners/operators reluctant to take observers on board.

Congress attempted to solve the observer

coverage problem in the October 1996 re-authorization of the Magnuson-Stevens Fishery Conservation and Management Act, which, with the Marine Mammal Protection Act, is the authority for observer programs. The 1996 re-authorization provided workers compensation coverage to observers under the Federal Employee Compensation Act (FECA). This has turned out to be inadequate for a number of reasons, perhaps the most important being that the basis of compensation under FECA excludes overtime. Since observers may work 12 or more hours a day when at sea, 40% or more of their compensation may be considered overtime. Excluding this pay from the basis of compensation for on-the-job injuries results in a totally inadequate level of compensation. This situation actually occurred in the case of an injured observer who was a Federal employee. In addition, the FECA claim application process for observers is unlikely to provide timely reimbursement of medical and living expenses when they are needed most. Finally, FECA does not extend coverage to observers while working in processing plants, during debriefing sessions, or while transiting to and from deployments. It is also possible that an observer could void his or her FECA coverage on board the vessel by performing any duties in service to the vessel, including acting under the captain's orders in an emergency.

Not only is FECA inadequate to provide fair coverage to observers, it also fails to address two other insurance concerns. The first is the exposure of vessel owners and operators to liability suits by injured observers. Nothing in FECA prevents such suits - only the Government, as the observer's employer, is exempt from suit. Since many vessels do not have liability insurance at all, and most who do have no coverage for observers, many vessel owners/operators are reluctant to take an observer on board even if coverage is mandated by law. NMFS has attempted to address this issue by providing reimbursement to vessel owners for Protection and Indemnity (P&I) coverage for observers, but the problem persists, especially in the case of uninsured vessels. The second concern is the potential exposure of observer provider companies to Jones Act suits by injured observers. Nothing in FECA prevents an observer compensated under FECA from also filing a Jones Act claim against the observer provider company. Furthermore, FECA encourages the Government to pursue a subrogation claim against the observer company or the vessel if FECA benefits are paid. The net result of all these problems has been that observer providers are still paying for an expensive and expansive range of duplicative or potentially inapplicable coverages, while observers still do not have a clear path to fair compensation for on-the-

job injuries.

The proposed legislation solves the observer coverage problem by revoking FECA coverage and, instead, bringing observers, by statute, under the terms of the Longshore and Harbor Workers Compensation Act (LHWCA). The LHWCA is to apply wherever their duties take them, whether it be on board a vessel, on an offshore platform, at a processing plant, in transit, or being debriefed on land. The model for this approach is various extensions of the LHWCA which have been passed over the years, including the Defense Base Act, the Outer Continental Shelf Lands Act and the Nonappropriated Funds Instrumentalities Act. Each of these acts has extended longshore coverage to new classes of workers not falling under the original LHWCA. The LHWCA solves the FECA problem by including overtime in the basis for compensation, and would provide prompt compensation for living and medical expenses at the time they are most needed. It has the additional advantage of a compensation schedule superior to many State workers compensation programs. The LHWCA, unlike FECA, provides for judicial review of adverse compensation decisions and for payment of attorney's fees by a successful claimant. The LHWCA is administered by the U.S. Department of Labor.

The proposed legislation precludes Jones Act claims by observers by mandating that an observer shall not be deemed to be a master, member of the crew, or seaman of a vessel to which they are assigned as an observer. The legislation also prohibits negligence claims by the observer against the vessel. The observer can, of course, still file suit against the vessel for willful injury. Finally, the legislation exempts the U.S. Government from liability to injured observers for inadequate training, faulty equipment or any other reason, unless the Government is itself the employer of the observer. These provisions, which limit the rights of observers in return for a fair, assured compensation schedule for on-the-job injuries, substantially mitigate liability concerns of vessels and observer provider companies.

2. Objectives of the Proposed Act.

The objective of this proposed legislation is to provide more comprehensive coverage for fishery observers in the United States by ensuring that the true nature of the observer's functions, duties and compensation are fully factored into the manner in which compensation is paid for observers that are injured or suffer a fatality while performing observer-related duties. The proposed

legislation would provide a single source from which observers could receive compensation without the time and expense of retaining legal counsel. A concurrent but equal objective is to contain the costs incurred by employers of observers, vessel owners and operators and the U.S. government with respect to the compensation regime to be used for observers. The aim is to strike the appropriate balance between the rights and needs of observers to be appropriately compensated for injuries and fatalities experienced while engaged in the performance of observer activities, while simultaneously placing a reasonable cap on exposure and expenditures for such compensation.

Currently, observers are considered to be "federal employees" for purposes of the Federal Employee Compensation Act, 5 U.S.C. §§ 8101, et seq., which provides that "[a]n observer on a vessel and under contract to carry out responsibilities under this Act or the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 et seq.) shall be deemed to be a Federal employee for the purpose of compensation under" FECA. 16 U.S.C. § 1881b (c). The FECA model is not very satisfactory given the nature of observer functions and wages. Among other things, FECA does not suitably include "overtime" within the determination of the amount of compensation to be paid to the injured observer, despite the fact that overtime is an inherent characteristic of the observer position. Under FECA, in "computing monetary compensation for disability or death on the basis of monthly pay" * * * "account is not taken of - (1) overtime pay; (2) additional pay or allowance authorized outside the United States because of differential in cost of living or other special circumstances * * *." 5 U.S.C. § 8114(b), (e)(1), (2). "Overtime pay" is defined to mean "pay for hours of service in excess of a statutory or other basic workweek or other basic unit of worktime, as observed by the employing establishment." 5 U.S.C. § 8114(a).

Section 8114(e) of FECA does allow the government to include "premium pay under section 5 U.S.C. § 5445(c)(1). In addition, the government has construed this allowance also to apply to "administratively uncontrollable overtime" under 5 U.S.C. § 5445(c)(2). FECA Program Memorandum No. 106; FECA Bulletin No. 89-26. Premium pay" under § 5445(c)(1), applies to employees whose positions require them "regularly to remain at, or within the confines of, [their] station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work * * *." "Administratively

uncontrollable overtime" under § 5445(c)(2) applies to employees "in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty * * *." But these limited exceptions to the general rule against including overtime in FECA compensation are not adequate to ensure that observers obtain compensation that reflects overtime, primarily because (1) there will be circumstances in which the nature of the observer's overtime duties does not fall within the definition of "premium pay" or "administratively uncontrollable overtime," and (2) these exceptions cap the amount of such overtime generally at 25 percent of the base compensation, while observer "overtime" may amount to 75% of "base pay".

A second important limitation of the current FECA coverage for observers is that does not appear to include injuries that occur when the observer is not physically on the vessel. In order to be deemed a Federal employee under FECA, the observer, *inter alia*, must be "on a vessel * * *." 16 U.S.C. 1881b(c). Thus FECA does not cover injuries that occur while the observer is in transit, working at a processing plant or involved in a debriefing session. There are even circumstances that could void FECA coverage for an observer on a vessel. The accompanying Senate Report to the 1996 MSFCMA reauthorization states that the amendment "would provide worker compensation under the [FECA] for observers while aboard a vessel for the purpose of performing their duties. However, this pecuniary arrangement would not apply to an observer while he or she is engaged in performing duties in the service of the vessel" 1996 USCAN, at 4111. Thus, an observer who performs any service to the vessel, even washing dishes or acting under the captain's orders in an emergency, could jeopardize his or her FECA coverage.

The proposed Act adopts the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 et seq. ("LHWCA"), as modified by the proposed statute to reflect the characteristics of observers. The LHWCA is modeled on State workers compensation laws, but applies to long shore and harbor workers injured while "upon the navigable waters of the United States." The LHWCA model is much better suited to provide observers superior benefits and procedural rights, while still limiting the exposure of the U.S. government, employers and vessel owners and operators to personal injury claims by observers.

Use of the LHWCA model would provide observers (1) the opportunity to recover for loss of wage earning capacity (including lost overtime if applicable), (2) the option of judicial review, and (3) the ability to recover attorneys fees as a prevailing party. Because the observer's remedies under the LHWCA would be exclusive, the U.S. government would not be otherwise exposed to a claim arising out of the injury or fatality of the observer, even for a claim of negligent supervision, training or debriefing, or from a cross-claim or claim for indemnity or contribution from an employer or vessel owner or operator. The proposed legislation also reduces the need for and premiums of P&I or other insurance by vessel owners by limiting observer claims against them to willful misconduct.

In addition to generally not being eligible for compensation that reflects overtime wages, FECA claimants have no right to seek judicial review of agency determinations on their compensation claims. 5 U.S.C. § 8128(b) (action of the Secretary or his designee is "final and conclusive for all purposes with respect to all questions of law and fact" and is "not subject to review by another official of the United States or by a court by mandamus or otherwise"). However, LHWCA claimants have a right to judicial review. 33 USC § 921(c) ("[a]ny person adversely affected or aggrieved by a final order of the [Benefits Review] Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred"). Also, it is easier for LHWCA claimants to recover attorney's fees in pursuing a claim for compensation than it is for FECA claimants. Under FECA, a claim for legal or other services furnished in respect to a case, claim or award for compensation is valid only if the Secretary of Labor approves, and there is no judicial review of that determination. 5 U.S.C. § 8127(b). By contrast, under the LHWCA, a claimant may recover a reasonable attorneys fee if his employer denies liability for compensation and the claim is sustained. 33 U.S.C. § 928.

Significantly, there is a critical precedent for using the LHWCA model to serve as a compensation scheme. The Defense Base Act, 42 U.S.C. § 1651 et seq., generally applies the LHWCA to, *inter alia*, "the injury or death of any employee engaged in any employment * * * under a contract entered into with the United States or any executive department, independent establishment, or agency therefore * * *, or any subcontractor, or subordinate contract with respect to such contract, where such contract is to be performed outside the continental United States * * * for the purpose of engaging in public work * *

*." 42 U.S.C. § 1651(a)(4). However, the DBA modifies the LHWCA in several respects, to tailor its provisions to the relevant circumstances addressed by the DBA. Similarly the Act generally applies the LHWCA to observers but modifies it in several respects to tailor the provisions to the relevant circumstances involving observers.

3. Section-by-Section Analysis

Section 1 of the Act applies the LHWCA, as modified by the Act, to observers by stating that, except as modified, the provisions of the LHWCA shall apply in respect to the "injury or death" of any person engaged in any employment as a fisheries observer" as defined in the Act. The term "injury" includes "illness" because the LHWCA defines "injury" to include "occupational disease or infection as arises naturally out of [the] employment or as naturally or unavoidably results from such accidental injury * * *." 33 U.S.C. § 902(2). Thus neither the LHWCA nor the proposed Act covers *each and every* illness that happens to befall an "employee" while at work. Rather, it must be an "occupational disease or infection as arises naturally out of such employment." In other words, the fact that an employee becomes sick on the job does not mean he gets compensation under the Act, unless there is a job-related reason for the sickness. LHWCA and the proposed Act are not a replacement for a general health care plan; rather they are to compensate employees for job-related injuries, including diseases or infections that arise naturally out of the employment.

Section 1 also makes clear that the Act applies to fisheries observers irrespective of the place where the injury or death occurs, and shall include any injury or death occurring to any such person while in transit (including waiting for a vessel to sail) to or from his place of employment, where the employer or the United States provides the transportation or the cost thereof.

Section 2 is the "Definitions" section of the Act. Unless noted otherwise, the definitions of the LHWCA are incorporated into the Act. However, the Act contains three definitions not found in the LHWCA. Section 2(a) of the Act defines the term "fisheries observer" to mean a "person under contract or otherwise engaged in employment as an observer in connection with a fish or fisheries monitoring program created by or pursuant to a law of the United States." The intention here is to cover all observers in all observer-related activities, and to treat all observers the same, regardless of whether they are

hired directly by the federal government or by a contractor or subcontractor. Section 2(a) also specifies that FECA does not apply to injuries or death covered under the Act, even if the injured or deceased fisheries observer is deemed a federal employee for any other purpose. This is to avoid double coverage for an observer, and ambiguity as to whether the observer's remedy is under the Act (applying the LHWCA) or FECA.

Section 2(a) further makes it clear that a fisheries observer shall not be deemed to be a "master, member of a crew, or seaman of the vessel to which the observer is assigned to perform any functions in connection with a program for the monitoring of fish or fisheries created by or pursuant to a law of the United States." This too is to prevent the opportunity for double recovery -- under the Act, under general maritime law, and under the Jones Act, 46 U.S.C. § 688 et seq. -- and confusion as to whether the observer is to be compensated under either the Act (applying the LHWCA), general maritime law, or the Jones Act. Although the Jones Act may provide an observer with the opportunity to obtain a higher amount of damages for injuries suffered while on board a vessel, compensation under the Jones Act is not guaranteed. To begin with there has been a divergence of judicial opinion whether observers are "seamen" under the Jones Act. Compare *O'Boyle v. United States*, 993 F.2d 211 (11th Cir. 1993) (American observer placed on board Japanese fishing vessel to enforce U.S.-Japan treaty not a "seaman" under the Jones Act); *Artic Alaska Fisheries Corp. v. Feldman*, No. 93-42R (W.D. Wash. Mar. 5, 1993) (observer not a seaman under the Jones Act); *Key Bank of Puget Sound v. F/V Aleutian Mist*, Case No. C91-107 (W.D. Wash. Jan.10, 1992) (fisheries observers not seamen), with *West One Bank v. M/V Continuity*, Case No. C93-1218C (W.D. Wash. Jan. 19, 1994) (observers were seamen under 46 U.S.C. § 10101(3)); *State Street Bank & Trust Co. v. F/V Yukon Princess*, Case No. C93-5465C (W.D. Wash. Dec. 22, 1993) (observers were seamen for purposes of perfecting preferred maritime liens); *Key Bank of Washington v. Dona Karen Marie*, Case No. C92-1137R (W.D. Wash. Oct. 26, 1992) (observer was a seaman for purposes of asserting a preferred maritime lien for crew wages).

In addition, even assuming for the sake of argument that an observer is a seaman, to recover significant damages under the Jones Act (including for elements such as pain and suffering) the injured observer would need to prove negligence on the part of the employer or a co-employee. By contrast, application of the LHWCA results in compensation to the observer regardless of fault.

In essence, the injured observer receives the benefit of assured coverage and the payment of a claim in a reasonably expeditious manner, without having to prove negligence, in exchange for foregoing the possibility of obtaining additional damages under the Jones Act, for items such as pain and suffering.

Section 2(a) also clarifies that a person employed exclusively to perform office, clerical, secretarial, security, or data processing work shall not be deemed a fisheries observer. This clarification is included because employees exclusively engaged in clerical work are excluded from coverage under LHWCA, and to ensure that the protections of the Act are reserved for personnel who are actually involved in observer-type functions.

Section 2(b) of the Act defines "employee" to mean a "fisheries observer" as defined in Section 2(a) of the Act.

Section 2(c) of the Act defines "employer" to mean a person that "contracts with or otherwise hires one or more fisheries observers. It makes it clear that an "employer" may be the United States government, or an agency, corporation or instrumentality thereof, or a contractor, subcontractor, or an entity certified or accredited by the United States government to provide fisheries observers, or other person. The intention here is to put the responsibility of procuring LHWCA insurance on the entity that hires the observers, whether that is (1) the federal government because it hired the employee, or (2) a contractor with the federal government under a contract to provide observers, or (3) a non-contractor which hires observers that have been certified or accredited by the federal government, and which vessels pay for observer coverage. However, Section 2(c) clarifies that neither a vessel owner/operator nor the United States government shall be deemed to be the employer of a fisheries observer unless the United States government or the vessel owner/operator directly contracted with or otherwise hired the observer for the provision of his services as a fisheries observer, and pays the salary of that observer directly to that observer. This clarifies the intention that neither the vessel owner/operator nor the U.S. government be deemed the employer unless they directly hire the observer.

The LHWCA contains an important provision to guard against the problem of an employer default, or a default by the employer's insurance carrier. Specifically, 33 U.S.C. § 918(b) provides that "[i]n cases where judgment cannot be

satisfied by reason of the employer's insolvency or other circumstances precluding payment, the Secretary of Labor may, in his discretion and to the extent he shall determine advisable after consideration of current commitments payable from the special fund established in section 44 [33 U.S.C. § 944] make payments from such fund upon any award made under this Act." Thus the general fund may be accessed to deal with the situation where the employer or its insurer default on the obligation to the observer.

Section 3 of the Act makes it clear that an "employer" undertakes the responsibility to pay his observers compensation payable under the LHWCA. However, as with the LHWCA, in the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor. Compensation shall be payable irrespective of fault as a cause for the injury.

Section 4 of the Act provides that compensation shall be payable for disability or death of an observer if the disability or death results from an injury occurring while the observer is engaged in any employment as a fisheries observer, irrespective of the place where the injury or death occurs, and shall include any injury or death occurring to any such person (a) while that person is aboard, boarding or leaving a vessel to which he is assigned to engage in activities as a fisheries observer, (b) while that person is otherwise engaged in employment as a fisheries observer in any location, on land or otherwise, including training, or (c) during transportation to or from his place of employment, where the employer or the United States provides the transportation or the cost thereof. While this is primarily based on the DBA and LHWCA, this language makes it clear that the coverage applies to all facets of the observers' duties, including land-based activities (such as a debriefing after a voyage). The intention is to have LHWCA provide all coverage and to avoid the need for state workers' compensation to apply to an observer. This is a desired result because: (1) it makes no sense to have potentially overlapping coverage under state workers compensation and LHWCA, (2) LHWCA is generally as good as or superior to all state workers' compensation programs, and (3) consistency and predictability are important objectives here. As with the LHWCA, no compensation is available if the injury was

occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another. Subject to the provisions of 33 U.S.C. § 933, any amounts paid to an observer for the same injury, disability, or death for which benefits are claimed under the Act are to be credited against any liability imposed by the Act.

Section 5(a) of the Act is taken directly from the DBA. It provides that the minimum limit on weekly compensation for disability, established by 33 U.S.C. § 906(b), and the minimum limit on the average weekly wages on which death benefits are to be computed, established by 33 U.S.C. § 909 (e) shall not apply in computing compensation and death benefits under this Act. Sections 906 and 909 also contain maximum limits, which are also part of the Act. Section 5(b) is taken directly from the DBA.

Section 6(a) of the Act is intended to make it clear that the liability of an employer to the observer under the Act is the observer's exclusive remedy against that employer, assuming that the employer has secured payment of compensation under the Act. It explicitly preempts State workers compensation laws in order to avoid duplicative coverage and insurance costs. The employer is liable for compensation to the observer regardless of fault, but because of exclusivity, the employee is prohibited from maintaining any cause of action against the employer. However, if an employer fails to secure payment of compensation as required by the Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory or comparative negligence of the employee.

Section 6(b) provides that a fishery observer who suffers injury or death aboard a vessel to which he is assigned to perform duties as a fisheries observer shall have no cause of action against that vessel for negligence or otherwise, except in cases where the vessel acted willfully in causing the injury or death. "Vessel," as defined by the LHWCA and incorporated into the Act, "means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter

or bare boat charter, master, officer, or crew member." 33 U.S.C. § 902(21). This subsection goes beyond the LHWCA, which allows claims for negligence against the vessel (but does not allow for claims for lack of seaworthiness). The language reflects the fact that vessels – whose cooperation is essential for the observers to perform their functions – have exhibited an unwillingness to accept observers because of concerns of liability for negligence claims by observers. Under the Act, the employee would be prohibited from a cause of action against the vessel.

There is ample precedent for Congress to preempt private claims for negligence under State common law. Courts applying 33 U.S.C. § 904 have held that the LHWCA immunizes employers from claims for negligence to the extent they comply with the compensation requirements of the Act. Similarly, FECA preempts negligence claims against the federal government where the FECA provisions apply. 5 U.S.C. § 8116(c). Other examples of federal statutory preemption include the Federal Rail Safety Act of 1970, 49 U.S.C. § 20106 (preemption of some claims for negligence against railroads regarding safety conditions at crossings, etc.); Federal Fungicide, Rodenticide and Insecticide Act of 1947, 7 U.S.C. § 136, et seq. (preemption of negligence claims relating to labeling against companies that sell pesticides, et al., where the labels comply with federal labeling requirements); Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) (preemption of tort claims against employers where the matter is covered by a collective bargaining agreement).

Also, the employer of the observer may not indemnify or otherwise agree to be liable to the vessel for a claim by the observer, directly or indirectly, and any agreements or warranties to the contrary shall be void. This language is necessary to avoid defeating the cost-containment purpose behind providing LHWCA-style coverage to observers, which would occur if observer employers agreed to shoulder the burden of a liability claim against the vessel. However, the provision makes clear that it is not intended to preclude recovery under the Act against a vessel owner/operator that is the direct employer of a fisheries observer. This is necessary for those instances, if any, where the vessel owner/operator is the employer of the observer, i.e., where the vessel owner/operator is the person that contracted with the observer for services and which directly pays the salary.

Section 6(c) of the proposed Act would

preclude the liability of the federal government in those cases where the observer is not directly employed by the federal government. Specifically, where the U.S. government is not the direct employer of the observer, the government shall not be liable for any damages arising out of any injury or death to a person that occurs while the person is engaged in any employment as a fisheries observer, irrespective of the place where the injury or death occurs. In those circumstances where the United States government is the employer of the observer, the liability of the government with respect to the injury or death of that person shall be limited to the remedies available in the Act. This provision is not in the LHWCA. It is added in the proposed Act primarily to preclude claims for negligent training, defective equipment and the like against the U.S. government by observers who are hired by contractors or subcontractors but trained by the government or who use government supplied equipment.

Section 7(a) of the Act adopts the DBA provisions (42 U.S.C. § 1653(a)) with respect to the venue in which a claim can be brought for compensation under the proposed Act. Thus, as in the DBA, the Secretary of Labor is authorized to extend compensation districts established under the LHWCA to establish new compensation districts, to include any area to which this Act applies; and to assign to each such district one or more deputy commissioners as the Secretary may deem necessary. This language has been taken from the DBA because it identifies the responsible party that can extend coverage to districts beyond U.S. territorial waters since LHWCA coverage does not extend beyond U.S. territorial waters.

Section 7(b) provides that court challenges of a compensation determination by the Department of Labor are to be filed in the federal district court jurisdiction wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the location at which the injury or death occurs. This is adopted directly from the DBA (42 U.S.C. § 1653(b)). Unlike the DBA, the LHWCA provides for direct appeals to the federal courts of appeal. However, under the proposed Act - as with the DBA - decisions of the district court can be appealed to the federal court of appeal for the circuit that covers the geographical area of the subject district court. Thus, the DBA model provides the observer - and any other interested party - with an additional level of judicial review not available under the LHWCA. This also may be more convenient for claimants

who wish to pursue a judicial challenge, because the federal district courts are more spread out geographically than the courts of appeal.

Section 8 of the proposed Act repeals 16 U.S.C. § 1881b(c), the provision that applies FECA to observers. Repeal is necessary so that observers are not covered under both FECA and LHWCA.

C-7

North Pacific Fishery Management Council

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DRAFT
Observer Advisory Committee Report
Jan 23 - 24, 2003

Alaska Fisheries Science Center
7600 Sand Point Way, NE, Seattle
Building 4, Room 2039
8:30 am - 5 pm

Executive Summary

The Observer Advisory Committee (OAC) reviewed a discussion paper developed by NMFS which outlines various issues and ideas for restructuring the North Pacific Groundfish Observer Program (Observer Program). Per Council direction in October 2002, the purpose of the meeting was to develop a problem statement and refine the scope of the proposal to modify the current Observer Program design and funding mechanism. The intent of such a change would be to address specific data quality and disproportionate cost issues related to the current program design. Based on this direction, the committee approved a problem statement and discussed specific alternatives, options, and issues for a potential formal analysis to support an amendment to restructure the Observer Program. The committee also addressed several other agenda items including observer insurance issues, FOIA requests, agency budget initiatives, status of the cadre program, and a pilot project proposal by NMFS.

Committee conclusions:

The OAC approved the following **Problem Statement** for restructuring the Observer Program:

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 committee also recommended the following:

- The Council and NMFS proceed with an analysis to modify the current Observer Program design and funding mechanism to address the data quality and disproportionate cost issues resulting from the current program structure. This analysis would propose changing the current program to one in which NMFS contracts directly with observer providers for observer services and the costs of observer coverage are paid for through a combination of Federal funding and a fee program.
- Given that the concerns identified in the problem statement are most prominent in the Gulf of Alaska and the <100% covered vessels, the primary alternative should focus on modifying the observer program for all vessels and processors operating in the Gulf of Alaska.
- As the currently <100% covered fleets participating in the BSAI groundfish fisheries may exhibit similar problems with data quality and cost inequity as the GOA fisheries, the committee approved a suboption to extend the fee-based program to all vessels with currently less than 100% coverage in the BSAI. The intent would be to assess the same fee on vessels with currently less than 100% coverage participating in the BSAI fisheries as is imposed on all vessels participating in the GOA.
- The committee also recognized that NMFS has not yet determined coverage levels by fishery, which would allow a definitive projection of costs. Understanding that this is a moving target with our dynamic fishery management objectives and rationalization initiatives, the committee came to general consensus that it would support building a program structure that would allow NMFS to place observers when and where needed, as coverage levels are determined for each fishery.
- The analysis should describe varying ways to structure a fee plan that may differ from the authority currently in the Magnuson Stevens Act (based on a percentage of ex-vessel values).
- The analysis should include a discussion of incorporating potential new and developing monitoring technologies into the observer program, and fully flesh out fee collection mechanisms, costs, and logistical/implementation issues associated with deploying observers, specifically with regard to vessels that may be participating in both the GOA and BSAI groundfish fisheries in a given year.
- The analysis should be developed in coordination with the Gulf rationalization project. The purpose of any program design change should be on data quality issues, with sufficient flexibility so that it is easily adaptable to evolving and emerging fishery management objectives in the Gulf of Alaska and other North Pacific fisheries.

DRAFT
Observer Advisory Committee Report
Jan 23 - 24, 2003
Alaska Fisheries Science Center
7600 Sand Point Way, NE, Seattle
Building 4, Room 2039
8:30 am - 5 pm

Committee: Joe Kyle (Chair), Julie Bonney, Susan Robinson, John Gauvin, Peter Risse, Kim Dietrich, Paul MacGregor (for Trevor McCabe), Kathy Robinson, Arni Thomson, Gillian Stoker (alternate)

Not present: Rocky Caldero, Trevor McCabe, Jerry Bongen, LeeAnne Beres, Bob Mikol

Staff: NPFMC - Chris Oliver, Nicole Kimball
NMFS/AFSC - Rich Marasco, Doug DeMaster, Martin Loefflad, Joe Terry, Bob Maier, Mark Kirkland, Jerry Berger, Jennifer Ferdinand, Todd Loomis, Heather Weikart
NMFS AK Region - Sue Salvesson, Kent Lind
NMFS National Observer Program - Vicki Cornish

DOC (Office of Inspector General) - Deborah Holmes, Stephen Moore

Other participants: Tracey Mayhew, Lori Swanson, Mark Buckley, Mary Schwenzfeier, Bryan Belay, Brent Paine, Mark Kirkland, Sharon Davis, Al Burch, Duke Bryan, Greer Cowan, Jerry Berger, Jan Jacobs, Michael Lake

I. Review and approve agenda

The chairman gave a brief overview of the agenda and introduced committee members and other participants. Staff from the U. S. Department of Commerce (Office of Inspector General) noted that their purpose in attending is to gather information on the North Pacific Groundfish Observer Program for a nationwide review of observer programs intended for completion in September 2003. The committee added the following two items to the agenda: 1) update of the Seattle Times FOIA request, and 2) status of NMFS Cadre program. The chair also reviewed the purpose of the meeting per Council direction in October 2002 (see agenda), noting that the last time the program was on the brink of such a major structural change was in 1995. The overall purpose of the meeting was to develop a problem statement and refine the scope of the proposal to modify the current Observer Program design and funding mechanism. The committee generally agreed that the focus of any such change should be on improving data quality, in order to better manage the North Pacific groundfish fisheries in the short and long-term.

II. Review discussion paper

Kent Lind (NMFS) gave a brief overview of a discussion paper prepared to summarize the results of a meeting with NMFS and Council staff held in Juneau in October 2002 to discuss various ideas for restructuring the Observer Program. The intent of the paper is to provide the OAC with a tool to begin discussions of a problem statement, scope, and potential alternatives for analysis. The program design change at issue is a fee plan with potential Federal funding. The program structure would continue the agency's role

in training, debriefing and managing the data provided by observers; however, under a new program design, NMFS would directly contract with one or more observer providers to recruit, hire, and place observers in the field. Kent emphasized that staff generally agreed that limiting the initial restructuring of the program to a distinct area, fisheries, or vessel classes may be the most feasible and effective way to begin to address the problems related to data quality and cost inequity. Limiting the initial scope of a program design change to a specific area or distinct category of vessels may increase the possibility of receiving Federal funding while targeting areas in which the problems are most acute.

The committee generally agreed that the most severe problems relevant to observer data quality are in the Gulf of Alaska and with vessels that are currently required to have less than 100% observer coverage (including vessels that currently have no coverage requirements). Some members of the committee did not agree that the current system, in which vessels directly contract with observer providers for observer services, is the basis of the problem. However, most committee members agreed that the current program design and rigid regulatory system directly affect the ability of NMFS to place observers where and when they deem necessary for data and management needs. The committee agreed that the current design is not flexible enough to tailor coverage levels to the existing needs of specific fisheries or to adapt to future program management objectives, such as Gulf rationalization. The committee also emphasized that the program is still one of the most effective in the nation, thus, any modifications would be made to increase the quality of the data we are already collecting in the Observer Program.

Given the concerns noted above, the committee reviewed, modified, and approved the following 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.

It was also noted that the problem statement only addresses the data quality issues that are a direct result of the current program structure, and other data quality issues, such as the need for better sampling protocols, continue to exist. The agency noted that sampling issues will continue to be addressed under the current or a new program design.

The committee also considered the overall scope of a program design change, and whether a fee plan/partial Federal funding should initially apply to a specific area (Gulf vs. BSAI), fisheries, or vessel classes, as opposed to all vessels participating in the North Pacific groundfish fisheries. In addition, the committee considered whether to include halibut vessels, vessels <60', and processing plants in an analysis of a potential fee plan.

The committee used the tables in the discussion paper to identify the estimated observer costs and potential fees that would apply under the current level of coverage in the Gulf and BSAI for 2000 and 2001, noting that any program restructuring would allow the agency to modify the current coverage levels to apply to the particular needs and fishery management objectives on a fishery by fishery basis. It was noted that while the majority of the current observer days in the Gulf is on 30% boats, the majority of the coverage in the BSAI is on vessels with greater than or equal to 100% coverage requirements. It was also noted that about 11-12% of the total observer days are in the Gulf and 88-89% in the BSAI, while about 88% of the total North Pacific catch is harvested in the BSAI. The committee agreed that the current program structure inherently results in data gaps and sources of temporal and spatial bias related to the vessels that have <100% coverage requirements, which is far more representative in the Gulf than in the BSAI.

The committee also recognized that NMFS has not yet determined coverage levels by fishery, which would allow a definitive projection of costs. Understanding that this is a moving target with our dynamic fishery management objectives and rationalization initiatives, the committee came to general consensus that it would support building a program structure that would allow NMFS to place observers when and where needed, as coverage levels are determined for each fishery. The current design makes it nearly impossible to shift coverage from one fishery to another to meet various objectives such as rockfish bycatch in one fishery versus halibut bycatch in another. The agency noted that it may be easier to look at a specific fishery and its primary objectives for observer data within a flexible program, and then determine the coverage level necessary to meet those objectives. The committee supported addressing the program structure to get the flexibility necessary to create statistically viable catch and PSC estimates.

The committee also agreed that while there are many different interests and issues identified by the agency, observer providers, observers, and industry, it is likely necessary to focus on a discrete piece of the observer program to work on initially, in order to highlight the most acute problems and increase the possibility of receiving Federal funding. The committee also generally agreed that there is a greater chance of success in implementing a new program design if it is focused on a discrete area or fleet. The agency and committee reiterated concerns that the spatial and temporal bias in observer data in the less than 100% covered fleet makes it difficult to know if the data accurately represents fishing activity at any given point in time. In addition, the most significant cost inequity problems (disproportionate costs paid among different vessels/fleets) are also in the <100% covered fleet (the committee noted figures from Tables 5.1 and 5.2).

One member also noted that while supporting the current system in many of the BSAI fisheries, any potential for some level of Federal funding should be spread among all vessels participating in all fisheries with required observer coverage. This suggested concerns with applying a new funding mechanism (fee plan/Federal funding) to a discrete portion of the fleet, i.e. only vessels fishing in the Gulf of Alaska. The agency noted that the only mechanism currently available to subsidize industry observer costs through Federal funding would require changing the current "pay-as-you-go" structure to a Federal contracting model similar to other observer programs in the nation. Thus, to spread any potential benefits of Federal funding among every fishery, it would require wholesale modification of the entire program. It was also noted that the chance and level of potential Federal funding is uncertain, thus a fee plan with little or no Federal funding may increase current costs of observer coverage to some and decrease costs to others. This is because everyone would be paying the same fee across the board, regardless of the actual cost.

The committee also noted that while it believes that the most significant data quality and cost inequity issues are in the <100% covered fleet in the Gulf, it would not want to foreclose the opportunity to apply a fee plan and collect data from halibut vessels and <60' vessels, in which no observer coverage is currently required. Existing and emerging digital technologies may be useful in collecting data from this fleet in the future. In

addition, some committee members were concerned with excluding some fisheries in the BSAI. While the majority of the committee agreed that limiting the program to the Gulf of Alaska is more feasible initially, several members noted that it may provide a model to apply to the BSAI in the future. The committee thus agreed that a key design objective for any new program structure would be that the program is easily scalable.

Some discussion also ensued on the feasibility of using a TAC set-aside to fund the observer program, such as is done in the crab fisheries. However, most agreed that the TAC set-aside model only works well in single species fisheries that are limited/closed primarily by reaching a TAC or GH. Such a model would be much more difficult to employ in the multispecies fisheries in the Gulf of Alaska, in which many fisheries are PSC driven.

Given these issues, the committee recommended that the Council and NMFS proceed with an analysis to consider restructuring the observer program to address the current data quality and cost inequity issues in the Gulf of Alaska. These issues are not viewed as critical in the BSAI given the higher level of observer coverage and rationalization of the pollock fishery under the AFA. **This analysis would propose changing the current program to one in which NMFS contracts directly with observer providers for observer services and the costs of observer coverage are paid for through a combination of Federal funding and a fee program.** The committee noted that while Federal funding certainly would enhance a restructured program, the uncertainty of this funding source should drive the development of a program that could provide minimal coverage from industry fees alone.

While the primary alternative would focus on changing the observer program for all vessels and processors operating in the Gulf of Alaska, the committee did not want to preclude the opportunity to address the halibut and <60' fleet and similarly characterized vessels in the BSAI. As some fleets participating in the BSAI exhibit similar problems with data quality and cost inequity as in the GOA fisheries, the committee decided that sufficient rationale did not exist to potentially exclude the <100% covered vessels from being considered in an analysis, nor did it want to limit the program only to certain gear types in the BSAI. However, the committee recognized that it did not have sufficient information available at this time to make specific recommendations about which BSAI fisheries and/or vessel classes should be considered for inclusion. **Thus, the committee's recommended alternative is to limit the scope of a program design change to all vessels and processors in the Gulf of Alaska, with a suboption to extend the program to all vessels with currently less than 100% coverage in the BSAI.**

The intent of the suboption would be to assess the same fee on vessels with currently less than 100% coverage participating in the BSAI fisheries as is imposed on all vessels participating in the GOA. As a guiding principle, the committee believed that only those fleets that participate in the program should benefit from it, in other words, vessels or processors that do not participate in the fee program should not benefit from the resulting coverage. At the same time, fees should not be assessed on vessels or processors that will not receive their coverage from the program.

The committee also noted that an analysis should describe ways to structure a fee plan that may differ from the authority currently in the MSA (based on a percentage of ex-vessel values), for example, at the cooperative level. The committee also noted that an analysis should include a discussion of incorporating potential new and developing monitoring technologies into the observer program. The analysis must also fully flesh out fee collection mechanisms, costs, and logistical/implementation issues associated with deploying observers, specifically with regard to vessels that may be fishing in the Gulf under a fee plan and

also fishing in the BSAI under the current structure. Finally, the committee noted that the analysis should be developed closely with the efforts of Gulf rationalization. It would not be appropriate to redesign a program based on the current need for fleetwide estimates of target and PSC catch; a new design must focus on flexibility so that it can be adapted to the Gulf rationalization alternatives and fishery management objectives arising in the future.

III. Discuss NMFS proposal for a pilot project

Sue Salvesson (NMFS) described a pilot project that NMFS is considering to test the combined use of electronic vessel logbooks and more effective observer deployment procedures to improve PSC estimates. The project would also allow NMFS to test various observer deployment models. The impetus for this project is the need to manage and estimate PSC on a smaller, more refined geographic scale, as opposed to the current method of applying observed rates in a specific fishing area to a much larger Federal reporting area. This would allow the agency a more accurate picture of bycatch patterns in specific areas over time. NMFS is currently exploring the use of contractual arrangements with individual vessels, as opposed to an Experimental Fishing Permit. The agency is considering the pilot project in the summer bottom trawl rockfish or flatfish fishery in the Central Gulf. NMFS noted that staff availability is uncertain because of other high priority EIS projects. If staff resources are made available, the agency will provide more details on the target fishery, timing, and contractual arrangements prior to the April meeting.

Several committee members noted that it is important to use this pilot project to help estimate coverage needed for catch and PSC estimates related to Gulf rationalization efforts. The committee also conveyed support for testing the use of technology to supplement human observers. Should Gulf rationalization result in increased observer coverage in the Gulf, several members noted that this may be cost prohibitive for smaller vessels and technology should be explored as an option. Thus, the committee believes the pilot project could be designed to link to the options for Gulf rationalization.

IV. Update on Federal Observer Compensation Act (FOCA)

Vicki Cornish (NMFS) gave a brief update on the status of the draft FOCA legislation, and the committee reviewed a report on observer program insurance issues and the potential implementation of FOCA. The report generally stated that the current insurance framework, comprised of several different programs with varying degrees of coverage, hamper the ability to provide clear, consistent guidance to observers about available compensation in the event of injury or illness on the job. The current programs available to observers are time consuming, laborious, and ambiguous vehicles due to questions surrounding an observer's 'status.'

FOCA clearly identifies fisheries observers as 'non-seamen' and therefore eligible to file claims under the Longshore and Harbor Workers' Compensation Act (LHWCA). This act would provide a schedule and compensation more straightforward and comprehensive than the Federal Employee Compensation Act (FECA), and unlike FECA, would allow coverage for observers wherever they are working. This includes coverage to workers in processing plants, during debriefing sessions, or while in transit to and from deployments. FOCA also accounts for overtime, which can be a substantial percentage of an observer's pay. In addition, while FOCA would limit the ability of observers to sue vessels for negligence, it would not affect their status for willful misconduct claims. The current draft of FOCA would bring all observers working on Federal programs under the LHWCA, whether they work under contract to the government or for certified observer provider companies contracting directly with vessels. Upon implementation, FOCA would supercede FECA with regard to observer coverage. NMFS noted that it is considering exempting observers that are Federal employees, effectively allowing them to remain covered under FECA.

Several members of the committee noted that observer providers are currently paying for redundant and ambiguous insurance coverage which does not provide adequate coverage to observers, and those costs are passed on to industry. Under FOCA, insurance companies would bid competitively for a contract to provide observer insurance (a single insurance contract which all observer providers would use), which may reduce costs. It would also be easier for observers to deal with one policy and receive support when filing claims. It was noted that neither the current program, nor the proposed FOCA legislation, addresses basic health insurance for observers (non-work related illness and injury). However, the inclusion of general health benefits, while not mandated by NMFS, could be viewed favorably in the competitive bidding process. Both the agency and committee recognized that health benefits are an important factor in the overall package to retain quality observers.

The observers, observer providers, and industry members of the committee noted that in general they support reduced costs for observer insurance and a more effective, comprehensive program for compensating observers. The agency noted that the draft FOCA legislative package is nearly complete, and final comments are being sought.

V. Discuss FY05 NMFS budget initiatives

Vicki Cornish (NMFS) gave a brief overview of the budget initiative process, noting that the agency's priorities for observer program funding are focused on efforts to estimate and reduce bycatch. Vicki noted that the 2005 budget is a good starting place for funding initiatives for the North Pacific program. The NMFS Alaska Region has submitted its requests for the NMFS budget, and noted that the committee's recommendation to focus observer program restructuring in the Gulf of Alaska dovetails nicely with its current budget initiatives and national priorities. Thus, the NPGOP may have a better opportunity to receive some Federal funding than they may have had in the recent past.

Vicki also noted that the agency needs to raise every regional program up to a standard comparable with coverage levels we are currently realizing in the North Pacific. Thus, the Alaska Region should not expect more funding at the expense of the other regions which have significantly lower coverage levels. Many committee members noted a different perspective: vessels participating in the North Pacific are burdened with paying \$11 million per year because their program is considered successful, while every other region receives Federal funding to pay for observer coverage.

VI. Other issues as necessary

Update on NMFS cadre program

Todd Loomis (NMFS) provided a brief update on the NMFS cadre program. The cadre was developed to provide observer and industry support in the field, by having NMFS staff available for vessel/plant deployments to address difficult sampling problems, protocols, or other related issues. In addition, it allows NMFS staff and observer trainers to keep up to date on industry and observer needs. The cadre has three trips planned for 2003, two out of the Gulf of Alaska, and one out of Dutch Harbor. Two additional initiatives for 2003 are to deploy a trainer and assist in a research project. The 2003 projected estimate is that the 5 cadre staff will complete a total of 100 days at-sea. Because new regulations supporting the cadre apply to "NMFS qualified staff," potentially 15 staff are available for deployment, including trainers and de-briefers.

Update on Seattle Times FOIA request

In March of 2002, the Seattle Times filed a Freedom of Information Act (FOIA) request for certain data and other safety related information contained in the electronic vessel survey forms that are prepared by observers subsequent to their vessel deployments. This information was requested on an individual vessel basis. NMFS responded with information pertaining to vessel safety, but with no individual vessel identifier. As a result, the Seattle Times made a second request on an individual vessel basis. NMFS is currently pursuing use of an exemption within FOIA which allows the agency not to comply with the request if compliance would potentially impair future collection of the data or impose competitive harm. NMFS randomly surveyed a portion of both the fleet and observers to understand their perceptions of whether releasing this data would produce either of those results. The industry surveys voiced strong opposition to releasing the data, with only one exception. About two-thirds of the observers surveyed thought that the release of the data could impair future collection of this information. The agency is reviewing all of the survey responses and confidentiality issues and will make a final agency determination in the near future.

The committee expressed similar concern with the potential release of this data, citing the potential for observer safety surveys to be misconstrued or filled out incorrectly. The agency also noted that no agency action is taken on the sole basis of a survey response, and that the survey is designed to provide a general sense of what is occurring in the fishery and a coarse means of identifying a potential problem. The agency also noted that it is moving in the direction of making all observer data confidential, which would in effect protect it from FOIA requests.

The committee agreed that observer safety is a very pertinent and important issue, and further efforts are needed to refine the current observer reports with regard to vessel and observer safety. Some concerns exist that observers do not have an effective mechanism to convey whether they believe a vessel is unsafe. Observers and observer providers are concerned that if vessel safety data is made completely confidential, it would not be available to observers boarding that vessel in the future. The agency noted that it is aware of these issues and is working to maintain the availability of safety information to observers and observer providers.