

DISCUSSION PAPER

**Expansion of a Fishery Management Plan Amendment
to Establish a New Program for Observer Procurement and Deployment in the North Pacific**

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North Pacific Fishery Management Council
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1.0 Introduction

Since early 2003, the North Pacific Fishery Management Council (Council) and its Observer Advisory Committee (OAC) have been developing a proposed FMP amendment to restructure certain components of the North Pacific Groundfish Observer Program. The initial focus of these efforts was on proposals to restructure the funding source and deployment model for Gulf of Alaska (GOA) groundfish fisheries and for Bering Sea and Aleutian Islands Area (BSAI) vessels with coverage requirements of less than 100%. None of the alternatives under consideration would have addressed the large-scale BSAI fisheries where most vessels are required to carry one or two observers at all times. The BSAI fisheries with 100% or greater coverage would have continued to operate under the current “pay-as-you-go” service delivery model.

In January 2004, the Council received a letter from the National Marine Fisheries Service (NMFS) (Appendix C) informing the Council of its concerns about operating an observer program under two different service delivery models. In its January 2004 letter, NMFS stated that it had determined that effective procedures for addressing observer performance and data quality issues can only be put into place through a service delivery model that provides direct contractual arrangements between NMFS and the observer providers. In essence, the NMFS letter concluded that the Council’s current alternatives were inadequate because most or all of the BSAI groundfish fisheries would continue to be covered under the existing “pay-as-you-go” model under all of the alternatives.

For that reason, NMFS recommended that the Council consider a revised problem statement and expand its analysis to include a new alternative or alternatives that would reflect a program-wide restructuring so that all observer services are provided by observer companies under direct contractual arrangements with NMFS.

The purpose of this discussion paper is to aid the OAC in considering revisions to the problem statement for observer program restructuring, and to provide some additional information on some of the issues affecting observer salaries. This paper is also intended to serve as a starting point for addressing the decision points identified in section 3.0 and constructing new alternatives as suggested in 4.0. It should be emphasized, however, that the hypothetical alternatives in this paper are only staff suggestions intended to help jump-start or focus the discussion and the OAC should not feel limited to these suggestions.

1.1 The Council’s response to NMFS and tasking for the OAC

At its February 2004 meeting, the Council reviewed the issues raised in NMFS’s letter and approved the following motion:

The Council tasks the Observer Advisory Committee (OAC) with: reviewing and recommending any appropriate changes to the problem statement; refining the existing alternatives; and exploring new alternatives that will address the issue of combining the BSAI and the GOA as one program, including the concept of a direct NMFS contract with observer providers. Additionally, the OAC should explore the potential use of a mixed model for collecting observer costs in any service delivery model that may be chosen as well as the potential cost of these different models to industry.

Also, the OAC should address issues raised by the Advisory Panel at the February Council meeting:

- 1) *the 'fishing operation exemption' of the Fair Labor Standards Act (FLSA)*
- 2) *the cost of NMFS' recommendation to provide overtime coverage for observers*
- 3) *how to increase flexibility in the current service delivery model to address NMFS observer program issues*
- 4) *observer insurance costs*

Further, the Council urges NMFS Headquarters to reconsider its adoption of the policy on observer compensation issued on November 13, 2003. The Council requests a response from NMFS Headquarters addressing the following issues: (1) how the new overtime policy would impact observer compensation costs under a direct contract approach for the North Pacific Groundfish Observer Program (Observer Program); (2) whether the policy would require that observers be compensated on an hourly plus overtime basis for all non-productive waiting time spent on board the vessels; (3) whether and how the policy addresses the issue of whether observers fall within the FLSA exemption for employees engaged in fishing operations; and (4) how the number of hours worked by an observer will be verified if the policy requires contractors to compensate observers on an hourly basis. To permit the OAC to move forward with its work on the proposed restructuring of the Observer Program, the Council requests that agency headquarters address and resolve these issues prior to the OAC meeting scheduled for March 11 - 12, 2004. Council staff will prepare correspondence to NMFS Headquarters to this effect.

1.2 Revised problem statement

In its letter, NMFS suggested the following revised problem statement to address NMFS's new concerns about its ability to address observer performance problems and data quality issues:

Revised problem statement for restructuring of the North Pacific Groundfish Observer Program (Substantive changes to the original problem statement are underlined below. Editorial or non-substantive changes are not identified.)

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 Council and NMFS face a number of longstanding problems that result primarily from the current structure of the Observer Program. 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 adjusted to respond to current and future management needs and requirements for individual fisheries. In addition, the existing program does not allow fishery managers to control when and where observers are deployed. This results in coverage limitations that constrain the reliability of catch and bycatch estimates based on observer data. Furthermore, data quality concerns cannot be resolved quickly and effectively when observers who have been identified as not meeting performance or conduct requirements appeal NMFS's suspension or decertification decisions. The ongoing collection of observer data during the appeals process may further undermine data quality and program integrity, and data collected under these circumstances may not be suitable for management and enforcement actions. The current program is also one in which many smaller vessels face observer costs that are disproportionately high relative to their gross earnings. 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.

2.0 Discussion of new issues that have lead us to this point

Along with the January 2004 NMFS letter, recent developments regarding observer compensation and eligibility for overtime pay have also raised concerns within industry, NMFS, and the Council. The following is a summary of the issues that have lead the Council to reconsider its problem statement and alternatives.

2.1 Problems with new procedures for decertification of observers

NMFS's January 2004 letter lays out in detail its concerns about existing procedures for dealing with observer performance problems under the current program design. Essentially, they are the following:

- Prior to 2003, the Observer Program had procedures in place that allowed immediate suspension of observers when potential performance problems were identified. However, these procedures were found to be in violation of observer's rights to due process and an appeal under the U.S. Constitution and the Administrative Procedure Act (APA).
- In 2003, NMFS implemented new procedures for the suspension and decertification of observers that provided observers with the opportunity for appeal to the NMFS Office of Administrative Appeals. Under these new procedures, NMFS cannot take immediate action to suspend an observer except in the case of threats to public health and safety.
- Under these new procedures, NMFS estimates that the decertification appeals process could last nine months or longer, during which the observer is allowed to continue working, although the data collected by such observers might need to be discarded in some circumstances, and information gathered by such observers would be deemed not suitable for use in enforcement cases.
- NMFS believes that these concerns can best be resolved under a system of direct Federal contracting under which NMFS could establish contract provisions that hold observer providers accountable for the quality of the data provided by their observers. Under such a system, observer providers would have an incentive to hire and deploy the best observers, and to insure that their observers are providing the highest quality data.

2.2 Additional concerns related to the operation of two separate programs in the North Pacific

NMFS also raised additional concerns about the Council's current alternatives that would establish two separate types of service delivery models. These include the potential problems that could occur if two separate wage structures were in place in the North Pacific as would be possible if some observers were operating under Service Contract Act (SCA) direct Federal contracts and other observers were operating under the "pay-as-you-go" program, which is not governed by the SCA. NMFS expressed concern that large wage and benefit differentials between the two programs could result in problems with hiring and retaining quality observers in the program that has lower wages or benefits. For example, if observers operating in a new program in the GOA had better pay and benefits than observers working in the pay-as-you-go program in the BSAI, the best and most experienced observers would be attracted to the GOA program leaving the BSAI program with the least experienced pool of observers. However, NMFS noted that this is a complex issue and the potential consequences are difficult to predict.

2.3 The McNamara-O'Hara Service Contract Act (SCA) and its applicability to direct Federal contracting

The SCA has been a longstanding issue associated with efforts to restructure the observer program. The SCA governs salaries and benefits for observers in any program that provides for direct Federal contracting for observer services. The following is a summary of the relevant provisions of the SCA as they relate to direct Federal contracting for observer services.

2.3.1 What is the SCA?

The SCA applies to every contract entered into by the United States or the District of Columbia, the principal purpose of which is to furnish services in the United States through the use of service employees. Contractors and subcontractors performing under such Federal contracts must observe minimum wage and safety and health standards, and must maintain certain records, unless a specific exemption applies.

Every service employee performing any of the government contract work under a service contract in excess of \$2,500 must be paid not less than the monetary wages, and must be furnished fringe benefits, which the Department of Labor (DOL) has determined to be prevailing in the locality for the classification in which the employee is working or the wage rates and fringe benefits (including any accrued or prospective wage rates and fringe benefits) contained in a predecessor contractor's collective bargaining agreement. The wage rates and fringe benefits required are specified in the SCA wage determination included in the contract.¹

Each year, the Wage and Hour Division of the Department of Labor receives requests for wage determinations for employees engaged in approximately 60,000 government service contracts covered under the SCA. Total annual federal government service contracting has been estimated in the billions of dollars. These SCA-covered contracts involve the performance of a wide range of services, including such diverse activities as aerial spraying, barber and beauty shop services, computer services, electronic equipment maintenance, furniture repair, surveying and mapping, trash removal, and warehousing.

The following is an excerpt of the relevant statutory language in the SCA

“Sec. 2(a) Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of \$2,500, ... whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees shall contain the following:

(1) A provision specifying the minimum monetary wages to be paid the various classes of services employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary [of Labor], or her authorized representative, in accordance with prevailing rates for such employees in the locality or where a collective bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's-length negotiations.

¹A summary of the relevant provisions of the SCA can be found at the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division web site:
http://www.dol.gov/esa/regs/compliance/whd/web/SCA_FAQ.htm

(2) A provision specifying the fringe benefits to be furnished the various classes of service employees....

Sec. 4 ... (c) No contractor or subcontractor under a contract, which succeeds a contract subject to this Act under and which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: Provided, that in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing ... that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality."

2.3.2 What geographical areas are covered under the SCA?

The SCA applies to all work performed within the United States. For purposes of the SCA, the term "United States" includes any state, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, Wake Island, Johnston Island, and the Commonwealth of the Northern Mariana Islands. The SCA does not apply to work performed in any other territory under the jurisdiction of the United States or any United States base or possession within a foreign country. Also, the SCA does not apply to work performed on ships operating in international or foreign waters. If a portion of the contract services is performed within the United States and a portion is performed outside the United States, the SCA applies to the portion performed in the United States.

2.3.3 Who is responsible for complying with the SCA?

Under the SCA, the Federal agency entering into the service contract is responsible for obtaining wage determinations from the DOL for each contract, and the contractor is responsible for paying the wage and benefits specified in the contract.

2.3.4 What happens if a contractor violates the SCA?

The SCA provides authority to withhold contract funds to reimburse underpaid employees, terminate the contract, hold the contractor liable for associated costs to the government, and debar from future government contracts for a period of three years any persons or firms who have violated the SCA.

2.3.5 How does the DOL make prevailing wage determinations?

The DOL establishes minimum monetary wages and fringe benefits based on what is prevailing in the locality as determined by wage surveys. A rate is determined to prevail where a single rate is paid to a majority (50 percent or more) of the workers in the same class in a particular locality. If a single rate is not paid to the majority of workers in a locality, statistical measurements such as the median (a point in a distribution where 50 percent of the surveyed workers receive that or a higher rate and 50 percent receive a lesser rate) or the mean (average) are used to establish prevailing wage rates.

Often, wage surveys result in insufficient data for job classifications, as is the case with observers. In these instances, the DOL establishes a prevailing wage through a "slotting," procedure, utilizing the grading system for Federal employees. Under "slotting," wage rates are derived based on a comparison of equivalent or

similar job duties and skills between the classifications which were surveyed and those for which no survey data is available. For example, a surveyed rate for the janitorial classification may be adopted for the food service worker (cafeteria worker) classification because job duties and skills, required for both classifications, are rated at the same grade level under the grading system for Federal employees. This is the procedure that the DOL has generally used to establish prevailing wages for observer services contracts in other regions of the U.S. to date.

2.3.6 When is the majority rate (i.e. the rate paid to more than 50% of the workers in an occupation in a locality) used to establish the prevailing rate?

The SCA regulations provide that “where a single rate is paid to a majority (50 percent or more) of the workers in a class of service employees engaged in similar work in a particular locality, that rate is determined to prevail”. 29 CFR 4.51(b). These majority rate prevailing wage determinations are typically called union dominance wage determinations. This situation would likely apply to the current North Pacific Groundfish Observer Program because more than 50% of the observers currently working in the program are covered by a collective bargaining agreement.

2.3.7 What happens when a collective bargaining agreement (CBA) is in effect for workers covered by the SCA?

When a collective bargaining agreement (CBA) is in place for workers covered by the SCA, employers, are of course, bound by the terms of any CBA that they have entered into. This means that a contractor cannot use the SCA to break a CBA and must continue to meet the terms of the CBA even if a potential DOL wage determination using another method might be lower. The SCA regulations do not specifically discuss a scenario under which the SCA prevailing wage is higher than the wage established under a CBA. This could conceivably happen when less than 50% of the workers in a job classification and locality are covered by a CBA. In this instance, the CBA wage would not be the prevailing wage, and contractors would be required to meet both the terms of the CBA wage and the SCA prevailing wage. It should be noted that CBAs and SCA prevailing wage determinations establish minimum wages that must be paid, but do not preclude an employer from paying a higher wage. Therefore, in instances in which a CBA wage and SCA prevailing wage determination are different, the employer could be bound by the higher of the two wage levels.

2.3.8 What happens when a non-union contractor wins a contract previously held by a union contractor?

When a non-union contractor wins a contract previously held by a union contractor covered by a collective bargaining agreement, the successor (non-union) contractor is also obligated to ensure that all service employees are paid no less than the wages and benefits to which the employees would have been entitled for the first year of the successor contract. The obligation of the successor contractor is limited to the wage and fringe benefit requirements of the predecessor's collective bargaining agreement and does not extend to other items such as seniority, grievance procedures, work rules, overtime, etc.

2.3.9 Under what circumstances would a CBA not be used to establish a prevailing wage?

Prevailing wage determinations preclude arrangements by parties to a CBA who either separately or together, act with an intent to take advantage of the wage determination process (i.e. “Sweetheart Agreements.”) The primary example of these types of agreements involve contingent CBA provisions that attempt to limit the contractor’s obligations by such means as requiring issuance of a wage determination, requiring the contracting agency to include the wage determination in the contract, or requiring the contracting agency to

adequately reimburse the contractor. Such contingent arrangements evidence an intent to take advantage of the wage determination scheme under SCA, and therefore generally reflect a lack of arm's length negotiations. If the DOL finds that a CBA was not entered into as a result of arm's length negotiations, the DOL could issue a prevailing wage determination that ignores the CBA.²

2.4 The Fair Labor Standards Act (FLSA) and the issue of overtime pay for observers

In a November 13, 2003, memo from William Hogarth to NOAA General Counsel, NMFS takes the position that contracted fisheries observers are non-exempt from coverage under the Fair Labor Standards Act (FLSA) by virtue of their status as technicians, and therefore are eligible for overtime pay. The memo is provided as [Appendix B](#). The memo recommends that NMFS request new wage determinations from the DOL that take into account NMFS's position that observers are entitled to overtime pay under the FLSA. The memo also takes the position that contracted observers working in the Exclusive Economic Zone (EEZ) also should be entitled to the prevailing wages and overtime pay required by the SCA and FLSA, respectively, even though both Acts do not extend into the international waters of the EEZ. The effect of this position by NMFS is that all observers operating under direct Federal contracts in the North Pacific would be entitled to overtime pay under the FLSA. (The Council's response to this memo is provided as [Appendix A](#).)

2.4.1 What is the Fair Labor Standards Act (FLSA)?

The FLSA is the law that establishes minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in Federal, State, and local governments. Covered nonexempt workers are entitled to a minimum wage of not less than \$5.15 an hour. Overtime pay at a rate of not less than one and one-half times their regular rates of pay is required after 40 hours of work in a workweek. The FLSA also contains numerous exemptions to the overtime requirements for various classes of workers.

2.4.2 What is the professional exemption and why did NMFS determine that it does not apply to observers?

Section 13(a)(1) of the FLSA exempts executive, administrative, professional, and outside sales employees from the minimum wage and overtime requirements of the FLSA, provided they meet certain tests regarding job duties and responsibilities and are compensated "on a salary basis" at not less than stated amounts.

The professional exemption is applicable to employees who perform work requiring advanced knowledge and education, work in an artistic field which is original and creative, work as a teacher, or work as a computer system analyst, programmer, software engineer, or similarly skilled worker in the computer software field; who regularly exercise discretion and judgment; who perform work which is intellectual and varied in character, the accomplishment of which cannot be standardized as to time; who receive a salary which meets the requirements of the exemption (except doctors, lawyers, teachers and certain computer occupations); and who do not devote more than 20% of their time to work other than that described above.

In making its determination that observers are "technicians" rather than professionals, and therefore not exempt from the overtime provisions of the FLSA, the National Observer Program, in consultation with the

²"Prevailing Wage Resource Book," US Department of Labor, Employment Standards Administration, Wage and Hour Division. Section 4(c) page 1.

National Observer Program Advisory Team, considered both the duties and responsibilities of fisheries observers as well as past recruitment actions for Federal fisheries observers.

The duties and responsibilities of fisheries observers involve adhering to routine sampling protocols that are planned and managed by professional employees. Fisheries observers perform these duties unsupervised, but all work is carefully reviewed for completeness and accuracy by professional biologists. Although most of the contracted observer programs currently require that observers have a professional degree (usually a Bachelor’s degree in a biological science) as an eligibility standard for recruitment by the contracted observer service provider, specialized experience can be substituted for education. Observers then receive up to three weeks of specialized training, which must be completed to the satisfaction of the program before observers are certified to be deployed aboard fishing vessels and in processing plants.

Based on this description of observer duties and responsibilities, NMFS determined that observers fail to meet the professional exemption and should be more accurately classified as non-exempt technicians.

2.4.3 Could the DOL’s proposed changes to the professional exemption criteria affect NMFS’s determination?

On March 31, 2003, the DOL published an Advance Notice of Proposed Rulemaking that would implement sweeping changes to the regulations implementing the FLSA. Among other things, the proposed changes would modify the professional exemption to overtime pay requirements. The public controversy surrounding these proposed changes led to efforts in Congress to prevent the DOL from implementing its proposed changes in 2003. Early versions of the same omnibus spending bill that contained the crab rationalization program also contained a provision that would have prevented the DOL from issuing new overtime pay regulations. However, this provision was stripped from the omnibus spending bill before passage, meaning that the DOL is free to issue new regulations governing the overtime provisions of the FLSA.

To date, the DOL has not issued final regulations that would modify the overtime provisions of the FLSA, and has not indicated when such regulations might be issued or how they might differ from those proposed in March 2003. Therefore, all that can be provided at this point is a comparison of the proposed changes from March 2003 and their effects on the professional exemption criteria. The following table provides a side-by-side comparison of the existing and proposed (as of March 2003) criteria for the professional exemption.

Side-by-side comparison of the proposed changes to the exemption for learned professional employees³

	Current long test	Current short test	Proposed standard test
Minimum Salary	\$155 per week	\$250 per week	\$425 per week
Duties	<p>Primary duty of performing work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study.</p> <p>Consistently exercises discretion and judgment.</p> <p>Performs work that is predominantly intellectual and</p>	<p>Primary duty of performing work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study.</p> <p>Consistently exercises discretion and judgment.</p>	<p>Primary duty of performing office or non-manual work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience.</p>

³From The DOL’s Web Site: http://www.dol.gov/_sec/media/speeches/541_Side_By_Side.htm

The proposed changes would eliminate the criteria that the professional employee “consistently exercises discretion and judgment,” and would also add language explicitly stating that work experience can be substituted for higher education. As stated in the Hogarth memo (11/13/03), NMFS’s determination that observers are technicians and not professionals was based in part on the fact that an observer’s duties do not consistently require discretion and judgement, and also on the fact that observers are allowed to substitute experience for education. At this point, it is premature to assume that the proposed changes, if passed, would cause NMFS to change its stated position that observers are technicians and not professionals. However, if the proposed changes to the criteria for the professional exemption are adopted, it is possible that NMFS would re-examine its position to determine whether or not observers meet the revised definition of professional employees.

2.5 What are the possible effects of the SCA and FLSA on observer compensation?

At this point it is not possible to determine exactly what effects the SCA and FLSA would have on observer compensation in the North Pacific groundfish fisheries for several reasons. First, because of the existence of collective bargaining agreements governing a majority of observers working in the North Pacific, and second, because the DOL criteria for the professional exemption to the overtime requirements of the FLSA are currently under revision.

At one end, salaries could remain unchanged if DOL defaults to the current collective bargaining agreement wage that the prevailing wage is the current union wage based on the principle of “Union Dominance” and if it is determined that observers fall under the professional exemption as it is proposed to be revised. At the other extreme, salaries could increase substantially if DOL determines that observers are entitled to the equivalent GS-scale wage for Federal employees and also entitled to overtime under the FLSA.

Part of the difficulty in determining how both the SCA and FLSA will affect observer compensation is that the agencies involved have a great deal of discretion in determining how both laws would apply. In the case of the SCA, the DOL is ultimately responsible for establishing a prevailing wage on a contract-by-contract basis. In the case of the FLSA, proposed changes to the overtime exemption for professional employees could potentially affect NMFS’s 2003 determination that observers are categorized as “technicians” under the FLSA and are therefore entitled to overtime pay. However, it should be emphasized that the proposed new criteria, while providing an employer with more latitude to classify employees as professionals, does not require that they do so. A cautious employer could continue to pay overtime for employees that potentially could be classified as exempt under the proposed new criteria.

Finally, when employees reside at an employee’s place of business as is the case at least indirectly for most observers, the FLSA provides employers with considerable flexibility to establish rules to determine when an observer is on-duty and off-duty. In the event that NMFS maintains its position that observers are technicians and entitled to overtime pay, the specific work rules governing on-duty and off-duty time have yet to be developed for observers in the North Pacific. It is therefore difficult to estimate how many hours per week the average observer would work in each individual fishery.

3.0 New decision points

During the development of the Council’s first set of alternatives for observer program restructuring in 2003, staff provided a series of decision points that related primarily to the scope of the program and the details of the fee collection program. If the Council accepts NMFS’s recommendation that the analysis consider a program-wide restructuring to address observer performance and data quality issues, several new decision

points emerge and previous decision points become less relevant. The following are some new decision points raised by NMFS's recommendation that the observer program restructuring include all fisheries under the Council's jurisdiction.

1. *Should the Council revise its Problem Statement as recommended by NMFS?*

In its January letter to the Council, NMFS provided the Council with suggested changes to the problem statement that the Council adopted in February 2003. NMFS' suggested changes were identified above in the introduction and the letter in its entirety is provided as Appendix C.

2. *Should the Council expand upon its previous alternatives by adding an alternative for comprehensive restructuring of the entire North Pacific Observer Program or should it develop a new suite of alternatives that are consistent with NMFS's position that any restructuring effort must be comprehensive?*

This is a crucial question that must be answered before a revised analysis can proceed. If the Council chooses to simply add a new alternative to the existing suite of alternatives it could be signaling to the public and NMFS that it does not necessarily concur with NMFS's concerns and wishes to keep alternatives on the table that would result in a hybrid program with some fisheries operating under the new system and major BSAI fisheries continuing to operate under the current "pay-as-you-go" system for the foreseeable future. If, however, the Council accepts NMFS's concerns about the potential problems with a hybrid program, and adopts a revised problem statement, then the Council's previous alternatives may no longer be relevant and a new suite of alternatives may be in order.

3. *Should a new comprehensive alternative(s) establish a uniform fee collection and deployment system for all fisheries or should the program be tailored to specific circumstances in different fisheries?*

Ultimately there are two fundamentally different approaches for recovering the costs of observer coverage: (1) fees based on the amount or value of fish landed, and (2) fees based on the amount of coverage received. Under the previous Research Plan, the participants in all of the fisheries under the Council's jurisdiction were subject to the same fee collection program based on the ex-vessel value of landed catch, and the same system for deployment of observers. However, there are no legal or operational reasons for requiring that all fisheries operate under the same system. In fact, due to the wide variety of monitoring issues in different fisheries, it may be appropriate to consider developing different fee collection and deployment systems for different fisheries or classes of vessels. For example, small vessels with less than 100% coverage could operate under an ex-vessel value fee program under which all vessels pay the same rate for observer coverage regardless of whether they carry an observer or not. At the same time, larger vessels with 100% or greater coverage levels could continue to operate under some type of modified billing system where they are billed through a third party for their actual number of coverage days.

The previous draft analysis of observer restructuring alternatives examined a variety of fee types and concluded that user fees based on the ex-vessel value of landed catch were the most appropriate funding source for a program focused primarily on the GOA. However, with the expansion of the program to include the large-scale fisheries of the BSAI, other types of fees may merit consideration.

Possible ways to break out the fisheries into separate programs include the following:

- Separate systems by area: BSAI vs GOA
- Separate systems by processing mode: Catcher processors vs catcher vessels

- Separate systems by fishery as defined by target species and/or gear type: (AFA pollock, cod freezer longline, H&G flatfish, GOA groundfish etc.)
- Separate systems by coverage level: One program vessels with less than 100% coverage and a separate program for all vessels and processors that have 100% or greater coverage requirements.

4. Which type of fee program should apply to which fisheries?

At least two types of fee systems are viable alternatives in the North Pacific. Fees based on the ex-vessel value of landed catch, and fees based on the number of fishing days or coverage days.

Fee based on percentage of the ex-vessel value of landed catch. This is the most commonly-used type of fee in the North Pacific. Both the original Research Plan and the halibut/sablefish IFQ cost-recovery program used fees based on the ex-vessel value of landed catch. The advantages to such a fee are that it is broad-based, perceived to be equitable, and roughly correlated with each operation's ability to pay and level of participation. A fee based on the ex-vessel value of landed catch would be relatively easy to monitor and collect because much of the information necessary to assess such fee is already collected by NMFS. The biggest problem with such a program is that revenues generated may not exactly match coverage needs. The total ex-vessel revenues generated by a fishery in a particular year cannot be predicted in advance, because future harvests and future prices are unknown. In addition, the total amount of required coverage for a fishing year also may not be known in advance because the number of participants and numbers of fishing days varies from year to year and cannot be predicted with a great deal of precision. For this reason, there is no way to know in advance whether a particular fee percentage will generate sufficient revenue to fund a desired level of coverage. This may not be a problem in fisheries where the level of coverage is variable. However, it could generate problems in fisheries such as the AFA pollock fishery, in which coverage levels are mandated by statute.

Fee based on fishing days or coverage days. Since a vessel's coverage level is directly associated with its number of fishing days, a fee program could be based on each vessel's number of fishing days and desired coverage level. This type of approach was initially rejected when the analysis was focused primarily on the GOA because such an approach does not address the problem of disproportionate costs that plagues the current pay-as-you-go program. In effect, vessels would be charged for their observer coverage in a very similar manner to how they are charged today, except that NMFS would be assessing the fee directly (or through a third-party contractor). Such a fee would disproportionately affect smaller vessels and lower-volume fixed gear vessels relative to high-volume trawl vessels. Furthermore, if a daily fishing fee is linked to coverage levels in a particular fishery, then every decision by NMFS to modify coverage levels would result in fee increases or decreases and require lengthy analysis and rulemaking. This could severely restrict the ability of NMFS to modify coverage levels in a timely manner to respond to changing data needs.

However, the concerns with a fee based on the number of fishing days or coverage days relate primarily to smaller-scale fisheries where coverage levels are less than 100%. This type of fee may have considerable merit in the large-scale fisheries in the BSAI where coverage levels are 100% or greater. If coverage levels in large-scale BSAI fisheries remain fixed in regulation and are not subject to annual and inseason adjustments as is contemplated in the GOA, then many of the arguments against such a system are not applicable. In fact, a fee system in which vessels are billed directly by NMFS (or a third party contractor) for their actual observer coverage may be the most optimal system for BSAI fisheries in which coverage levels will likely remain at 100% or greater. That is because such a system would ensure that the amount of fees collected exactly matches the cost of the coverage required.

5. *Should NMFS assess and collect fees directly or contract those activities to a third party “financial contractor” or billing service as suggested in the NMFS letter?*

In its January 2004 letter to the Council, NMFS recommends that a two-tier contracting system be explored for potential use in the North Pacific. Under such a system, NMFS would hire some type of financial contractor or billing service to collect fee payments from fishermen and processors and then would enter into separate contracts with observer providers to provide coverage. Although further legal review is necessary, such a system could possibly be implemented without additional statutory authority because NMFS would not be handling fee proceeds directly. This type of two-tiered contracting system could be incorporated into any of the alternatives under consideration. If the Council wishes to pursue this concept, it will at some point in the future need to be included explicitly into some or all of the alternatives.

The only current example of third-party contract service delivery model is in the Georges Bank Atlantic sea scallop fishery. That program is described in detail in Section 7. In that program, revenues are generated by a TAC set-aside system. All vessels wishing to fish in the Georges Bank closed area must notify the Program Administrator at least 5 days prior to departure and are either assigned an observer or granted a waiver for that fishing trip. Because the total coverage level is approximately 25%, vessels receive waivers for approximately 75% of their fishing trips. Vessels carrying observers are allowed to harvest an additional quantity of sea scallops during each fishing trip and the revenues from this additional harvest are submitted to the third party contractor, the National Fish and Wildlife Foundation (NFWF) which uses those proceeds to pay contractors for the coverage provided. Under the terms of the contract, NFWF receives 8% of the proceeds to cover overhead and the cost of administering the program.

At least one advantage to such a system is that it could avoid the statutory limitations that prevent the Council from implementing a fee program that is different from the original research plan. One obvious disadvantage is that it would impose an additional layer of overhead costs that would come out of fee proceeds. A system in which NMFS bills industry directly also would increase the level of overhead, however it is not necessarily the case that such costs would be paid for out of fee proceeds. Depending on how the program is designed, the overhead costs of a direct billing system could either be absorbed by NMFS or recovered by NMFS from fee proceeds. On the other hand, in a no-cost third party contract system, the only source of revenue to pay for overhead is the fee proceeds.

It should also be understood that a no-cost third party contract is still subject to the requirements of the SCA. Thus, this approach should not be considered as a way to avoid the observer compensation issues that arise with direct Federal contracting.

4.0 Hypothetical new alternatives.

- Caveats:
1. The following alternatives apply to all groundfish and halibut fisheries in the BSAI and GOA.
 2. The alternatives are independent of the decision about whether to use a two-tier (or no-cost) contract model whereby NMFS contracts with a financial institution to collect and disburse funds as suggested in the NMFS letter.
 3. The Council’s previous five alternatives remain on the table unless or until they are explicitly discarded.

- Alternative 6: Uniform ex-vessel value fee program (similar to old Research Plan). This alternative could be based on the existing statutory authority (and would be limited to 2%), or could be expanded in ways that would require additional statutory authority.
- Alternative 7: Uniform ex-vessel value fee program for “baseline” coverage with separate assessments for IFQ, CDQ, and co-op programs that require additional coverage for individual vessel monitoring. This program would have a relatively low and uniform ex-vessel value fee to provide baseline “open-access” coverage for all groundfish and halibut fisheries. The baseline coverage level would be that which is necessary to collect the basic fisheries data necessary to manage open access style fisheries. Specific fisheries that have higher coverage needs due to vessel-specific quotas (AFA co-ops, CDQ, bycatch co-ops, etc.) would have their additional coverage paid for through additional assessments. These additional assessments could be in the form of an additional ex-vessel fee assessment, or they could be some form of a modified pay-as-you-go fee with vessels billed directly for their additional coverage.
- Alternative 8: Separate programs for vessels with less than 100% coverage and vessels with 100% or higher coverage. Vessels with less than 100% coverage would pay an ex-vessel value fee and would be required to carry observers when requested by NMFS. Vessels with 100% coverage or greater would pay a modified pay-as-you-go type of fee to cover the direct costs of their observer coverage. This alternative would address cost disparities and increase deployment flexibility for vessels and fisheries with less than 100% coverage, while providing the least disruption to vessels and fisheries that currently have 100% or greater coverage requirements.
- Alternative 9. Separate programs for catcher/processors (C/Ps) and catcher vessels (CVs): Unlike the status quo in which coverage levels are based on vessel length, this alternative would divide C/Ps and CVs into separate programs with separate fee programs and coverage rules for each sector. Shoreside processors would be included in the CV category because observers on catcher boats often work jointly with plant observers.
- Alternative 10. Separate programs for individual fisheries defined by target species and/or gear type. This alternative would break down the groundfish fisheries of the North Pacific into different fishery categories that have different coverage needs (AFA co-ops, CDQ, freezer longline, H&G flatfish, GOA groundfish, etc.) and would establish separate fee assessments and coverage rules for each fishery. This type of program would probably be the most difficult to implement and operate and would raise complicated issues when vessels operate in more than one fishery. Vessels that operate in multiple fisheries would pay different fees depending on which fishery they are operating in at a given time.

5.0 New issues raised by expanding the program to all fisheries in the BSAI

5.1 Start-up funding

The start-up costs for Year One are many times higher if we include all of the BSAI fisheries in the program. Because Federal contracting rules require that the funds be in hand before the government enters into contracts, the cost of the first year’s program would likely need to be provided in advance. The estimated average annual cost to industry for groundfish observer coverage in the North Pacific was \$10.5 million for

the years 2000-2002. This estimate only includes the direct costs born by industry and does not include indirect costs or program management costs on the part of NMFS. Start-up costs on the order of \$10 million is likely to be significantly more difficult to acquire through the NMFS budget process than the far more modest \$1.2 million estimated start-up costs required for a program restructuring limited to just the GOA.

The problem of start-up costs may also be considered in the discussion of a modified pay-as-you-go contract system for vessels with 100% or greater coverage levels. Under such a system, vessels could be billed on a monthly or quarterly basis for their coverage needs and contractors could be paid on a rolling system that eliminates the need for a year's worth of start-up funds to be acquired in advance.

One sort of contracting model called "indefinite delivery/indefinite quantity" could reduce, but not eliminate, the amount of start-up costs required. Under this type of contract, NMFS would enter into a contract with an observer provider for an initial block of coverage days that could be expanded in the future as additional funds become available. The contractor provides a bid for the initial block of coverage and a rate for additional coverage that the contractor is willing to provide. Using this type of contract, NMFS could theoretically contract with observer providers for the first quarter of a fishing year with the option of continuing coverage for the remainder of the fishing year as funds become available.

Regardless of the type of contract, some level of start-up funding will be necessary prior to the start of the program. The three most viable sources of start-up funds are: (1) a one-time direct Federal subsidy, (2) implementing the fee collection prior to the start of the program, and (3) a Federal loan similar to the loan that funded the AFA buyout (of nine catcher processors) that would be paid off over time through fee revenues. At least two of these sources would require action by Congress.

5.2 Coverage levels for BSAI fisheries

New coverage issues arise with the expansion of the program to include all BSAI fisheries. The previous draft did not explore alternative coverage levels in the GOA, expecting that we would initially aim for the same overall level of coverage days in the short-term, but gaining the flexibility to shift coverage among vessel fleets as needed, with evaluation on a regular basis through the 'plan team approach.' Thus, the issue was mainly deferred to later analysis. However, this approach may not be possible in the BSAI because the management program is much more reliant on observer coverage in the BSAI, and (100% and greater) coverage levels are mandated by various statutes and program requirements. The large-scale BSAI fisheries are also far more dependent on observer coverage for their management than the inshore fisheries of the GOA where inseason management is based primarily on delivery reports by processors rather than at-sea catch estimates made by observers.

The Council and NMFS may have less flexibility to adjust coverage levels in BSAI fisheries to account for circumstances such as revenue shortfalls, especially in the AFA pollock fishery where catcher processors are required by statute to carry two observers anytime they fish for or process groundfish. For this reason, a program in which vessels with 100% or greater coverage requirements continue to pay for the direct costs of their own coverage through some sort of modified pay-as-you-go fee assessment may be preferable to an ex-vessel value fee. In this sense, one can ensure that revenues always match coverage needs.

5.3 Statutory issues

Previous discussion papers and draft analyses have identified the statutory barriers to some of the proposed changes to the Observer Program. At present, the only type of fee program authorized in statute is one based

on ex-vessel value with a 2% cap, and the fee must be assessed against all fishing vessels and processors, including those not required to carry an observer under the plan, participating in fisheries under the jurisdiction of the Council, including the North Pacific halibut fishery (MSA Section 313(b)(2)(F)). Although NOAA General Counsel has not yet provided a definitive legal opinion on the question, they have given preliminary indications that a fee program that covers only part of the North Pacific (such as one limited to the GOA) would require new statutory authority to implement. In addition, all but one of the strawman new alternatives would be inconsistent with these statutory restrictions. However, NMFS has given a preliminary indication that these statutory restrictions may be avoided under a two-tier contracting system in which a third party contractor or private billing service manages the fee collection aspect of the program and disburses funds to observer providers at the request of NMFS. However, a more definitive legal analysis of this issue is necessary.

However, the Council may continue to explore all reasonable alternatives at this point in the process regardless of whether or not they are consistent with existing statute. The Magnuson-Stevens Act will likely be reauthorized before a complete restructuring of the observer program is completed and NMFS has consistently recommended that the statutory fee collection authority be expanded to give regional Councils more flexibility in designing observer programs, including programs that use fees based on factors other than the ex-vessel value of landed catch.

5.4 Crossover issues

Crossover issues arise anytime more than one program is operating in the North Pacific and vessels switch from fishery to fishery or area to area where different programs are in effect. Crossover issues also could arise even if a single uniform program covers the entire North Pacific, if different contractors are responsible for providing coverage in different areas. Until specific alternatives are identified, it is impossible to describe in detail what sort of crossover issues will arise. However, as a general principle, the Council should strive to maintain as much consistency as possible between programs so that observer salaries, work rules, certification/decertification procedures, etc. are uniform throughout the North Pacific.

6.0 Data summaries for existing North Pacific fisheries

The following tables provide information on the number of vessels, ex-vessel value of harvests, observer days, and observer costs as a percentage of ex-vessel value for all of the individual fleets operating in the North Pacific groundfish and halibut fisheries. These mutually-exclusive fleet categories are based on the fleet definitions used in the programmatic groundfish SEIS. The estimated observer daily cost of \$350/day includes the current \$320/day average rate for Level 1 and Level 2 observers; an estimate of \$30/day for travel expenses passed on to industry by providers; but does not include the estimated \$15/day for meals that vessel operators provide to observers.

Table 6.1 Number of vessels that fished for groundfish and halibut in the BSAI and GOA from 2000-2002 by processing mode, permit type, and vessel class

SECTOR	PERMIT TYPE	VESSEL CLASS	GOA			BSAI		
			2000	2001	2002	2000	2001	2002
Catcher processor	Groundfish only	AFA CP >125				15	16	17
		Pot CP <125	1	1	2		2	2
		Longline CP < 125	14	11	11	14	14	12
		Longline CP > 125	8	8	11	27	30	30
		Pot CP > 125	3	1	2	8	5	3
		Trawl CP < 125	4	6	4	8	7	7
		Trawl CP > 125	14	12	12	15	15	15
	Halibut only	Longline CP < 125	26	26	19	13	8	15
		Longline CP > 125			1			1
	Catcher vessel	Groundfish & Halibut	AFA Trawl 60-124	1	1	1	1	1
AFA Diversified Trawl < 125			3	3	3	2	3	3
Non-AFA Trawl 60-124			14	13	14	4	1	3
Longline > 60			62	65	66	36	37	33
Pot > 60			32	29	27	14	13	15
Fixed Gear 33-59			508	470	456	48	58	54
Fixed Gear < 32			61	66	51	26	18	35
Unknown CV					1	0	0	1
Non-AFA Trawl < 60			21	22	21	2	2	2
Groundfish only			AFA Trawl > 125	2		2	31	30
		AFA Trawl 60-124	8	11	6	44	44	41
		AFA Diversified Trawl < 125	18	19	16	24	24	24
		Non-AFA Trawl 60-124	20	22	18	5	4	6
		Longline > 60	8	6	5	1	1	2
		Pot > 60	67	21	20	96	61	44
		Fixed Gear 33-59	121	86	88	7	13	13
		Fixed Gear < 32	50	40	25	10	13	11
		Unknown CV	9	5	8	1	8	11
		Non-AFA Trawl < 60	23	23	23		6	8
Halibut only		Longline > 60	6	5	3	2	2	1
		Pot > 60		2	1	1	3	3
		Fixed Gear 33-59	457	430	397	6	9	12
		Fixed Gear < 32	331	290	292	239	233	205

Table 6.2a 2000 Exvessel value of groundfish and halibut harvests by processing mode and vessel class

Year	Sector	Permit type	Vessel class	GOA exvessel values		BSA exvessel values	
				Groundfish	Halibut	Groundfish	Halibut
2000	Catcher processor	Groundfish only	AFA CP >125	0	0	122,320,105	0
			Pot CP <125	(confidential)	0	0	0
			Longline CP <125	8,745,901	0	13,545,968	0
			Longline CP >125	2,937,749	0	55,199,724	0
			Pot CP >125	(confidential)	0	1,717,824	0
			Trawl CP <125	1,840,905	0	10,920,104	0
			Trawl CP >125	5,733,890	0	50,782,665	0
			Halibut only	Longline CP <125	0	293,744	0
		Catcher vessel	Groundfish & Halibut	AFA Diversified Trawl <125	1,960,776	583,828	(confidential)
	AFA Trawl 60-124			(confidential)	(confidential)	(confidential)	(confidential)
	Fixed Gear <32			437,023	3,843,879	22,861	2,311,220
	Fixed Gear 33-59			35,682,207	49,875,665	1,517,801	8,518,491
	Longline >60			18,989,242	17,716,089	1,089,455	10,620,184
	Non-AFA Trawl 60-124			4,501,257	2,908,963	(confidential)	(confidential)
	Pot >60			4,405,791	8,457,547	1,012,559	3,757,597
	Non-AFA Trawl <60			5,388,654	2,403,555	(confidential)	(confidential)
	Groundfish only		AFA Diversified Trawl <125	11,952,758	0	11,122,238	0
			AFA Trawl >125	(confidential)	0	80,274,369	0
			AFA Trawl 60-124	1,259,401	0	80,054,508	0
			Fixed Gear <32	629,925	0	77,120	0
			Fixed Gear 33-59	2,925,219	0	91,871	0
			Longline >60	413,557	0	(confidential)	0
			Non-AFA Trawl 60-124	10,562,498	0	763,637	0
			Pot >60	5,507,326	0	11,162,173	0
			Unknown CV	125,770	0	42	0
			Non-AFA Trawl <60	5,065,017	0	0	0
			Halibut only	Fixed Gear <32	0	3,522,331	0
Fixed Gear 33-59				0	11,879,717	0	368,882
Longline >60	0	588,039		0	(confidential)		
Pot >60	0	(confidential)		0	(confidential)		
2000 Total			129,942,864	102,109,063	445,247,526	29,381,405	

Table 6.2b 2001 Exvessel value of groundfish and halibut harvests by processing mode and vessel class

Year	Sector	Permit type	Vessel class	GOA exvessel values		BSAI exvessel values	
				Groundfish	Halibut	Groundfish	Halibut
2001	Catcher processor	Groundfish only	AFA CP >125	0	0	105,731,614	0
			Pot CP <125	(confidential)	0	(confidential)	0
			Longline CP < 125	7,261,463	0	11,856,431	0
			Longline CP > 125	1,981,111	0	53,707,690	0
			Pot CP > 125	(confidential)	0	1,595,046	0
			Trawl CP < 125	1,862,884	0	6,768,178	0
			Trawl CP > 125	4,630,044	0	55,890,447	0
			Halibut only	Longline CP <125	0	210,171	0
	Catcher vessel	Groundfish & Halibut	AFA Diversified Trawl < 125	1,294,978	474,633	1,134,899	0
			AFA Trawl 60-124	(confidential)	(confidential)	(confidential)	0
			Fixed Gear < 32	544,670	3,135,336	20,319	1,088,483
			Fixed Gear 33-59	28,456,447	43,281,210	2,233,583	6,926,378
			Longline > 60	15,197,399	16,268,185	1,195,182	8,165,657
			Non-AFA Trawl 60-124	3,847,991	2,013,961	0	(confidential)
			Pot > 60	1,988,781	6,222,328	1,464,585	2,342,088
			Non-AFA Trawl < 60	5,138,540	2,760,966	(confidential)	0
		Groundfish only	AFA Diversified Trawl < 125	9,166,697	0	10,151,906	0
			AFA Trawl > 125	0	0	82,653,439	0
			AFA Trawl 60-124	1,135,100	0	68,302,001	0
			Fixed Gear < 32	272,581	0	356,244	0
			Fixed Gear 33-59	1,360,584	0	49,137	0
			Longline > 60	323,369	0	(confidential)	0
			Non-AFA Trawl 60-124	10,902,171	0	447,491	0
Halibut only	Pot > 60	725,083	0	6,772,602	0		
	Unknown CV	423,842	0	1,220,154	0		
	Non-AFA Trawl < 60	4,644,110	0	613,655	0		
2001 Total				102,045,280	87,725,600	413,970,408	23,057,136

Table 6.2c 2002 Exvessel value of groundfish and halibut harvests by processing mode and vessel class

Year	Sector	Permit type	Vessel class	GOA exvessel values		BSAI exvessel values	
				Groundfish	Halibut	Groundfish	Halibut
2002	Catcher processor	Groundfish only	AFA CP >125	0	0	117,901,815	0
			Pot CP <125	(confidential)	0	(confidential)	0
			Longline CP < 125	8,118,920	0	8,731,770	0
			Longline CP > 125	3,769,147	0	36,220,721	0
			Pot CP > 125	(confidential)	0	793,957	0
			Trawl CP < 125	1,704,814	0	9,943,244	0
			Trawl CP > 125	5,496,057	0	51,083,935	0
			Halibut only	Longline CP < 125	0	289,435	0
		Longline CP > 125	0	(confidential)	0	(confidential)	
	Catcher vessel	Groundfish & Halibut	AFA Diversified Trawl < 125	1,103,478	524,390	917,138	0
			AFA Trawl 60-124	155,362	41,586	825,569	0
			Fixed Gear < 32	728,245	3,573,991	37,497	938,005
			Fixed Gear 33-59	30,527,725	51,050,344	2,080,651	8,153,068
			Longline > 60	14,641,362	17,088,960	1,286,262	8,440,685
			Non-AFA Trawl 60-124	2,490,957	2,723,868	524	262,811
			Pot > 60	1,550,246	7,714,376	2,003,148	2,775,880
			Unknown CV	7,463	0	150,394	0
			Non-AFA Trawl < 60	3,612,709	3,657,440	(confidential)	0
			Groundfish only	AFA Diversified Trawl < 125	5,051,771	0	12,010,964
		AFA Trawl > 125		(confidential)	0	71,633,635	0
		AFA Trawl 60-124		360,682	0	57,670,523	0
		Fixed Gear < 32		294,811	0	340,470	0
		Fixed Gear 33-59		1,310,825	0	236,653	0
Longline > 60	886,332	0		(confidential)	0		
Non-AFA Trawl 60-124	6,878,418	0		593,741	0		
Pot > 60	1,285,988	0		5,462,919	0		
Halibut only	Unknown CV	103,924	0	2,913,369	0		
	Non-AFA Trawl < 60	1,894,490	0	1,636,932	0		
	Fixed Gear < 32	0	3,505,664	0	3,126,382		
	Fixed Gear 33-59	0	10,307,882	0	1,259,066		
	Longline > 60	0	105,118	0	(confidential)		
	Pot > 60	0	(confidential)	0	532,745		
2002 Total			92,472,766	100,927,626	385,617,352	26,125,742	

Table 6.3a Numbers of observer days and estimated observer cost as a percentage of exvessel value by year, area, sector, permit type, and vessel class.
 Observer costs are based on an estimated direct cost of \$350/day.

Year	Sector	Permit type	Vessel class	GOA		BSAI	
				Observer days	% of exvessel value	Observer days	% of exvessel value
2000	Catcher processor	Groundfish only	AFA CP >125			4,840	1.38%
			Pot CP <125	27	4.18%		
			Longline CP < 125	311	1.25%	1,573	4.06%
			Longline CP > 125	116	1.38%	6,571	4.09%
			Pot CP > 125	56	4.03%	155	3.17%
			Trawl CP < 125	156	2.97%	704	2.25%
			Trawl CP > 125	301	1.84%	4,231	2.92%
			Hallbut only	Longline CP < 125	0	0.00%	0
	Catcher vessel	Groundfish & Hallbut	AFA Trawl 60-124	0	0.00%	40	0.73%
			AFA Diversified Trawl < 125	84	1.15%	15	1.27%
			Non-AFA Trawl 60-124	271	1.26%	0	0.00%
			Longline > 60	603	0.58%	275	0.82%
			Pot > 60	164	0.45%	78	0.57%
			Fixed Gear 33-59	8	0.00%	0	0.00%
			Fixed Gear < 32	0	0.00%	0	0.00%
			Non-AFA Trawl < 60	0	0.00%	0	0.00%
		Groundfish only	AFA Trawl > 125	0	0.00%	4,389	1.91%
			AFA Trawl 60-124	48	1.33%	1,988	0.87%
			AFA Diversified Trawl < 125	571	1.67%	499	1.57%
			Non-AFA Trawl 60-124	573	1.90%	32	1.47%
Hallbut only	Longline > 60	0	0.00%	10	7.43%		
	Pot > 60	180	1.14%	563	1.77%		
	Fixed Gear 33-59	0	0.00%	0	0.00%		
	Fixed Gear < 32	0	0.00%	0	0.00%		
	Non-AFA Trawl < 60	0	0.00%	0	0.00%		
	Longline > 60	0	0.00%	0	0.00%		
	Pot > 60	0	0.00%	0	0.00%		
	Fixed Gear 33-59	0	0.00%	0	0.00%		
Fixed Gear < 32	0	0.00%	0	0.00%			
2000 Total				3,469	0.52%	26,831	1.51%

Table 6.3a Numbers of observer days and estimated observer cost as a percentage of exvessel value by year, area, sector, permit type, and vessel class.
Observer costs are based on an estimated direct cost of \$350/day.

Year	Sector	Permit type	Vessel class	GOA		BSAI	
				Observer days	% of exvessel value	Observer days	% of exvessel value
2001	Catcher processor	Groundfish only	AFA CP >125			5,817	1.93%
			Pot CP <125	17	3.85%	18	4.02%
			Longline CP < 125	320	1.54%	1,404	4.14%
			Longline CP > 125	109	1.93%	7,043	4.59%
			Pot CP > 125	42	2.02%	233	5.11%
			Trawl CP < 125	173	3.25%	576	2.98%
			Trawl CP > 125	161	1.21%	3,949	2.47%
			Halibut only	Longline CP < 125	0	0.00%	0
	Catcher vessel	Groundfish & Halibut	AFA Trawl 60-124	0	0.00%	33	0.81%
			AFA Diversified Trawl < 125	94	1.86%	32	0.99%
			Non-AFA Trawl 60-124	289	1.73%	0	0.00%
			Longline > 60	556	0.62%	221	0.83%
			Pot > 60	125	0.53%	175	1.61%
			Fixed Gear 33-59	11	0.01%	0	0.00%
			Fixed Gear < 32	0	0.00%	0	0.00%
			Non-AFA Trawl < 60	0	0.00%	0	0.00%
		Groundfish only	AFA Trawl > 125			4,057	1.72%
			AFA Trawl 60-124	46	1.42%	1,832	0.94%
			AFA Diversified Trawl < 125	524	2.00%	455	1.57%
			Non-AFA Trawl 60-124	689	2.21%	51	3.99%
Longline > 60	0		0.00%	305	66.35%		
Pot > 60	37		1.79%	563	2.91%		
Fixed Gear 33-59	0		0.00%	0	0.00%		
Fixed Gear < 32	0		0.00%	0	0.00%		
Halibut only	Unknown CV	26	2.15%	0	0.00%		
	Non-AFA Trawl < 60	0	0.00%	0	0.00%		
	Longline > 60	0	0.00%	0	0.00%		
	Pot > 60	0	0.00%	0	0.00%		
		Fixed Gear 33-59	0	0.00%	0	0.00%	
		Fixed Gear < 32	0	0.00%	0	0.00%	
2001 Total			3,219	0.58%	27,771	1.67%	

Table 6.3a Numbers of observer days and estimated observer cost as a percentage of exvessel value by year, area, sector, permit type, and vessel class.
Observer costs are based on an estimated direct cost of \$350/day.

Year	Sector	Permit type	Vessel class	GOA		BSAI	
				Observer days	% of exvessel value	Observer days	% of exvessel value
2002	Catcher processor	Groundfish only	AFA CP >125			5,236	1.55%
			Pot CP <125	12	11.44%	43	8.13%
			Longline CP < 125	297	1.26%	1,455	5.83%
			Longline CP > 125	197	1.83%	6,523	6.30%
			Pot CP > 125	55	5.85%	107	4.72%
			Trawl CP < 125	206	4.24%	597	2.10%
			Trawl CP > 125	217	1.36%	4,324	2.96%
			Halibut only				
		Longline CP < 125	0	0.00%	0	0.00%	
		Longline CP > 125	0	0.00%	0	0.00%	
	Catcher vessel	Groundfish & Halibut	AFA Trawl 60-124	11	1.95%	21	0.89%
			AFA Diversified Trawl < 125	109	2.34%	32	1.22%
			Non-AFA Trawl 60-124	278	1.87%	0	0.00%
			Longline > 60	469	0.52%	195	0.70%
			Pot > 60	83	0.31%	124	0.91%
			Fixed Gear 33-59	11	0.00%	0	0.00%
			Fixed Gear < 32	0	0.00%	0	0.00%
			Non-AFA Trawl < 60	0	0.00%	0	0.00%
		Groundfish only	AFA Trawl > 125	3	0.78%	3,816	1.86%
			AFA Trawl 60-124	19	1.84%	1,811	1.10%
AFA Diversified Trawl < 125	331		2.29%	460	1.34%		
Non-AFA Trawl 60-124	571		2.91%	90	5.31%		
Longline > 60	0		0.00%	270	12.21%		
Pot > 60	56		1.52%	525	3.36%		
Fixed Gear 33-59	0		0.00%	0	0.00%		
Fixed Gear < 32	0		0.00%	0	0.00%		
Halibut only	Longline > 60	0	0.00%	0	0.00%		
	Pot > 60	0	0.00%	0	0.00%		
	Fixed Gear 33-59	0	0.00%	0	0.00%		
	Fixed Gear < 32	0	0.00%	0	0.00%		
2002 Total			2,924	0.53%	26,533	1.71%	

7.0 The Northeast Region Sea Scallop Observer Program: An example of a resource-funded third party agreement

For the first time NMFS used a new service delivery model in 1999 termed the “Resource Funded Third Party Agreement” because it uses a portion of a fishery’s Total Allowable Catch to fund the observer program. This program was designed to provide coverage on sea scallop vessels fishing in a closed area of the Georges Bank.

The Atlantic sea scallop fishery targets Atlantic sea scallops with dredge gear. Other commercially landed species include monkfish, winter flounder, summer flounder, and yellowtail flounder. Bycatch species include crabs, various hakes as well as several flounder species that may be discarded for regulatory reasons. Sea turtles have been caught or struck. There has been no bycatch of marine mammals or sea birds in observed hauls.

A total of 250 vessels possess limited entry permits for the Atlantic sea scallop fishery. In 1999 approximately 5.5 million pounds of sea scallop meat were landed. In 1999, each vessel was allowed 3 trips with catch not to exceed 10,000 pounds. If an observer was on board each vessel was allowed 200 pounds extra per day and the sale of those extra scallops was used by the vessel to pay the observers. When the quota for scallops and bycatch quota for yellowtail flounder were not reached by October 5, all vessels were allowed an additional 3 trips and the fishery remained open until the bycatch quota for yellowtail flounder was caught.

7.1 TAC set-aside funding mechanism

Funding for observer deployments is provided by allocation of sea scallop resources specified for that purpose. The TAC of sea scallops from the Georges Bank Closed Area II was determined to be 4,300 metric tons of meat weight. One percent of that or 43 metric tons were added to the TAC and set aside for the funding of observer costs.

None of the funds derived from sale of the scallops are used to defray cost incurred by NMFS. Those costs are paid from funds originally allocated for other purposes. The costs included NEFSC staff time, equipment, supplies, training contracts, observer deployments made by the NEFSC’s observer contractor to supplement the supply of new sea scallop observers and any deployments made by the new sea scallop observers prior to the implementation of the agreement with NFWF.

From 1999 - 2002, each vessel taking an observer is allowed to harvest 200 additional pounds of sea scallop meat for each day an observer was assigned to the vessel. Vessels then sold the additional catch allocation at prevailing dockside prices. At a minimum dockside price of \$5.00 per pound, this resulted in vessels making at least \$1,000 in additional revenue per day. At the completion of the trip, each vessel owner or designee sent a check to the NFWF for \$425 for each day an observer was on the vessel. Observers provided invoices to the FSB itemizing their deployment days. Upon verification of the invoices by a member of the FSB staff, the FSB Chief authorized payment by NFWF to the observers. Any amount of money remaining in the NFWF fund after all compensations were made to observers were divided proportionately among all vessels which contributed to the fund. In 2003, vessels were allowed to harvest \$300 additional pounds of sea scallop meat.

7.2 Third party agreement with the National Fish and Wildlife Foundation

In 1999, the Northeast Fisheries Science Center (NEFSC) signed an agreement with the National Fish and Wildlife Foundation (NFWF) to receive funds from the sale of allocated resources by the fishing industry for observer salaries and to disburse those funds to the observers. The payments were made to observers who were deployed on sea scallop vessels fishing in an area previously closed to mobile gear fishing activity. The observers were recruited, trained under contract, and deployed by staff of the NEFSC Fisheries Sampling Branch (FSB).

The Statement of Work (SOW) for the current agreement was developed by staff of the Fisheries Ecosystem Monitoring and Analysis Division (FEMAD) and the FSB with help from the US Department of Commerce, Eastern Administrative Support Center (EASC), Procurement Division. A sole source justification was made by NMFS in order to procure services in time to open the fishery, so no Request for Proposals (RFP), advertising or receipt of bids was conducted by EASC. The agreement was negotiated directly by EASC with NFWF and NMFS did not exercise any direct management control over the process. The Agreement did receive extensive legal review by NOAA General Council and it was determined that it was not a contract or grant. The Agreement was awarded to NFWF in July 1999 and work under the terms of the agreement began with trips which ended 30 July 1999. NFWF was paid a flat fee of 8% of the payments made to the observers. The agreement was not in place prior to the opening of the fishery and funds to cover the costs of deployments for the first six weeks of the fishery were reallocated from other NMFS accounts.

Observers submitted invoices to FSB following each deployment. FSB staff reviewed and validated the invoices by comparing the claims against trip records. The validated invoice from the observer with the vessel name and dates of deployment was provided to NFWF by FSB with a cover letter requesting that payment be made to the observer whose invoice was attached. Captains/owners sent checks directly to NFWF along with the vessel name and address for the payment of the \$425 per observer day. NFWF sent receipts for payments received to each vessel.

Data collected on each trip were mailed by the observer to the FSB after each trip, unless the observer deployed directly to another vessel. Data were collected using highly simplified versions of the logs regularly used by observers covering the scallop fishery and those data were primarily concerned with the monitoring of yellowtail flounder bycatch. Thus, extensive data on other species and age structures were not collected by observers in this program.

7.3 Staff support by NMFS

The NEFSC Fisheries Sampling Branch has a full time permanent staff of nine personnel for overall management and support of all northeast regional observer programs. The staff consists of one GS-14 Fishery Biologist Branch Chief, one GS-12 Statistician, five GS-9 through GS-12 Fishery Biologists, one Computer Assistant and one Secretary/Office Automation Specialist. FSB staff dedicated to this Sea Scallop Dredge Fishery primarily consisted of the Branch Chief and one GS-12 Fishery Biologist with additional help primarily with recruiting and training from FSB staff.

The GS-12 Statistician recruited observers with help from other FSB staff. Observer candidates were recruited by advertisements in newspapers, contacts with the fishing industry, contacts in the fisheries academic community and contacts with observer programs in other regions. An application format was used with a simple listing of past fishing vessel employment and/or qualifying fisheries related formal education. No background checks nor contacts with references were made. A committee of three NEFSC staff headed

by the GS -12 Statistician reviewed the applicants and selected candidates based on availability for specific training sessions combined with fishing experience and education in fisheries related fields.

Observers were not employed by NMFS. Observers were individually contracted for the duration of training and deployments using blanket purchase agreements. Blanket purchase agreements remained in effect for observer deployments until the agreement with NFWF became effective. After the agreement went into effect, blanket purchase agreements were used to pay observer candidates only during training. Observers were treated as though they were individual contractors even though they did not have contracts with NMFS, NFWF or the scallop industry.

7.3.1 Training

FSB staff developed a brief training agenda outline and provided some limited staff to help train observers. Four training sessions for observers were subsequently conducted under contract with the Manomet Center for Conservation Sciences. Manomet charged NMFS \$78,978 for conducting the four training courses, each of which lasting five days including one day devoted to safety, first aid and CPR. The U.S. Coast Guard vessel safety inspection program staff provided safety training at no cost to Manomet or NMFS. Manomet determined if the observer passed the course based on tests they developed and administered. No at-sea training was provided.

Trainees were contracted by the NEFSC and paid \$200 per day or \$1,000 for attending the 5-day training session. All candidates who were accepted into the training program verbally indicated they would accept deployments prior to start of training. Of 42 selected applicants, two did not show and were replaced, two dropped out during training, four passed the course but never deployed, 10 passed the course and deployed only once and 20 passed the course and were deployed more than once.

Cost of the Manomet training contract, individual observer training contracts, travel and time lost from other duties by FSB staff during training were not reimbursed by the industry.

7.3.2 Equipment and Supplies

FSB staff purchased, stored and issued all observer equipment. Observers were issued basic equipment, including safety equipment (survival suit, EPIRB, strobe light, etc.), sampling gear (length frequency boards, weight scales, etc.), field guides and standardized forms following training. As equipment and supplies were used, broken or otherwise in need of replacement, NMFS issued replacements. FSB staff maintained inventories of equipment and supplies. Sign-out sheets were used by each observer to record issued gear and supplies. Observers turned in their gear following their last deployment. No control mechanisms were in place to assure they did and it required repeated phone calls and threats of prosecution to get equipment back from the one observer who did not turn it in.

Funds for purchase of equipment and supplies were not reimbursed from the sale of allocated resources. Equipment and supplies were purchased using funds from other NEFSC accounts. As no mechanism was in place to provide for the reimbursement of cost incurred by NMFS and there was risk of mis-allocating government funds meant for other projects.

7.4 Observer deployments and method for determining which vessels receive coverage

The goal of the program was to assign observers to 25% of all vessel trips in order to collect sufficient data to determine when the yellowtail flounder bycatch quota would be met. Vessel operators called in their daily sea scallop catch reports which were used to monitor the status of the sea scallop quota.

Vessels sailed from Virginia, New Jersey, New York, Connecticut, Massachusetts, New Hampshire and Maine with the majority sailing from New Bedford, Massachusetts, the dominant sea scallop port of landing in the northeast. Because of the distance to the Georges Bank site, many vessels from ports south of central New Jersey landed their catches in New Bedford. Observers worked out of their homes in Massachusetts, New Hampshire and Maine. No observers were successfully recruited and trained from New Jersey or Virginia, states other than Massachusetts with large scallop fleets.

Initial assignment of observers was done by random selection of vessels expected to participate and they were notified at the time the fishery opened in mid June. Subsequently, each vessel was required to give five days notice prior to sailing. A decision was made by the FSB Chief as to whether or not to assign an observer or grant a waiver based on observer availability and whether or not the vessel had taken an observer previously. Each vessel was required to report its activities daily via a satellite based tracking system. That system relayed files of vessel activities twice daily that were accessed by the FSB Chief. Using those files, he determined the vessel's status as to previous observer assignments and remaining trips and attempted to select as many different vessels as possible for observation. One member of the FSB made all of the actual assignments of the observers to the selected vessels. Once an observer was assigned a vessel and the vessel operator informed, it became the responsibility of the observer to contact the vessel operator and assure that he or she met the vessel at the port site and date scheduled for departure.

Observers were instructed to check vessels for safety including display of current coast guard safety inspection stickers. When they were found not to be in compliance, the vessel operator was advised to get inspected, remedy any unsafe conditions and pass the inspection before they could fish under their closed area permit. In a few cases, observers were reassigned pending the inspection and the vessel was allowed to make one trip conditional on passing inspection and taking an observer on the next trip.

Observers were neither federal employees, vessel employees nor employees of the NFWF. Thus, there were no provisions made for liability or other appropriate insurance including workman's compensation or unemployment insurance. Vessel owners were advised via a notice to all permit holders to take out insurance riders to protect themselves from claims by observers. There were no control mechanisms in place to assure that vessels complied with the recommendations to carry insurance riders.

7.5 Purpose and use of data collected

The goal of the sampling design was to determine the ratio of bycatch of yellowtail flounder to scallops landed in the scallop fishery so that estimates of total yellowtail flounder bycatch could be made and the fishery closed if and when the bycatch limit was met. The New England Fishery Management Council recommended the opening of the fishery contingent on NMFS obtaining 25% coverage of the fleet to assure sufficient sample size for accurate bycatch estimates. NMFS supported the opening of the fishery. No actual post fishery analysis was conducted to determine if 25% coverage was appropriate and as the data were not entered to analyze, no control mechanism was in place to assure that future levels of coverage are based on analysis of those data.

A limited suite of data were collected including information on each observed haul location, species caught, species discarded and size frequency of sea scallops and several key groundfish species including yellowtail flounder, monkfish, and barndoor skate. Observers were provided with measuring boards and weight scales for the purpose of collecting actual lengths and weights of the catch composition. Other essential equipment and supplies needed for the collection of these data were also provided.

Among the limited suite of data collected was the estimation of pounds of sea scallop meat and pounds of yellowtail flounder caught from each tow. These estimates were summed daily by the observer and reported to the vessel captain. The vessel captain in turn transmitted those daily estimates as well as the captain's own estimate of the total pounds of sea scallops caught and kept via the vessel monitoring system's satellite-based communication system. The daily ratio of observed yellowtail flounder catch to sea scallop catch kept multiplied by the total scallops caught and kept was used to estimate total yellowtail flounder bycatch. The fishery was closed when the estimated yellowtail flounder bycatch quota was met. The data transmitted by the vessel captains and used to estimate the yellowtail flounder bycatch was not compared to the data actually collected and recorded by the observers. Thus, there was no control mechanism to assure that either the observers or captains provided correct information.

7.6 Debriefing, data entry, and editing

Observers received only limited debriefing by FSB staff. Less than 5% of the trips were followed by face to face debriefings. Some debriefings were conducted by phone. There were no funds for observer travel to Woods Hole for debriefing nor staff available to debrief the observers.

Data were not entered except by the vessel operator who sent a daily summary of estimated total scallop catch, observed scallop catch kept, and total observed yellowtail flounder catch. There were no control mechanisms in place to assure that each vessel actually reported on each fishing day.

Some editing of the observer data was done on a manual basis by FSB staff. However, it was very limited due to lack of staff available for the project. Routine comparisons were not made between the data transmitted by the vessel captain and that documented on the data collection forms by the observer. A superficial spot check of 20 trips indicated that the daily summary data transmitted by the vessel captains were different from the observer's recorded daily totals from the same trips on at least one day for 18 out of 20 trips. A further spot check, comparing transmitted data with observer logs from only inexperienced observers recruited from the industry, indicated that daily summaries disagreed on 30 of 32 comparisons. Since the data were not entered, computerized audits of the data could not be made.

The catch reporting system used by the vessel operators did not specify the sequential tow numbers that were observed. This prevented a detailed comparison between the captain and observer data since it was not possible to always determine which set of observed hauls were used by the captain in his daily report.

All trip folders are filed in spine folders that are labeled and filed by year, month, and trip identifier. The sea scallop closed area observed trips are currently filed in one office and there are no duplicate paper copies filed or computerized files elsewhere. Trip data files may be viewed by data users to reference raw data, observer comments, and annotations on the logs. The FSB maintains control of the files.

7.7 Incentives to increase data quality

The Atlantic sea scallop observer program has a unique built-in financial incentive program to generate high quality data. Observers who's data meets certain data quality standards are eligible for a data quality bonus.

The bonus for high quality data is \$100/day of which \$80 goes to the observer, \$10/day to the area coordinator, and \$10/day to the program manager. This system has provided a powerful incentive for observers to produce the highest quality and cleanest data possible.

7.8 Problems encountered by the program

The time frame for setting up the first year of the Closed Area scallop fishery was short. The decision to open the area was not made in time to implement strategies for the smooth operation of the program.

The program manager was originally instructed to hire displaced fishermen as observers. While this may have provided temporary relief to some fishermen who were out of work, it failed to solve their long term problem. Additionally, it opened up the program for accusations regarding conflict of interest. Overall accuracy of data was questioned and, in fact, the data were not of sufficient quality to allow entry into the database. The requirement to hire fishermen was lifted and non-fishermen were recruited and trained as well. However, the delay in recruiting non-fishermen resulted in limiting the pool of observer candidates.

No mechanism was in place for the industry to fund the training nor for the industry to fund procurement of equipment and supplies as there was insufficient time to develop the mechanism. NMFS contracted and paid for training and purchased equipment and supplies. A mechanism was ultimately put in place using an agreement with National Fish and Wildlife Foundation (NFWF) to act as receiver for funds from the industry to pay for observers' salaries. NMFS set a daily rate charge for each day an observer was deployed on the vessel. An observer TAC was implemented to allow vessels with observers to catch an additional 200 pounds of scallop meats per day to offset the cost of the observer. However, while industry did pay for most of the deployments, it did not pay for all of them. The initial deployments were paid for by NMFS since the agreement with NFWF was not implemented prior to the opening of the fishery.

Appendix A: February 11, 2004 letter from the Council to William Hogarth regarding observer compensation issues

February 11, 2004

Dr. William Hogarth
NOAA Fisheries
1315 East-West Highway
Silver Spring, MD 20910

Dear Dr. Hogarth:

At its recent meeting in February, the North Pacific Fishery Management Council (Council) scheduled a review of issues related to the North Pacific Groundfish Observer Program (Observer Program), and progress on a preliminary analysis to modify the existing service delivery mode to one in which NOAA Fisheries would contract directly with observer providers for observer services. The Council is currently supporting development of this analysis, the alternatives of which propose changing the observer deployment and funding mechanism for all vessels and shoreside processors operating in the Gulf of Alaska, with the potential to also include vessels operating in the Bering Sea and Aleutian Islands (BSAI) that currently have less than 100% observer coverage requirements.

As part of this agenda item, the Council reviewed a letter received from the Administrator of NMFS, Alaska Region, on January 22, 2004. This letter outlines agency concerns regarding: 1) the existing procedures for addressing observer performance and conduct problems, and 2) the potential consequences of a recent NMFS policy which defines wage rates and overtime requirements for contracted observers. Recognizing the potential disparity that may result between areas with regard to these issues if the Council moves forward with a direct contract model only in the Gulf of Alaska, the Regional Administrator recommended that the Council include an alternative in the analysis that would extend the direct contract model proposed for the Gulf of Alaska to the BSAI, thereby reflecting a program-wide restructuring of the Observer Program. The effect of the alternative is that all observer services in the North Pacific would be provided by observer companies under direct contractual arrangements with NMFS, thus the procedures for addressing observer performance problems and observer wage rates would be consistent among areas.

While supportive of exploring the addition of a program-wide alternative, the Council is concerned with the implications of the NMFS position⁴ on observer wages that has come to light during deliberations on this action. It is the understanding of the Council that NMFS maintains that the wage and overtime pay requirements of the Service Contract Act (SCA) and Fair Labor Standards Act (FLSA) apply to fisheries observers employed in programs under which NMFS has direct contractual arrangements with observer providers. This is a very complex issue, and the potential consequences are difficult to predict at this time. However, implementation of this policy raises serious financial and operational concerns that may significantly affect the operation of the North Pacific fisheries under the proposed direct contract model.

⁴Memorandum from William T. Hogarth, Ph.D. to Terry H. Lee regarding Applicability of Overtime Pay for Fisheries Observers (November 13, 2003).

On its face, the application of the FLSA requirements to fisheries observers could result in a significant increase in labor costs. While observers typically engage in productive work in excess of 40 hours per week due to the nature of the work, they are often placed on a vessel for several weeks at a time (the entire length of the vessel trip), with a considerable amount of time spent as “waiting time.” Under the NMFS policy, if observers are not considered exempt from the FLSA, providers could be required to compensate observers for 168 hours per week (productive time and waiting time) with every hour in excess of 40 hours being paid at 1.5 times the basic rate of pay. Review of the FLSA indicates that the potential for this interpretation is quite possible, as the law requires that an employee must be compensated for all hours worked, and working time is not limited to hours spent in active productive labor, but also includes “on call” time or time spent idle and waiting for work (29 CFR 778.223). The Council is thus concerned with further interpretation of the requirements of the FLSA and whether the policy would require that observers be compensated on an hourly basis, including overtime hours, for all non-productive “waiting time” spent onboard vessels. Should the policy be clarified such that observer providers are not required to compensate observers for non-productive “waiting time,” it is unclear how the observer provider would verify the number of productive hours and overtime hours worked.

In addition to the potential cost impacts and the need for further clarification of the NMFS policy, the Council questions the rationale used for determining that contracted fisheries observers on vessels and in shoreside processing plants are necessarily subject to the wage and overtime pay requirements of the FLSA overall. The Council’s understanding is that there are three separate exemptions to consider under the FLSA provisions: 1) exemption for executive, administrative or professional employees; 2) exemption from both the minimum wage and overtime requirements for employees engaged in fishing operations;⁵ and 3) exemption from overtime requirements for employees engaged in processing operations.⁶

Additionally, and importantly, work performed beyond U.S. territorial waters is outside the jurisdiction of the SCA and the FLSA. The memo of November 13, 2003, identifies that the jurisdictional issue with regard to U.S. territorial waters was considered, but the agency decided that tracking the geographical location of a vessel in order to determine whether the SCA/FLSA wages apply represents an excessive administrative burden. The rationale used for dismissing the territorial waters exemption does not seem adequate in the Council’s opinion, particularly given the significant cost implications to the fishing industry which are associated with that policy determination.

The Council also questions the agency’s rationale for determining that fisheries observers are not exempt under the blanket exemptions for employees engaged in fishing or fish processing operations as identified in Section 13(a)(5) and Section 13(b)(4) of the FLSA, respectively. These exemptions appear to be designed to address the unique nature of fisheries operations and employees who work at sea. The implementing regulations further clarify that for the purpose of the above mentioned exemptions, an employee is considered “employed in” a fishing or fish processing operation where his/her work is “an essential and integrated step in performing such named operation, or where the employee is engaged in activities which are functionally so related to [fishing operations] ...that they are necessary to the conduct of such operation (20 CFR 784.100).”

Observers are an integral and necessary part of the fishing operations in the North Pacific, in that the data collected by observers is used for multiple conservation and management purposes, including in-season

⁵This refers to the section 13(a)(5) exemption. 29 CFR 784.100.

⁶This refers to the section 13(b)(4) exemption. 29 CFR 784.101.

management of the harvest and development of the annual stock assessments. To ensure data is collected to meet these purposes, observers are required on all vessels greater than 60 feet length overall for various time periods, as well as in shoreside processing plants and on stationary floating processors in both the Gulf of Alaska and the BSAI. Thus, while the duties performed by the observer are functionally related to the ongoing and responsible prosecution of the fisheries, the operation of these vessels and processors could also not be legally conducted without the observer performing his/her work. The importance of the observer's work to the sustainable management of the North Pacific fisheries has been frequently recognized by the Council, NMFS, the fishing industry, and the public, and has been required in Federal regulation for the domestic groundfish fisheries since 1989.

There is no question that the Council values the work performed by observers and believes observers should be paid fairly for their work. However, the current service delivery model and industry-funded system in the North Pacific remains different from other government-funded observer programs around the nation. The current service delivery model is one in which individual vessels and processors contract directly with an observer provider, and the direct cost of observer services is funded wholly by those vessels and processors required to have observer coverage. In 1997, observers organized to bargain for better compensation and working conditions, and currently, the Alaska Fishermen's Union has contracts with three of the four existing observer providers. The collective bargaining agreement developed through the union has formed the basis for observer compensation for the past several years, and is recognized as a fair and comprehensive process by which to develop wage rates to compensate observers for the specific and unique characteristics of their work.

While the current Observer Program in the North Pacific is recognized as quite successful, the Council has engaged in ongoing efforts with the agency and the public to improve the existing program. The Council's Observer Advisory Committee was constituted several years ago to facilitate this effort. It is through this committee that the Council has recently been working to develop an analysis to modify the existing service delivery model to one in which the agency would contract directly with observer providers for observer services, to be funded by a uniform fee on all vessels and processors included in the program and/or Federal funding. Clearly, the proposed change to a system in which the government has a direct contractual arrangement with observer providers will have direct cost impacts to industry, and these must be comprehensively analyzed and considered in the analytical document supporting an FMP amendment. The Council has an Observer Advisory Committee meeting scheduled for March 11 - 12, 2004, to further development alternatives, elements, and options for this amendment package. Given the recently identified issues described above, it is clear that application of the SCA/FLSA wage and overtime requirements under the new NMFS policy could significantly affect cost estimates for a program in which NMFS directly contracts with observer providers, although lacking further clarification, it is uncertain to what degree costs would be affected.

In sum, the Council believes the potential cost impacts and implementation concerns associated with the agency policy on wage and overtime pay requirements give sufficient cause to urge NOAA Fisheries to reconsider its recent policy on observer compensation issues as identified in the November 13, 2003 memo. Specifically, the Council respectfully requests a response from NOAA Fisheries on the following issues:

- 1) whether and how the policy considers observers under the Fair Labor Standards Act exemption for employees engaged in fish harvesting operations (Section 13(a)(5)) or fish processing operations (13(b)(4));
- 2) how the new wage and overtime policy would impact observer compensation costs under a direct contract approach for the North Pacific Groundfish Observer Program;

- 3) whether the policy would require that observers be compensated on an hourly basis plus overtime pay for all non-productive (“waiting time”) hours spent on board vessels or in shoreside processing plants; and
- 4) if observers are not required to be compensated for non-productive hours, how would the number of productive hours worked be verified if the policy requires providers to compensate observers on an hourly basis?

In order to proceed productively with the Observer Advisory Committee meeting, analytical efforts to restructure the Observer Program in the North Pacific, and the Councils’ further consideration of these issues at our April meeting, the Council requests that NOAA Fisheries HQ address and resolve the issues identified above as soon as possible, preferably prior to the Observer Advisory Committee meeting scheduled for March 11 - 12, 2004. The Council is committed to working with NMFS and the North Pacific Groundfish Observer Program to continue to improve what is recognized as one of the most comprehensive and effective observer programs in the world. Thank you in advance for considering the requests identified above.

Sincerely,

Chris Oliver
Executive Director

cc: Dr. Jim Balsiger
Dr. Bill Karp
Ms. Sue Salveson
Ms. Vicki Cornish
Ms. Lisa Lindeman

Appendix B: Text of Memo from William T Hogarth to Terry H. Lee regarding applicability of overtime pay for fishery observers

November 13, 2003

MEMORANDUM FOR: Terry H. Lee
Office of General Counsel

FROM: William T. Hogarth, Ph.D. /signed/

SUBJECT: Applicability of Overtime Pay for Fisheries Observers

This memo supplements a request from Mr. Abe Vinikoor of the Western Administrative Support Center (WASC) for an legal opinion from the Department of Commerce Office of General Counsel (DOC OGC) on whether contracted fisheries observers are entitled to overtime pay. It provides justification for the National Marine Fisheries Service (NMFS) position that contracted fisheries observers are non-exempt from coverage under the Fair Labor Standards Act and other Acts, as appropriate, by virtue of their status as technicians, and therefore are eligible for overtime pay.

Based on information provided by DOC OGC and Department of Labor representatives during a workshop sponsored by the NMFS' National Observer Program (see Appendix 1; Fisheries Observers Insurance, Liability, and Labor Workshop, section 4.2, pp. 17-20), it was determined that NMFS needed to clarify the status of observers as either professionals (which are exempt from coverage under the Fair Labor Standards Act), or technicians (which are non-exempt).

This issue was discussed at a subsequent meeting of the National Observer Program Advisory Team. The National Observer Program Advisory Team is comprised of representatives from each NMFS region and headquarters office. The Advisory Team works with NMFS' National Observer Program staff in the Office of Science and Technology to identify issues of national concern, to recommend or establish priorities for national research and problem solving, and to support information collection and program implementation. The team, at its October 2001 meeting, recommended that the National Observer Program develop a Position Description for fisheries observers that would clarify their status as technicians, using the Biological Technician series (GS-404) as a starting point. It was recommended this Position Description be forwarded to the Department of Labor for consideration in issuing future Wage Rate Determinations and for inclusion in the Service Contract Act Directory of Occupations (see <http://www.dol.gov/esa/regs/compliance/whd/wage/main.htm>). This clarification would provide consistency in wages paid to observers in various regions of the U.S. In addition, it would help clarify pay scales for work performed on land and at sea and aid in determining appropriate types of benefits, i.e., overtime compensation.

The National Observer Program, in consultation with the National Observer Program Advisory Team, reviewed the duties and responsibilities of fisheries observers and developed a classification scheme identifying three levels of Fishery Observer for consideration by the Department of Labor (Level I/II/III). I sent a letter to Mr. William Gross, Director of the Department of Labor's Wage Determination Division on September 9, 2002 (see Appendix 3) to that effect. That letter, along with a subsequent letter

dated November 6, 2002, resolved to establish wage rates for contracted fisheries observers that are comparable to Federal Observers under the General Schedule (GS) system.

The development of Fishery Observer Position Descriptions for consideration by the Department of Labor was prompted by inconsistencies in wage rate determinations that had been made up to that point, and the fact that these wages were considerably less than the federal equivalency for the same type of position. Wage rate determinations issued by the Department of Labor for various localities stipulated minimum hourly wages ranging from \$9.55/hour (2001 for California, Oregon, Washington) to \$10.59/hour (2001 for California County of Los Angeles), whereas the 2003 hourly pay scale for GS-5 employees is \$11.23/hour (see http://www.opm.gov/oca/03tables/pdf/g_s_h.pdf). If the Department of Labor had a uniform national standard for making wage rate determinations for fisheries observers, then there would be more consistency in wage rates for contracted observers, and these wages would reflect wages that would be paid to federal employees performing the same job functions.

In developing the position that contracted fisheries observers are technicians, the National Observer Program, in consultation with the National Observer Program Advisory Team, considered both the duties and responsibilities of fisheries observers as well as past recruitment actions for Federal fisheries observers (see Appendix 4). In a 1999 Vacancy Announcement for Federally-employed fisheries observers in Hawaii that was issued before the program was converted to a contracted program, recruitment for fisheries observers were for Biological Science Technicians (ZT-404-II, equivalent to GS-5 through GS-8).

The classification of fisheries observers as technicians is also consistent with guidance from the Office of Personnel Management's classification standards for (see The Classifier's Handbook, Chapter 4 "Determining the Pay System and Series" at <http://www.opm.gov/fedclass/clashnbk.pdf>). The duties and responsibilities of fisheries observers involve adhering to routine sampling protocols that are planned and managed by professional employees. Fisheries observers perform these duties unsupervised, but all work is carefully reviewed for completeness and accuracy by professional biologists. Although most of the contracted observer programs currently require that observers have a professional degree (usually a Bachelor's degree in a biological science) as an eligibility standard for recruitment by the contracted observer service provider, specialized experience can be substituted for education (see also Appendix 4, Qualifications). Observers then receive up to three weeks of specialized training, which must be completed to the satisfaction of the program before observers are certified to be deployed aboard fishing vessels.

Therefore, NMFS maintains the position that fisheries observers are biological technicians and are therefore eligible for overtime compensation under the Service Contract Act (SCA), the Fair Labor Standards Act (FLSA), and other Acts stipulating wages and benefits for contracted service employees, as appropriate.

While we understand that work performed by observers beyond U.S. territorial waters is outside of the jurisdiction of the SCA and FLSA, attempting to track the geographical location of a vessel in order to determine whether or not SCA/FLSA wages apply would be a huge administrative burden for both the contracted observer provider and the agency. Therefore, it is the position of NMFS that the wage rate that the Department of Labor determines is appropriate for each specific locality should be applied to contracted fisheries observers whether they are working inside or outside of U.S. territorial waters in order to provide a fair, simple, and consistent application of the SCA/FLSA.

If you concur with this position, we strongly encourage you to advise WASC to request a revised Wage Rate Determination from the Department of Labor for Honolulu, as well as for localities that may be associated with the deployment of observers under current West Coast observer contracts as well as those solicited in the future. This would apply to contracts, cooperative agreements, and grants issued for the deployment of

observers in the Alaska Marine Mammal Observer Program, the West Coast Groundfish Observer Program (via a cooperative agreement with the Pacific States Marine Fisheries Commission), and the California Longline and Gillnet Observer Programs. This will ensure that wage rates for fisheries observers reflect the new Position Descriptions for Fishery Observers that were provided to the Department of Labor in 2002, and that overtime pay is provided under these contracts in accordance with the SCA, FLSA, or other applicable laws.

Attachments

Appendix C: January 22 letter from NMFS to the Council regarding concerns about operating an observer program under two service delivery models



**UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration**

National Marine Fisheries Service

P.O. Box 21668

Juneau, Alaska 99802-1668

January 22, 2004

Ms. Stephanie Madsen
North Pacific Fishery Management Council
605 W. 4th Avenue
Anchorage, Alaska 99501

Dear Madam Chair:

In a December 1, 2003, letter, we informed the Council of potential concerns about administration of an observer program with two different observer service delivery models in the Gulf of Alaska (GOA) and the Bering Sea Aleutians Islands management area (BSAI). We also informed the Council that we would be coming back in February with additional information on the issues we raised and any recommendations on how to address them.

In the December 1 letter, we expressed concern about operating an observer program under two service delivery models when the authority and procedures for addressing observer performance problems differed between the two models. We have now determined that effective procedures for addressing observer performance and data quality issues can only be put in place through a service delivery model that provides direct contractual arrangements between NMFS and the observer providers. The basis for this determination is outlined below. We believe a change to this type of service delivery model is essential because the current system does not provide us the tools we need to ensure observer accountability, data quality, and program credibility.

Procedures for dealing with observer performance problems that arise under the current pay-as-you-go system and that would remain in place in the Bering Sea under all the alternatives presently under consideration by the Council are inadequate. While observer performance and conduct problems are identified infrequently, NMFS must have effective procedures for dealing with these problems because they may directly affect the quality of data used for management and assessment, and because the perception of integrity is considered to be critical given the scientific, management, and compliance monitoring responsibilities of observers. Before the start of 2003, the Observer Program had procedures in place that allowed immediate suspension of observers when potential performance problems were identified. However, these procedures did not comply with the Administrative Procedure Act (APA) requirement that prior to suspension, an observer must have an opportunity for an appeal to provide his/her side of the story. Under the decertification process implemented in 2003, the administrative process for addressing potential performance problems and data quality issues was changed substantially to protect observers' constitutional rights and meet requirements defined in the APA. Under the new process, the agency is unable to take immediate action to suspend observers except in cases of threats to public health and safety. When the NMFS Observer Program Office identifies a concern, the agency must first allow the observer involved to respond to the allegations while continuing to work. If NMFS decides to take action to decertify, the observer has the right to



appeal. Based on discussions with the NMFS Office of Administrative Appeals and their priority workload, the appeal process could last nine months or longer, during which the observer is allowed to continue working. NMFS therefore would be obliged to discard data collected by observers in some situations, and information collected by some observers under these circumstances would not be deemed suitable for addressing compliance and enforcement concerns.

Based on initial consultations with agency contract specialists, we believe these concerns could be resolved through contracts between NMFS and observer providers under which the providers agree to be held accountable for the quality of data collected by observers. We believe the observer provider contractors would have greater flexibility than does NMFS to address observer performance concerns in ways that would minimize impacts on the overall quality of the data collected by the observer program while protecting the interests of observers under the terms of employment under which they would be hired. We believe, therefore, the only effective way for NMFS to deal with the critical data quality and performance issues identified above is by establishing direct contractual arrangements between NMFS and observer providers.

The alternatives currently before the Council focus on effecting these service delivery model changes primarily in the GOA, and retaining the current system for most vessels in the BSAI for the foreseeable future. Because NMFS must take steps to resolve the aforementioned data quality and credibility problems throughout the observer program, NMFS recommends the Council include a new alternative in the analysis being developed to assess restructuring of the observer program that would reflect a program-wide restructuring that extends the options for contractual arrangements in the GOA to the BSAI so all observer services are provided by observer companies under direct contractual arrangements with NMFS.

In the December 1 letter, we also raised concerns regarding possible consequences of a new NMFS policy which defines wage rates and overtime requirements for observers under service delivery models that include direct contracts between NMFS and observer providers. This could result in substantial differences in observer remuneration between status quo and NMFS-contracted sectors in a hybrid system between the GOA and the BSAI, and might seriously constrain observer availability in the less-remunerative sector. This is a complex issue and the potential consequences are difficult to predict. However, this issue would not arise under the program-wide change alternative recommended above because all observer services would be provided under direct contracts between NMFS and observer providers. Bear in mind that overall observer labor costs might increase under this new NMFS policy. We are investigating this concern and will keep the Council informed.

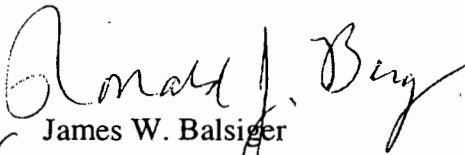

We recognize that including the BSAI in the initial restructuring of the observer program is potentially controversial and will require additional analytical work. We also believe that reasonable options for contractual arrangements exist that could address some of the major concerns raised by the Council when it voted to repeal the Research Plan in 1995. We continue to work with contract law specialists to determine if some of these arrangements could be

implemented without the need for a change in statute to collect fees for observer services. We encourage the Council to provide additional time to explore these concepts in an analysis that ultimately could support a much needed change to the observer program.

In order to proceed with an expanded analysis, we recommend the Council consider a revised problem statement for the analysis that could encompass the alternatives already under consideration by the Council, as well as a new alternative for a broader change. We have drafted a new statement for consideration by the Council (attachment 1). We also provide some additional information on the contracting process and our initial thoughts on one contracting approach that holds promise for resolving the problems described in this letter (attachment 2). As detailed in attachment 2, we think implementing this approach within existing statutory authority may be possible. This will, however, require a determination by NOAA General Counsel or the Department of Commerce General Counsel.

Whether or not new alternatives for program-wide change are proposed by the Council, we will need more time to address contracting issues with NOAA and DOC to ensure we identify approaches that meet the Council's and NMFS' goals and objectives for restructuring. We anticipate we will be able to have an initial analysis to the Council in June at the earliest. However, an April date for initial consideration of a completed draft analysis is overly optimistic given the nature and complexity of the issues and alternatives we are challenged to analyze. To facilitate this process, we ask the Council to consider adopting a new problem statement at the February meeting. Because the Council's Observer Advisory Committee (OAC) is scheduled to meet March 11-12, 2004, this might be a good opportunity for the Council to ask this committee to refine the existing suite of alternatives, including identifying new alternatives for analysis that fit the program wide approach proposed in this letter. The OAC also could begin to work with staff to assess the issues associated with different contractual models that could be employed to address the objectives for restructuring the observer program.

Sincerely


For  James W. Balsiger
Administrator, Alaska Region

Attachments

Attachment 1

Revised problem statement for restructuring of the North Pacific Groundfish Observer Program

(Substantive changes to the original problem statement are underlined below. Editorial or non substantive changes are not identified)

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 Council and NMFS face a number of longstanding problems that result primarily from the current structure of the Observer Program. 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 adjusted to respond to current and future management needs and requirements for individual fisheries. In addition, the existing program does not allow fishery managers to control when and where observers are deployed. This results in coverage limitations that constrain the reliability of catch and bycatch estimates based on observer data. Furthermore, data quality concerns cannot be resolved quickly and effectively when observers who have been identified as not meeting performance or conduct requirements appeal NMFS's suspension or decertification decisions. The ongoing collection of observer data during the appeals process may further undermine data quality and program integrity, and data collected under these circumstances may not be suitable for management and enforcement actions. The current program is also one in which many smaller vessels face observer costs that are disproportionately high relative to their gross earnings. 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.

Attachment 2

Conceptual Approach for Tiered Contractual Arrangements to Provide Observer Services in the North Pacific Groundfish Fisheries

Government contracts can be designed in a number of different ways to match the agency's needs and interests with the services that are required of contractors. Through properly designed and implemented contracts, the government can put in place a mechanism which holds contractors accountable for the quality of work conducted by their employees. In a typical example, prospective contractors would be asked to provide a quality assurance plan as part of their submission when they bid on a contract. Contract provisions can also be crafted to ensure that observer skill and experience levels are properly matched with deployment requirements. As part of the evaluation process, the government source evaluation board would review quality control and observer deployment plans submitted by bidders, and evaluate their effectiveness. Once a contractor has been selected and the contract signed, these plans would be put into effect. In many instances, a contractor would likely identify and correct performance problems independently (although the government could require the contractor to document and inform the government of any such actions). In other cases, the government might identify specific concerns and ask the contractor to take appropriate action. Depending on the specific quality and performance requirements of the government, a quality control plan could contain a number of different provisions. For example, a contractor might choose to retrain or reassign a poorly performing employee, or could choose not to re-hire a poorly performing temporary employee. Quality control plans can be implemented to address specific quality-of-work concerns, codes of conduct, and other concerns which the government would identify in its request for proposals. Failure to follow the quality control plan could result in a negative performance evaluation affecting a contractor's ability to secure future contracts or, potentially, contract cancellation.

We have discussed an approach which holds promise for meeting the Council's and NMFS' needs for high quality observer services. It is a flexible approach, which could likely be modified to address concerns that might be raised during program development. Based on advice received from contracting specialists, we believe that this approach is viable and legally sound, although we intend to pursue a written legal opinion to confirm our understanding.

This approach is based on the concept of establishing two types of contracts. The first contract would be between the agency and a financial institution that has collection and disbursement capabilities. This company (the financial contractor) would be employed to collect observer fees from fishing companies and disburse them to observer providers as directed by the agency. Contractor fees could be recovered from industry payments or paid directly by NMFS if appropriated funds were available.

NMFS would also establish contracts with several observer providers to deploy observers to fishing vessels and plants as directed by the agency. These observer providers would invoice the

financial contractor to request payment for provision of observer services. Payment would be made as directed by NMFS.

A range of approaches could be developed for establishing the basis for collection of monies by the financial contractor. This contractor could be directed simply to recover daily observer coverage costs from vessels and plants required to obtain observer coverage. This could reproduce existing or modified coverage requirements. Alternatively, the contractor could be directed to collect a fee based on catch value from fishery participants, and use this to reimburse contractors for deploying observers as directed by NMFS. The possibility also exists to design a mixed model under which, for example, daily coverage costs would be collected from vessels in one sector (the Bering Sea), and a fee-based system put in place for another sector (the Gulf of Alaska). As currently considered in the alternatives developed to date, industry funds could be supplemented with appropriated funds through a "partial-cost" approach under which the financial contractor receives some funds from the industry and some from government sources in the event that appropriated funds become available.

In its simplest form, this approach could likely be put in place without changes in statutory authority. If so, it could be implemented in a more timely manner than other fee collection programs in which a federal agency directly collects and distributes fees and revenues. Enhancements that require statutory authority and/or appropriated funds could be added as authority and/or funds become available.