

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re the revocation of the)
observer certification of) Appeal No. 04-0008
)
JANE DOE,¹) DECISION ON RECONSIDERATION
Appellant.)
) June 12, 2006
)
_____)

STATEMENT OF THE CASE

Ms. Doe filed a timely appeal of an Initial Administrative Determination [IAD], dated November 3, 2004, issued by the North Pacific Groundfish Observer Program [NPGOP]. The NPGOP concluded that Ms. Doe failed to perform her assigned duties as described in the Observer Manual or other written instructions during a 2004 cruise [Cruise 9022] and that mitigating circumstances did not support an action other than decertification. The NPGOP concluded that decertification was warranted, pursuant to 50 C.F.R. § 679.50(j)(3). Ms. Doe can appeal the IAD because it directly and adversely affects her interests.²

I held hearings on May 17, 2005 and May 24, 2005.³ At the conclusion of the hearings, I closed the record and, at the parties' request, provided for written closing statements.⁴ Both Ms. Doe and NPGOP submitted written closing statements and a response to the other side's closing statement.⁵ I conclude that the record has sufficient information for me to reach a decision and that all procedural requirements have been met, as required by 50 C.F.R. §679.43(k). The NPGOP is represented by Tom Meyer of the Alaska Regional Office of NOAA General Counsel. Ms. Doe is not represented by legal counsel.

I issued a Decision, dated January 3, 2006. The Decision affirmed the IAD. I concluded that NPGOP had proven, by a preponderance of evidence, four of the eight allegations in the IAD

¹ Jane Doe is a fictitious name to protect the privacy of the Appellant.

² 50 C.F.R. § 679.43(b).

³ Second Order Scheduling Hearing and Making Further Legal Rulings (April 29, 2005). [R. 1419a - 1419f] Pursuant to 50 C.F.R. § 679.43(n)(2)(iii), Ms. Doe waived her rights to thirty days' written notice of this hearing. [R. 1419a] The "R." notation means "Record" and refers to the page of the administrative record where the document is located.

⁴ Order Closing the Record and Providing for Written Closing Statements (May 25, 2005). [R. 1447 - 1448]

⁵ NPGOP Closing Statement and Brief on Legal Standards Applicable to Administrative Review of Initial Agency Determination to Revoke an Observer Certification (June 9, 2005)(hereinafter NPGOP Closing Statement) [R. 1453 - 1479]; Jane Doe Closing Statement (June 8, 2005) [R. 1481 - 1488]; NPGOP Reply Brief to Ms. Doe's Closing Statement (June 16, 2005) [R. 1490 - 1491]; Jane Doe Response to NPGOP Closing Statement (June 20, 2005) [R. 1493 - 1494].

that Ms. Doe had not performed according to written standards for an observer. I concluded that NPGOP had not abused its discretion by concluding that Ms. Doe's performance in those four areas represented severe deficiencies in her work and that decertification was warranted.

The NPGOP asked me to reconsider my conclusion that the NPGOP had not proven four of the eight allegations in the IAD.⁶ I ruled on the NPGOP's motion for reconsideration in a separate order.⁷ I ruled that the NPGOP showed grounds for me to reconsider my conclusion that the NPGOP had not proven that discrepancies in Ms. Doe's sampling data work violated written observer standards. I ruled that the NPGOP had not shown grounds to reconsider any other conclusions in the original Decision.

This Decision on Reconsideration contains my new conclusion that the data discrepancies in Ms. Doe's work violated a written observer standard and other, minor, changes from the original Decision.

SUMMARY OF DECISION ON RECONSIDERATION

I affirm the IAD and affirm the decertification of Ms. Doe as an observer. The IAD found eight areas where Ms. Doe's work did not meet written standards for observers.

The NPGOP proved five of these eight allegations. First, Ms. Doe did not complete the Vessel Safety Checklist. Second, Ms. Doe did not meet the standard for frequency of hook counts on a longline vessel, which is the basis for the estimate of the overall total catch [OTC] of the vessel. Third, Ms. Doe did not properly tare the scale – account for the weight of the basket in which she weighed fish – because she did not record her calculations in writing. Fourth, Ms. Doe did not meet sampling requirements for calculations of average weight of fish that the vessel caught. The NPGOP thereby proved cause for suspension of Ms. Doe as required by 50 C.F.R. § 679.50(j)(3)(ii)(A)(1) and (2). Fifth, Ms. Doe's sampling data had discrepancies between different data sources, which violate the observer's duty to accurately record sampling data, as set forth in 50 C.F.R. § 679.50(j)(2)(ii)(B).

The NPGOP did not prove three allegations. First, the NPGOP did not prove that Ms. Doe failed to meet a written observer standard through inappropriate content in the Daily Notes section of her logbook. Second, although the NPGOP proved that Ms. Doe did not retain at least six original deck sheets, the NPGOP did not prove that Ms. Doe's actions violated a written observer standard. Third, the NPGOP did not prove that the Manual or other written instructions established a clear written standard for collection of halibut injury data that Ms. Doe violated. The NPGOP did not abuse its discretion in concluding that Ms. Doe's work showed severe deficiencies and that decertification of Ms. Doe was warranted under 50 C.F.R. § 679.50(j)(3)(iii), based on the following facts. The hook count standard and the size for the

⁶ NPGOP Motion for Reconsideration (Jan. 3, 2006).

⁷ Order Granting Reconsideration in Part and Denying Reconsideration in Part (June 9, 2006).

species composition samples are clearcut standards in the Manual that Ms. Doe knew, that she understood and that she did not meet by a wide margin. Ms. Doe had been warned during the prior cruise [Cruise 8324] and during the mid-cruise debriefing for this cruise [Cruise 9022] that she needed to meet the standard for frequency of hook counts, i.e., two hook counts per week. Ms. Doe did not communicate through her Daily Notes, e-mails to her inseason advisors or the Vessel and Plant Survey that she had any problems meeting the standard for hook counts or the size of the species composition sample. Ms. Doe's substandard performance led to a significant amount of unreliable data, namely the overall total catch data and the species composition data for Cruise 9022 were unreliable.

The NPGOP did not abuse its discretion in concluding that Ms. Doe failed to show mitigating circumstances that justified an action less than decertification.

ISSUES

1. Did the NPGOP show that Ms. Doe failed to perform her assigned duties as described in the Observer Manual or other written instructions from the Observer Program Office?
2. Did NPGOP abuse its discretion in concluding that decertification was warranted and that mitigating circumstances did not justify an action other than decertification?

ANALYSIS

1. Did the NPGOP show that Ms. Doe failed to perform her assigned duties as described in the Observer Manual or other written instructions from the Observer Program Office?

The federal observer regulation states at 50 C.F.R. § 679.50(j)(2)(ii)(A): "Observers must perform their assigned duties as described in the Observer Manual or other written instructions from the observer Program Office."⁸ The other written instructions relevant to this appeal are written comments that the observer received during debriefing. Debriefing is the process whereby an NPGOP staff person reviews the observer's work on a cruise. The mid-cruise debriefing typically takes a few hours. The final debriefing occurs at the end of the cruise and takes several days. The NPGOP debriefer reviews the observer's work, meets with the observer and provides written comments in areas where the observer needs improvement. Thus, the question on appeal is whether the NPGOP has proven, by a preponderance of the evidence, that Ms. Doe did not perform assigned duties as specified in the Observer Manual or written debriefing comments. The NPGOP seeks to decertify Ms. Doe based on deficiencies in

⁸ 50 C.F.R. § 679.50(j)(2)(ii)(A). A failure to perform written assigned duties means that the NPGOP has cause for suspension or decertification under 50 C.F.R. § 679.50(j)(3)(ii). The NPGOP then determines whether the observer's failure to perform means that decertification is warranted. 50 C.F.R. § 679.50(j)(3)(iii). For the entire Observer Program regulation, see Final Rule, 67 Fed. Reg. 72,595 (Dec. 6, 2002) *adopting* 50 C.F.R. § 679.50.

her work on Cruise 9022. A cruise refers to an observer's tour of duty on a particular vessel. The vessel for Cruise 9022 was a catcher/processor vessel and the dates of Cruise 9022 were March 15, 2004 to May 23, 2004. [R. 859, 874] Ms. Doe's only other cruise as a federal observer was Cruise 8324, which occurred in 2003 on the same vessel.

By regulation, the Observer Program must designate an NPGOP staff person as suspension/decertification official.⁹ The NPGOP designated Heather Weikart as the suspension/decertification official. Ms. Weikart received a recommendation to decertify Ms. Doe from Russ Seither, who conducted Ms. Doe's final debriefing after Cruise 9022. [R. 5 - 10]. Ms. Weikart reviewed Mr. Seither's nine allegations and decided that three did not support decertification.¹⁰ First, she rejected the allegation that Ms. Doe did not count hooks correctly because the NPGOP did not have any documentation for this allegation. Second, she rejected the allegation that Ms. Doe had a defensive disposition during debriefing because NPGOP does not have a standard for disposition and attitude. Third, she rejected the allegation that Ms. Doe did not sample enough hauls. Ms. Weikart stated: "Although I am concerned about the number of hauls you failed to sample, you did fulfill the NPGOP requirement of documenting each incident. There is no violation."¹¹

While analyzing Mr. Seither's recommendations and the data from Cruise 9022, Ms. Weikart found three additional problems: inadequate or incomplete sampling requirements for average weights; incorrect or incomplete deck forms; and data discrepancies. [R. 24] The NPGOP gave Ms. Doe a Notice of Opportunity to Submit Evidence on these nine allegations, which I will refer to as the NPGOP Notice. [R. 23 - 31] Ms. Doe responded. [R. 15 - 21]

The decertification official issued an initial administrative determination [IAD]. The IAD accepted Ms. Doe's explanation for one allegation, namely that she had incorrect or incomplete deck forms,¹² but found eight areas where Ms. Doe failed to perform her assigned duties. The IAD concluded that Ms. Doe had not presented mitigating circumstances that explained her substandard performance and that decertification was warranted. [R. 90 - 100]

I now review the IAD to determine whether the NPGOP has proven, by a preponderance of evidence, that Ms. Doe failed to perform her assigned duties as specified in writing by the

⁹ 50 C.F.R. § 679.50(j)(3)(i).

¹⁰ Notice of Opportunity to Submit Evidence and a Defense in a Proceeding to Consider Whether Your Certification Should Be Revoked at 3 (Sept. 2, 2004)[R. 25].

¹¹ *Id.* at 3. [R. 25] Since the NPGOP abandoned this allegation, I have not considered its criticisms of Ms. Doe's reasons for not sampling hauls. E.g., R. 1491. ("Ms. Doe failed to sample a number of 'on' hauls because she didn't get out of bed. There is no sound excuse or explanation in the record for her frequent failure to get out of bed.") If the NPGOP chooses to abandon an allegation, it cannot rely on it.

¹² [R. 96] The IAD accepted Ms. Doe's explanation that she "used thumb counters to count predominant and non-predominant species. If more species appeared in the sample, I used the tick method on the back of the deck form." [R. 19]

Observer Program Manual or other written instructions from the Observer Program Office. The IAD found that Ms. Doe violated Observer Program standards in eight areas. I discuss each IAD Finding on the following pages:

1. Inappropriate content in the Daily Notes section of the observer logbook 5 - 8
2. Incomplete Vessel Safety Checklist 8 - 10
3. Non-retained raw data 10 - 15
4. Infrequent hook counts 15 - 18
5. 50-kilogram Salter scale tared incorrectly 18 - 20
6. Improper calculation of halibut injury assessment and length frequency data . . 20 - 23
7. Unmet sampling requirements for average weights 23 - 27
8. Data discrepancies 27 - 29

IAD Finding # 1: Inappropriate content in the Daily Notes section of the observer logbook.

The NPGOP’s Notice of Opportunity to Submit Evidence [NPGOP Notice] to Ms. Doe stated:

Mr. Seither’s recommendation states in part; “Comments about what movies were being watched, what books were being read, and what kind of dreams were being dreamt have no place in the observer logbook as it is a legal document.” Page 2-6 of the 2004 North Pacific Groundfish Observer Manual states in part; “Your logbook is your field biology notebook and must be treated as such. *Do not use it as a personal journal.* . . .Use the Daily Notes section to include notes on problems that occurred while you were aboard the vessel, any illnesses or injuries you suffered, and the reasons you chose all sampling methods used. . . .”

I reviewed the Daily Notes section of your logbook and confirmed that many of the comments are irrelevant.” [R. 25]

The IAD adopted this finding. [R. 92]

Although Ms. Doe stated that “there was a lot of information in the daily notes section that was irrelevant to the cruise,” [R. 15] this is not a binding admission that she failed to meet a written legal standard for performing an observer duty. Ms. Doe also offered an explanation for her actions by stating that “I thought my time aboard the vessel needed to be accounted for.” [R. 15] I will make an independent judgment whether Ms. Doe violated a written standard through inappropriate content of the Daily Notes section of her logbook.

Ms. Doe made entries in the Daily Notes section for 69 days: every day from March 15, 2004 to May 23, 2004. The overwhelming majority of the comments are unquestionably relevant and the type of information that an observer should put in the Daily Notes. Ms. Doe describes timing of hauls, problems with hauls, reasons why she did not sample and other events of note. The NPGOP did not specify which entries had inappropriate content. Seven entries had comments that referred to a dream, a movie or a novel and the entry for May 8, 2004 had irrelevant details

and flip comments.¹³

I conclude that Ms. Doe did not violate a written standard for observers through inappropriate content in her Daily Notes for several reasons. First, Mr. Seither is not correct that Ms. Doe's logbook contains comments about what movies were being watched, what books were being read, and what kind of dreams were being dreamt. Ms. Doe made five references to watching movies [April 20, 21, 24, 25 and May 1] but does not say what movies are being watched. It does not give the titles of the movies or describe them in any way, except to describe one as heartwarming. Ms. Doe made seven references to reading [April 20, 21, 22, 23, 24, 25, May 1] but does not mention any books by name or describe the books except to say they were novels.

Ms. Doe referred to a dream once, in the entry for April 20, 2004, where she simply notes she was awakened from a nap at 1600 hours "by a disturbing dream." She does not describe the dream and, if an observer did develop any kind of mental problem, it might be helpful if the observer had noted the advent of disturbing dreams.

Second, the Manual does not contain, and therefore does not define, the term "inappropriate content." The closest it comes to that is that it tells the observers not to use the logbook as a "personal journal." The Manual does not define what is personal except as follows:

Do not use it as a personal journal. Although you must document any interference or inappropriate behavior toward you, avoid venting frustrations or making slanderous, derogatory or discriminatory remarks in your logbook.
[Manual at 2-6][emphasis in original]

By implication, a personal comment is one that merely vents frustrations or is slanderous, derogatory or discriminatory. None of Ms. Doe's comments merely vent. None are slanderous, derogatory or discriminatory. All of Ms. Doe's comments relate to the cruise. None are personal in the sense of addressing family, relationships, finances, religion or politics. The dictionary defines personal as "of or relating to a particular person" and "relating to an individual, his character, conduct, motives or private affairs especially in invidious and offensive manner."¹⁴ An observer unquestionably is supposed to describe many "personal" subjects in the logbook. The Manual tells the observer to document any inappropriate behavior toward the observer, which could be acts that occurred in private and relate to the character, conduct and motives of the observer or the ship's personnel.¹⁵ The Manual tells the observer to write down any reason the observer did not sample. This includes the observer's physical and mental condition, which could definitely include information usually considered personal.¹⁶

¹³ April 20, 2004 [R. 862]; April 21, 2004 [R. 863]; April 22, 2004 [R. 863]; April 23, 204 [R. 864]; April 24, 2004 [R. 865]; April 25, 2004 [R. 865]; May 1, 2004 [R. 867]; May 8, 2004 [R. 870].

¹⁴ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged) (1986).

¹⁵ Observer Manual at 2-6.

¹⁶ *Id.*

The Manual tells the observer: “*Make an entry for every day*, describing the day’s events, even if it was what you would consider an ‘ordinary day.’”¹⁷ The Manual tells the observer: “Remember events which seem ordinary to you on this vessel may be unusual to the fleet or fishery, so don’t hesitate to write down any information which affects your work or day-to-day life aboard the vessel.”¹⁸ For example, Ms. Doe’s discussion with the captain as to when she could do her laundry,¹⁹ or the fact that she could and did watch movies, are aspects of her day-to-day life and might be relevant whether the vessel operator met its responsibility to provide an observer with accommodations equivalent to those provided for management personnel on the vessel.²⁰

Finally, Ms. Doe’s mid-cruise debriefing on Cruise 9022 occurred on April 17, 2004. [R. 1397] The debriefer stated: “Her daily notes are a bit sparse.”[R. 83] Every single comment by Ms. Doe that is arguably inappropriate occurred after April 17, 2004.²¹ This supports Ms. Doe’s explanation for these comments: “I thought my time aboard the vessel needed to be accounted for.” [R. 15]

In light of the Manual’s injunction that an observer should include much information that could be considered personal and the mid-cruise debriefing comment from Cruise 9022, I find it understandable that Ms. Doe thought she needed to account for her time. I conclude that Ms. Doe did not violate the written standard against using the logbook as a personal journal.

I acknowledge that some of Ms. Doe’s entries are unprofessional in tone.²² I acknowledge NPGOP’s legitimate concern that an observer’s logbook might become evidence in a court or administrative proceeding.²³ The NPGOP could address that with a particular observer in debriefing. If the NPGOP wanted to address this issue for all observers, it can evaluate whether to modify the Manual, or issue supplemental instructions, and further define what it means to use the Manual as a “personal journal” or define “inappropriate comments.”

Even though I conclude that Ms. Doe did not violate a written standard by what she put in her Daily Notes, I rely on what she left out of her Daily Notes to uphold two IAD Findings. In IAD Finding # 4, the NPGOP found that Ms. Doe did not meet the standard for frequency of hook counts. In IAD Finding # 7, the NPGOP found that Ms. Doe did not meet sampling requirements for average weights. The Manual tells an observer “to use the Daily Notes section to include

¹⁷ *Id.* [emphasis in original]

¹⁸ *Id.*

¹⁹ R. 862 [part of entry for April 20, 2004].

²⁰ 50 C.F.R. § 679.50(g)(1)(i).

²¹ April 20, 2004 [R. 862]; April 21, 2004 [R. 863]; April 22, 2004 [R. 863]; April 23, 204 [R. 864]; April 24, 2004 [R. 865]; April 25, 2004 [R. 865]; May 1, 2004 [R. 867]; May 8, 2004 [R. 870].

²² For example, the entry for May 8, 2004. [R. 870]

²³ Hearing Testimony of Heather Weikart (May 17, 2005), Tape 1, Side B, log 577 - 590.

notes on problems that occurred while you were aboard the vessel.”²⁴ Ms. Doe did not put in her Daily Notes comments on problems she encountered in meeting those standards. I rely on this omission in upholding IAD Findings # 4 and # 7.²⁵

IAD Finding # 2. Incomplete Vessel Safety Checklist.

The NPGOP Notice to Ms. Doe stated:

Mr. Seither’s recommendation states in part; “The Vessel Safety Checklist in the observer logbook must be completed to verify the safety equipment of the vessel has been updated and to familiarize the observer with the location of the safety equipment.” Page 17-2 of the 2004 North Pacific Groundfish Observer Manual states in part; “Prior to boarding a vessel for the first time, you must check the vessel for compliance with Coast Guard regulations. Complete your “Vessel Safety Examination” form in your logbook (see Figure 17-2).”

I reviewed your logbook and confirmed that the Vessel Safety Examination is incomplete. The “Total Capacity” of the “Life Rafts” section is blank. In addition, you noted “Good,” rather than the expiration dates, for the life rafts, hydrostatic releases, and EPIRB [Emergency Position Indicating Radio Beacon]. [R. 26]

The IAD reached the same conclusion. [R. 92 - 93]

The Manual establishes a written standard: completing the Vessel Safety Examination Form. I reviewed the Vessel Safety Examination Form filled out by Ms. Doe. [R. 698]. Ms. Doe filled in much of the form, including whether the vessel had the proper installation of the hydrostatic release, the location of the EPIRB and the number and location of life rings. But I find that Ms. Doe did not fill out the form completely. Ms. Doe left the form blank for total capacity of life rafts. And Ms. Doe did not fill in the expiration date for the life raft, the hydrostatic release and the NOAA registration sticker for the EPIRB but, instead, wrote “good.” [R. 698]

In response to this allegation, Ms. Doe makes three arguments. First, she notes that the Manual tells observers to use a list, “Issues to Address During Safety Orientation,” as “a reference for what questions to ask yourself while looking at safety gear.”²⁶ The Issues list does not ask about expiration dates. But the Manual tells observers both to use the issues checklist *and* complete the vessel safety examination form, and it gives observers a sample of a completely filled out Vessel Safety Examination Form.²⁷ The Form does require expiration dates.

²⁴ Manual at 2 - 6.

²⁵ See pages 18, 25, 30 *infra*.

²⁶ Observer Manual at 17 - 2.

²⁷ Observer Manual at 17 - 2 & Figure 17 - 1 at 17 - 3.

Second, Ms. Doe states that she did, in fact, check the expiration dates for the life raft, hydrostatic release and the EPIRB. By “good,” she meant that it was current and was not going to expire during the cruise. [R. 1231] I believe that Ms. Doe checked the expiration dates. But even if, to Ms. Doe, “good” meant current and meant that the equipment would not expire before the end of the cruise, the NPGOP did ask observers to fill in an expiration date and the NPGOP can legitimately ask them to do that. The NPGOP can seek standardized information that is self-explanatory and does not require an observer to explain his or her unique meaning of a term. The presence of an expiration date could alert the NPGOP, or other observers, if a piece of equipment was going to expire shortly after the cruise.

Third, Ms. Doe is an observer with the State of Alaska shellfish program. Ms. Doe states that answering “good” would have been sufficient on the State form and that she mixed the requirements of the two programs. [R. 1231] First, I do not agree that Ms. Doe’s answers on the Federal form would have answered the State form. The State form requires the observer to fill in the number of persons the life raft can hold. [R. 1419] Ms. Doe’s failure to fill in that number would leave both the State and Federal form incomplete. Second, the State form does require the observer to simply verify “Current? yes/no” on the expiration date for the life raft and the EPIRB. And “good” probably is the equivalent of answering “yes.” [R. 1419] But even if Ms. Doe’s answers on the Federal form about the expiration dates would have answered the State form, Ms. Doe was filling out the Federal form and did not completely fill it out.

I affirm the second finding of the IAD and conclude that Ms. Doe violated a written standard for performance of an observer duty by not completely filling out the Vessel Safety Examination Form.

IAD Finding # 3. Non-retained raw data.

The NPGOP Notice states:

Mr. Seither’s recommendation states in part; “Original data was recopied to new decksheets and then discarded. This was confirmed for 6 of the 84 hauls sampled, though there may have been more.” Page 4-24 of the 2004 North Pacific Groundfish Observer Manual states in part; “Using the deck form allows you to keep the original data and enter it directly into the ATLAS system without having to copy it over to another form.”

I reviewed your deck forms (a.k.a. deck sheets). Although there is no indication which deck forms were recopied, I found a number of deck forms that look too “clean” to have been completed on deck. The recopying of raw data was addressed in a previous evaluation. The debriefing evaluation for Cruise 8324 states in part; “Most Atlas deck sheets were filled out correctly; however, several had been copied because you thought they were too messy. Although deck sheets

should be legible we ask that you not transcribe your data since errors can occur in the process and raw data can be lost. The raw deck sheets that I saw were acceptable.” [R. 26- 28]

The IAD adopted this finding. [R. 93] Ms. Doe sampled 84 hauls out of 171.²⁸ For each sampled haul, Ms. Doe filled out a deck sheet or deck form. The IAD raises two issues. First, did Ms. Doe recopy deck sheets? If so, how many? Second, did Ms. Doe’s recopying deck sheets violate a written standard of conduct for observers?

A. Did Ms. Doe recopy deck sheets? If so, how many?

Ms. Doe argues in her closing statement that she is certain that she only recopied one deck form. [R. 1482] Ms. Doe also stated in her answer to a written question before the hearing that she recopied a deck form when she cut the original form. [R. 1441]

The NPGOP argues that Ms. Doe recopied at least six original deck forms. [R. 1463] I find, by a preponderance of the evidence, that Ms. Doe recopied at least six deck sheets.

First, the strongest evidence in support of this finding are other written statements by Ms. Doe. In response to the initial NPGOP Notice of Opportunity to Submit Evidence, Ms. Doe stated:

The recopying of raw data was not a regular practice. In situations where I thought my data would not be legible or acceptable I did such a thing. These cases were if I thought only I would recognize the numbers I wrote, in which a simple erase and write over was tried. But with the deck forms it is difficult to let the numbers be seen once an eraser was used. Situation beyond my control would prevent me from being legible all the time, like the weather. **The situation most common to cause me to recopy my deck sheets** was during sampling of length/weights, cutting the fish to determine sex, the deck sheet got in the way and were cut up. It was my practice to complete calculations and fill in the data required on the deck forms as soon as I completed my duties for that particular haul. Therefore if the above situation was encountered it was fixed as soon as possible. The manual states (pg 2-4) “your data and logbook entries must be clear and legible. If your writing is unclear, incorrect data may be entered into the in season database...” **All I was trying to do is have information that was clear to me and to the people who had to look into my data. In majority of the cases the deck forms were ok, although a few I felt were not.**²⁹ [R. 16]
[emphasis added]

In her written appeal, Ms. Doe stated:

²⁸ Species Composition Samples, Deck Sheets. [R. 1062 - 1228] On Cruise 9022, the vessel made 171 hauls: hauls 156 through haul 327. [R. 970 - 982].

²⁹ Letter from Ms. Doe to NPGOP (Oct. 4, 2004) (emphasis added). [R. 16]

The violation addresses the recopying of deck sheets. It was brought to my attention in debriefing of cruise 8324. **At this point in time I did not realize the seriousness of doing such a matter.** In which it states “several had been copied because you thought they were messy. Although deck sheets should be legible we ask you not transcribe your data since errors can occur in the process and raw data can be lost.” **This sentence states that it is *suggested*, not required, that we do not transcribe our raw data. I was just trying to make sure that the people who were to look at my data were able to read it and understand it.**

It states in the manual on (pg 2-4) “your data and logbook entries must be clear and legible. If your writing is unclear, incorrect data may be entered into the in season database? [sic]” Thereby felt that reading my data was the more important matter. **The recopying of my deck forms was not a regular occurrence; I believe 6 cases out of 172 sampled hauls.** Therefore how does this jeopardize my data as a whole? The recopied deck sheets should only be addressed here. **These deck sheets were recopied in a timely manner, which means as soon as such problem occurred, reducing the chances of mistakes.**³⁰

These written statements are not consistent with Ms. Doe only recopying one deck sheet because she cut an original deck sheet. These written statements suggest that she recopied more than one deck sheet. Ms. Doe states that recopying deck sheets “was not a regular practice.” She states that in the “majority of the cases, the deck forms were ok, although a few I felt were not.” She states recopying deck forms “was not a regular occurrence; I believe 6 cases out of 172 sampled hauls.”

These statements suggest that she recopied deck sheets, not just when she cut up one original, but when she thought the original deck sheets were illegible. She states that she tried “a simple erase and write over . . . [b]ut with the deck forms it is difficult to let the numbers be seen once an eraser was used.” She states: “All I was trying to do is have information that was clear to me and to the people who had to look into my data.” She explains that she interpreted the mid-cruise debriefing comments from Cruise 8324 – “we ask that you not transcribe your data since errors can occur in the process and raw data can be lost” – as a suggestion rather than a requirement.

Second, Ms. Doe’s position changed over the course of the appeal as she realized that the NPGOP did not want any deck forms recopied. In her first written statements, Ms. Doe defended recopying deck sheets to make sure they were legible. In answers to written questions before the hearing, she said she recopied a deck sheet because she cut the original. At the hearing, her testimony was equivocal as to whether she is sure she only recopied one.³¹ In her

³⁰ Letter from Ms. Doe to OAA (Dec. 12, 2004) (emphasis added). [R. 1232]

³¹ Hearing Testimony (May 17, 2005), Tape 2, Side A, log 179-207.

closing statement after the hearing, Ms. Doe states she is sure she recopied only one deck form. I give more weight to Ms. Doe's earlier, written statements because these statements definitely convey that she recopied more than one deck form and explain why she did. These statements were her first response. These statements were not influenced by what position she thought would be most beneficial to her.

Third, Ms. Doe brings up a new point in her closing statement, namely, that Mr. Seither did not raise the problem during her debriefing for Cruise 9022. [R. 1482] Ms. Doe's testimony at the hearing flatly contradicts this point. Ms. Doe testified:

Administrative Judge: When he said [in the debriefing] that he thought six [deck sheets] had been recopied, did you contradict that? Did you dispute that?

Ms. Doe: Yes, I told him that I know of at least one because I remembered doing it and I couldn't say there was more than six and he wouldn't, his answer was I think you copied six or more, so I made the argument: No I didn't. [Hearing Testimony (May 17, 2005), Tape 2, Side A, log 179 - 185]

Fourth, Ms. Weikart testified that she reviewed the deck sheets and concluded that between ten and twenty were recopied or not filled out on deck.³² Ms. Weikart testified that the deck sheets for hauls 235, 236, 237 and 240 looked as if they had been recopied or not filled out on deck. These forms do not have stray marks and splashes and blotches on them as do the deck sheets for hauls 211, 217, 227, 242, 253 and 259. The deck sheets identified by Ms. Weikart do look too clean to have been filled out on deck.

I therefore find that Ms. Doe recopied at least six deck sheets based on Ms. Doe's written statements, her equivocal testimony at the hearing, her changing position in the appeal, her allegation in the closing statement that Mr. Seither never brought up this issue in debriefing, which is flatly contradicted by her hearing testimony, and by the appearance of a number of deck sheets that look as if they had been recopied.

B. Did Ms. Doe's recopying deck sheets violate an observer duty specified in writing by the NPGOP?

This is a close question but I conclude that Ms. Doe's recopying deck sheets did not violate a written observer standard. The Manual does not explicitly state that an observer should never copy a deck sheet that the observer views as illegible. The Manual does emphasize legibility as a preeminent goal:

Your data and logbook entries must be clear and legible. If your writing is unclear, incorrect data may be entered into the inseason database used to manage

³² Hearing Testimony (May 17, 2005), Tape 2, Side A, log 238 - 247.

the fishery. During debriefing, these errors need to be fixed, and if the debriefer is unsure of a number, s/he will need to have you present to interpret your data. This will lengthen time spent debriefing, and if questions cannot be resolved, may cause data to be lost. To ensure your data are legible:

- write carefully in clear, dark writing,
- check the forms for stray marks *or incomplete erasures* before faxing, and
- record the data in an organized manner. [Observer Manual at 2 - 4] [emphasis added]

The NPGOP points to the debriefing comment from 8324 as establishing a written standard that an observer should not recopy deck sheets. It states:

Most Atlas deck sheets were filled out correctly; however, several had been copied because you thought they were messy. Although deck sheets should be legible we ask that you not transcribe your data since errors can occur in the process and raw data can be lost. The raw deck sheets that I saw were acceptable.
[R. 86]

Ms. Doe states that she interprets that sentence as a suggestion rather than a requirement not to recopy raw data. [R. 1232] The NPGOP maintains “that ‘we ask that you not’ is a polite way of saying ‘don’t.’” [R. 1464]

The Manual establishes clear standards for observer behavior in many instances. It tells an observer never to cross out anything completely in the Daily Notes section and never to erase in the Daily notes section.³³ It tells observers how frequently they should do hook counts and how many fish should be in average weight samples.³⁴ The Manual does not explicitly say that an observer should never recopy a deck sheet. It does not state that, if an observer recopies a deck sheet, the observer should turn in the original sheet with the recopied sheet. And the Manual acknowledges that, in contrast to the Daily Notes section, an observer might erase content on a deck sheet. It simply warns against “incomplete erasures.”

I conclude that, given the Manual’s emphasis on legibility of data and the permissibility of erasing data on a deck sheet, the debriefing comment is insufficient to establish a written standard that an observer should never recopy a deck sheet or, if the observer does, the observer should turn in the original, messy one with the replacement, neater one. I conclude that Ms. Doe did not violate a written observer standard by recopying deck sheets and not handing in the original sheets.

It is my understanding from this appeal that the NPGOP has two rules for observers regarding recopying deck sheets. [1] Do not recopy a deck sheet. [2] If you do, hand in the original and

³³ Observer Manual at 2 - 7.

³⁴ I discuss the hook counts under finding # 4 and the average weight samples under finding # 7.

the recopied sheet.³⁵ The testimony of Jennifer Ferdinand, the Observer Data Quality Control Manager, suggests these two rules:

Generally when I have encountered the issue of an observer recopying deck sheets because they were messy, the observer has returned with the messy deck form and the recopied, neater deck form, so they still retained their raw data. We discourage that because every time you recopy numbers, there is the potential for you transposing numbers and leaving things out.³⁶

If those are the standards the NPGOP wishes to communicate to observers, it can do that through individual debriefing comments, a statement in the Manual or supplemental instructions to observers.

IAD Finding # 4. Infrequent hook counts.

The NPGOP Notice states:

Mr. Seither's recommendation states in part; "Ten counts were done for the entire trip, but to meet the minimum requirements [Ms. Doe] should have completed a minimum of 17 hook counts. Furthermore, the vessel was frequently parting gear during the second trip. This means that gear was being spliced back together and hook counts were changing as well." Page 6 - 5 of the 2004 North Pacific Groundfish Observer Manual states in part; "The average number of hooks per segment will change from set to set due to hook loss and repairs. . . . ***Accurate hook counts are essential for longline sampling.*** You must count the number of hooks attached to each segment of gear for at least ***one-fifth of a set, twice per week***, the entire time you are aboard the vessel."

I reviewed your data and found documentation of ten average hook counts in the calculation section of the logbook. I also found that the frequency of hook count sampling did not increase after it was addressed in your mid-cruise debriefing evaluation. The requirement to complete hook counts more frequently has been addressed in two previous evaluations. The debriefing evaluation for Cruise 8324 states in part; "Hook counts must be done twice a week!" The mid-cruise debriefing evaluation for Cruise 9022 states in part, "[Ms. Doe] is counting hooks

³⁵ Hearing Testimony (May 17, 2005): Tape 2, Side A, log 315 - 395 (testimony of Heather Weikart, NPGOP Decertification Official, and Jane Doe, Appellant); Tape 2, Side A, log 561 - 590 (testimony of Heather Weikart); Tape 2, Side B, log 5 - 25 (testimony of Jane Doe); Hearing Testimony, Tape 1, Side A (May 24, 2005), log 291 - 339 (Testimony of Jennifer Ferdinand, Observer Data Quality Control Manager) (portion of testimony quoted above). If rule [1] is absolute, rule [2] never comes into play. It is my understanding from this appeal that the general rule is that observers should not recopy deck sheets. But, in the unlikely event that an original deck sheet is damaged or made illegible, the observer should hand in the original sheet, albeit damaged or illegible, *and* the new sheet.

³⁶ Hearing Testimony (May 24, 2005), Tape 1, Side A, log 325.

for a third of the gear almost twice a week. She will make sure to count hooks twice a week in the future.” [R. 27]

The IAD adopted this as finding. [R. 93 - 94]

The Observer Manual establishes a clear written standard for hook counts: twice per week on one-fifth of a set of gear. NPGOP wants current information on the vessel’s effort. The Manual explains:

One of the very first things you need to do when assigned to a longliner is to find out how many hooks are being retrieved. ***The total number of hooks on each segment of gear and in each set is the foundation of all your other data.*** Without these numbers, you cannot calculate your sample size or the Official Total Catch [OTC]!³⁷

The NPGOP notice adopts Mr. Seither’s conclusion that Ms. Doe should have conducted a minimum of 17 hook counts. [R. 27] The vessel was on the water for 67 days: from March 17, 2004 to May 23, 2004.³⁸ This is a period of nine and a half weeks. If an observer did a hook count twice a week, the observer would do 19 hook counts. The NPGOP may have been making allowance for the mid-cruise stop when, for five days, the vessel was in port or returning to the fishing grounds and did no fishing.³⁹ I conclude that the NPGOP can hold Ms. Doe to a standard of 17 hook counts.

I find that Ms. Doe did a total of ten hook counts on Cruise 9022 during the following weeks:

Week 1, March 14 - 20, 2004: Hook count # 1 [R. 723] on March 18 - 19, 2004 [R. 970]⁴⁰
Week 2, March 21 - 27, 2004: Hook count # 2 [R. 729] on March 24 - 25, 2004 [R. 971]
Week 3, March 28 - April 3, 2004: Hook count # 3 [R. 735] on March 29 - 30, 2004 [R. 972]
Week 4, April 4 to April 10, 2004: Hook count # 4 [R. 741] on April 3 - 5, 2004 [R. 973]
Week 5, April 11 - April 18, 2004: Hook count # 5 [R. 749] on April 11 - 12, 2004 [R. 974]
Mid-cruise debriefing: April 17, 2004 [R. 1396 - 1397]
Week 6, April 18 - April 24, 2004: Hook count # 6 [R. 757] on April 22 - 23, 2004 [R. 976]
Week 7, April 25 to May 1, 2004: Hook count # 7 [R. 761] on April 25 - 26, 2004 [R. 977]
Hook count # 8 [R. 769] on April 30 - May 1, 2004 [R. 978]
Week 8, May 2 to May 8, 2004: No hook counts
Week 9, May 9 to May 15, 2004: Hook count # 9 [R. 781] on May 13 - 14, 2004 [R. 980]

³⁷ Observer Manual at 6 - 5 (emphasis in original).

³⁸ The cruise for Ms. Doe started on March 15, 2004 with two days in port. [R. 858]

³⁹ The five days were April 17 - 21, 2004. [R. 861 - 863; R. 976]

⁴⁰ The dates of the hook counts are usually two dates because Ms. Doe wrote her hook counts on the calculation sheets for the Observer OTC estimates. These sheets do not have dates but haul numbers. I used the dates of hauls on the Vessel Haul Forms as the dates of the hook counts. [R. 970 - 982]

Week 10, May 16 - May 22, 2004: Hook count # 10 [R. 789] on May 18 - 21, 2004 [R. 988]
Last day of cruise: May 23, 2004 [R. 874]

Only in week 7 did Ms. Doe do two hook counts. In week 8, she did none. At the hearing, Ms. Doe offered no argument or testimony on the hook count issue. She stated: "I was wrong. I admit to it."⁴¹ I find that Ms. Doe did not meet the standard for frequency of hook counts in the Observer Manual.

Ms. Doe stated in her appeal:

I did not meet the requirements for average hook counts per week. I was averaging one hook count every five days of fishing. I tried making a mental note to myself to remember to complete the task, but my memory failed me. I tried to put myself on a schedule to do hook counts every third day, but when an illness, bad weather days and non-sample hauls were added to the routine, I lost the mental note I had. I should have made a written note to myself and kept a more visual schedule.

My error should not be unnoticed, but should be viewed as one that can be easily fixed. More organization with my time and my sampling duties with a written record in my logbook, would remedy the problem. [R. 1232]

Ms. Doe states that she lost her mental note to do hook counts due to the combined effects of non-fishing days, bad weather and illness. Every observer must deal with non-fishing days, bad weather and illness. I conclude this is not a defense to the failure to meet the hook count standard.

Ms. Doe states that she was averaging one hook count every five days of fishing. The standard is not tied to fishing days but to calendar weeks, although if a vessel hardly fished at all, it would not be possible to do two hook counts per week. This vessel typically fished six or seven days a week.⁴² I conclude that the vessel fished enough so that Ms. Doe could have done two hook counts per week of fishing.

I also analyzed whether the combined effects of the days that Ms. Doe did not sample for a documented reason – bad weather, sickness, oversleeping, line parted or mistake – made it impossible for her to do two hook counts per week. Ms. Doe did not sample 32 hauls:

⁴¹ Hearing Testimony, May 17, 2005, Tape 2, Side B, log 118.

⁴² Week 1 [vessel fished 3 days – first two days in port]; Week 2 [7 days]; Week 3 [7 days]; Week 4 [7 days]; Week 5 [6 days]; Week 6 [3 days – week after mid-cruise stop]; Week 7 [7 days]; Week 8 [7 days]; Week 9 [6 days]; Week 10 [5 days]. I define a day of fishing as a day when the vessel retrieved gear according to the Vessel Haul Forms. [R. 970 - 982].

bad weather	10 hauls:	161, 187, 199, 212, 214, 220, 234, 233, 251, 295
sick	14 hauls:	169, 228, 248, 254, 260, 261, 264, 265, 266, 267, 322, 323, 327, 328
slept	5 hauls:	201, 239, 276, 286, 315
line parted	2 hauls:	206, 297
mistake	1 haul:	302 ⁴³

Except for haul 201 on April 3 and haul 206 on April 6, the vessel made other hauls on each day Ms. Doe missed a haul. For example, even though Ms. Doe did not sample haul 169 on March 23 because of illness, the vessel retrieved haul 170 after haul 169 on March 23 and Ms. Doe sampled haul 170. [R. 971, R. 983]. So she could have done a hook count on haul 170. Even if Ms. Doe could not do a hook count on another haul on the same day, the vessel was fishing almost every day and she could have done a hook count the next day. I conclude that the combined effects of non-fishing days, sickness and bad weather did not prevent Ms. Doe from meeting the hook count standard.

The Manual tells an observer to describe in the Daily Notes any problems that occurred while aboard the vessel.⁴⁴ Ms. Doe did not describe in the Daily Notes any problem in meeting the hook count standard. [R. 858 - 874] Ms. Doe did not ask for help from her inseason advisor, who was Jason Stern. [R. 56]⁴⁵ By the tone of the e-mails, it appears that Ms. Doe had a comfortable working relationship with Mr. Stern but she did not bring up the hook count problem at any point. [R. 56 - 70]

The NPGOP could give observers a standardized place in the logbook to record hook counts and a standardized method to keep track of how many they have done. That might be more effective than the observers devising their own method for recording hook counts and keeping track of when they have done them. But NPGOP does not have to do that. For decertification, NPGOP does have to establish a written standard and show that the observer violated that standard. NPGOP has done that. I therefore affirm finding # 4 of the IAD and conclude that Ms. Doe failed to satisfactorily perform the duties of an observer for frequency of hook counts as specified in the Observer Manual and reinforced by written comments in the mid-cruise debriefings for Cruise 8324 and Cruise 9022.

IAD Finding # 5. 50-kilogram Salter scale tared incorrectly.

The IAD determined:

There were actually two things you did wrong, neither of which was insignificant.

⁴³ Observer Haul Forms [R. 983 - 995]. The Observer Haul Forms cite bad weather as the reason she did not sample hauls 212 and 214. [R. 987] The Daily Notes state falling back to sleep for haul 212 and health problems for haul 214. [R. 861]. See page 27 *infra* & Appendix A, point 2.

⁴⁴ Observer Manual at 2 - 6.

⁴⁵ Ms. Doe also sometimes received e-mails about data transmission from Glenn Campbell.

The first was not recording the weight of the basket setup and the total weight once fish were added on the deck form. The second was not recording the calculations. [R. 94]

Ms. Doe explained how she accounted for the weight of the basket:

I am a person who looks at a task and tries to find ways to make that task more efficient, more accurate, and easier. That is what I thought I was accomplishing when I did not tare my scales for cruise 9022. I looked at the situation and found that the weight of the basket set up changed prior to each time I weighed a new basket of fish. I believed with the increase in slime from the fish and water to the basket, changed the reading of the scales. Instead of taring the scales I made mental note of what the needle read with just the basket set up, added fish and then subtracted the initial weight from the total weight of the basket set up and the fish being weighted. I figured this would be more accurate since I am accounting for the slight change in weight each time. Plus I thought that it was basically the same as taring the scales. [R. 1233]⁴⁶

Mr. Seither, the final debriefer from Cruise 9022, stated that, during the debriefing, Ms. Doe was inconsistent in explaining how she accounted for the weight of the basket. [R. 8] The NPGOP did not call Mr. Seither as a witness. Ms. Doe disputes Mr. Seither's characterization of her statements in the debriefing.⁴⁷ Ms. Doe was consistent in her written statements before the hearing, and in her testimony at the hearing, as to how she accounted for the weight of the basket.⁴⁸ I therefore find that Ms. Doe accounted for the weight of the basket by the method she described above.

Did this method violate a written standard? The purpose of taring a scale is to account for the weight of the container. Even though she did not use the tare screw, Ms. Doe's method accounts for the weight of the container. The NPGOP admitted that her method would have been acceptable if she had recorded the weight of the basket without the fish and the weight of the basket with the fish and showed the calculation which resulted in the weight of the fish alone.⁴⁹ I conclude that Ms. Doe's method of accounting for the weight of the container did not violate a written observer standard.

⁴⁶ The tare is "the weight of a container or vehicle that is deducted from the gross weight to obtain the net weight." To tare a scale means "to ascertain or mark the tare of" the scale. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged) (1986).

⁴⁷ R. 16; Hearing Testimony, May 17, 2005, Tape 2, Side B, log 176 - 186.

⁴⁸ R. 16; R. 1233; Hearing Testimony, May 17, 2005, Tape 2, Side B, log 164 - 190.

⁴⁹ R. 1403-1404; Hearing Testimony, May 17, 2005, Tape 2, Side B, log 290. The NPGOP states that writing the calculation in the calculation section of the logbook, but not the deck forms, would be insufficient because the deck forms are the only documents on deck – where the observer actually weighs the fish. I do not address this issue because Ms. Doe did not write her calculations on the deck forms *or* the logbook and I found she thereby violated an observer standard.

But did Ms. Doe's failure to write down the calculation violate a written observer standard? On this point, the Manual is clear. All calculations must be written and recorded. It states:

Calculations

All calculations, no matter how small, must be recorded in your logbook. The only exception to this rule is for average weight calculations, which may be written on the Species Composition Form 3US or deck forms. Write your calculations directly into your logbook rather than transcribing them from scrap paper. Document all your calculations, and the formulas used, in order to make your data self-explanatory. Record and label your calculations so that another person could easily understand them without any interpretation.

Calculations which you may think are trivial or obvious must also be recorded. This includes, but is not limited to, conversions from pounds to kilograms, product recovery rate calculations, [and] halibut length to weight conversions [Manual at 2 - 7][emphasis in original]

I therefore conclude that Ms. Doe violated a written standard for observers by not recording her calculations regarding the weight of the container in which she weighed her sample fish.

IAD Finding # 6. Improper calculation of halibut injury assessment and length frequency data.

The Manual section on this subject states at page 6 - 26:

Average weight collection

Because of their size, halibut present a problem for observers when they are the predominant species on an IFQ vessel.⁵⁰ When observing on halibut IFQ vessels, you will need to account for halibut on the line either by estimating and recording each fish's length or by collecting an average weight sample and applying it to halibut in your tally. If you decide to use an average weight collection, you will need to randomly collect at least 20 halibut per set. . . .

. . . .

Halibut Injury Assessments

Vessels that have a halibut IFQ are allowed to retain halibut of legal size. The vessel crew are required to carefully release any undersized halibut. The IPHC is interested in the injuries caused to released halibut. In order to obtain an accurate

⁵⁰ Ms. Doe's vessel was a halibut IFQ vessel, namely, the vessel operator had the right to catch and retain halibut up to the amount of an IFQ permit holder's Quota Share.

representation of the total population, all halibut in your injury assessment must be measured. If you plan on measuring the halibut for an average weight sample and you want to use the same sample for your halibut injury assessment, the fish must be measured flat and a fork length recorded (see “Technique for Measuring Halibut” on page 10-5). For your sample, randomly collect halibut regardless whether they will be retained or not. Collect and measure all the halibut in this sample, **but only assess the injuries of fish that are discarded**. Record the additional legal, retained halibut from your sample with a code 9, “Unknown,” in the Injury column of the Form 7. **Remember, do not sex halibut**. Always record a “U” in the sex column of the Form 7. [emphasis in original]

I understand the NPGOP’s position to be that an observer is supposed to take the following three steps when conducting a halibut injury assessment:

- Step 1: collect halibut – retained and non-retained – for the sample.
- Step 2: measure the length of all the halibut in the sample.
- Step 3: assess the injuries to the non-retained halibut in the sample.⁵¹

I accept that as the correct procedure for conducting a halibut injury assessment.

The NPGOP states that Ms. Doe did the following on cruise 8324:

- Step 1: Ms. Doe collected halibut – retained and non-retained – for her sample.
- Step 2: Ms. Doe measured the length of all the halibut in the sample.
- Step 3: Ms. Doe did not properly assess the injuries to the non-retained halibut.

On Cruise 8324, the NPGOP did not use the halibut injury assessments, but did use the length data, since Ms. Doe collected the halibut randomly. [R. 86-87]

The NPGOP states that Ms. Doe did the following on cruise 9022:

- Step 1: Ms. Doe collected only non-retained halibut for her sample.
- Step 2: Ms. Doe measured the length of all the halibut in her sample.
- Step 3: Ms. Doe assessed the injuries to the non-retained halibut.

I agree that, on Cruise 9022, Ms. Doe made a mistake at step 1. For her sample, she only collected halibut the vessel was not retaining.

Ms. Doe states that she thought that she was only supposed to measure the length of the halibut in the injury assessment sample **if she was going to use the same sample for her average weight sample**. [R. 1233, R. 1481] This is a close and difficult issue because, through the process of

⁵¹ R. 94 - 95; R. 1404 - 1406; Hearing Testimony, May 17, 2005, Tape 2, Side B, log 403 - 536.

the appeal, NPGOP has made clear the steps involved in collecting the sample for the halibut injury assessment. I conclude that Ms. Doe's interpretation of her duties at the time of Cruise 9022 is understandable and that the Manual and the debriefing comments are not sufficiently clear to establish that Ms. Doe failed to perform an observer duty as specified in writing by the NMFS Observer Program.

The Manual is unclear. The Manual has language that supports the NPGOP's interpretation that an observer must measure the length of all the halibut in the halibut injury assessment sample: "In order to obtain an accurate representation of the total population, all halibut in your injury assessment must be measured" and "Collect and measure all the halibut in this sample, *but only assess the injuries of fish that are discarded.*"(emphasis in original)

But the Manual also has language that supports Ms. Doe's interpretation: "*If you plan on measuring the halibut for an average weight sample and you want to use the same sample for your halibut injury assessment*, the fish must be measured flat and a fork length recorded. For your sample, randomly collect halibut regardless whether they will be retained or not."⁵² This paragraph does not refer to the group of halibut selected for a halibut injury assessment as a "sample" but only refers to the halibut selected for the average weight assessment as a "sample." Ms. Doe did correctly measure the length of all the halibut in her average weight sample. But Ms. Doe did *not* conduct her halibut injury assessment with the same halibut she used for her average weight sample. I conclude that Ms. Doe reasonably concluded that, since she used different halibut for her injury assessment than for her average weight sample, she did not have to measure the length of halibut that she was not assessing for injury.

Ms. Doe testified that she addressed this issue with the teacher at the class she took before Cruise 9022.⁵³ Ms. Doe's testimony is unclear as to precisely what she asked him. Neither Ms. Doe nor the NPGOP called the teacher as a witness. I do not make any finding as to whether the teacher of the training class, either generally or specifically with Ms. Doe, addressed whether the halibut injury sample had to include halibut that were not assessed for injury.

The mid-cruise debriefing from cruise 9022 did not clarify that the halibut injury sample must include halibut that the observer did not assess for injury. The mid-cruise debriefing comment states, "Overall, [Jane] is doing fine this contract. She is not required to return for a second midcruise unless she boards a different vessel type she has not experienced before or would like to review an error report." [R. 83] With respect to halibut injury data, the mid-cruise debriefing states, with approval, that Ms. Doe "is collecting halibut injury on halibut the vessel is not keeping during randomly selected nontally period." [R. 82] This comment tells Ms. Doe that she is doing it right.

The debriefing comment points up the ambiguity in the concept of data on "halibut injury." The observer is, and is not, supposed to collect "halibut injury data" only on halibut the vessel is not

⁵² Manual at 6-26 [emphasis added].

⁵³ R. 1481; Hearing Testimony, May 24, 2005, Tape 2, Side A, log 108 - 116; 321 - 355.

keeping. The observer is supposed to collect injury data only on the halibut the vessel is *not* keeping if by “halibut injury” data you mean assessment of injury to the halibut. The observer is supposed to collect injury data on halibut the vessel *is* keeping if by “halibut injury” data you mean the length of the halibut the vessel is keeping.

It is possible that, for “halibut injury” data, the IPHC could have been interested only in a sample of non-retained halibut and how many of those were injured. It turns out that the IPHC is interested in a sample of all halibut that the vessel is catching and, of that, how many halibut are not retained and are injured. But the Manual, coupled with the mid-cruise debriefing comments from Cruise 9022, is open to both interpretations. I therefore conclude that Ms. Doe did not violate a written standard by not including in her halibut injury sample the lengths of halibut that Ms. Doe did not assess for injury.

IAD Finding # 7. Unmet sampling requirements for average weights.

The observer must estimate a vessel’s overall total catch. This means that the observer estimates how many pounds of fish the vessel catches. The observer uses average weights of sampled fish to do this. For the average weights to be valid, the Manual prescribes a number of fish for predominant and non-predominant species that the observer must sample. The NPGOP alleges two problems with Ms. Doe’s average weight samples. First, Ms. Doe did not meet the standard in the Manual for the number of fish for her average weight calculations. Second, Ms. Doe did not document the source of her average weight calculations in eleven hauls when she relied on data from other hauls.

A. Insufficient number of fish in Ms. Doe’s average weight samples.

The Manual at page 6 - 11 provides a clear written standard for the sampling requirements for average weights:

Average Weights

For most species, it is impossible to weigh all the individuals from your tally period and you’ll need to take average weights. Collect the following:

- 50 fish from predominant species
- 20 individuals from the shortraker/rougheye group from *inside* your tally sample
- 15 individuals from all other species.

Ms. Doe agrees that is the standard. She states, “I was well aware of the required amount of species needed to be collected for average weights.” [R. 18]

The decertification official analyzed Ms. Doe’s deck sheets and found numerous instances when Ms. Doe did not sample 50 fish of the predominant species and 15 of the non-predominant species for average weight calculations. [R. 51 - 55] The NPGOP Notice states:

I have analyzed the average weight data in your logbook and have determined that you did not meet sampling requirements. Of the 233 average weight calculations analyzed, 134 samples did not meet the applicable sampling requirement. This included 35 average weight samples for predominate species. [R. 29]

These figures in percentages are as follows:

<u>134 average weight samples that did not meet applicable sampling requirements</u>	= 57%
233 average weight calculations for predominant and non-predominant species	
<u>35 average weight samples for predominant species that do not contain 50 fish</u>	= 51%
69 average weight calculations for predominant species	

Of the 69 average weight calculations for predominant species, Ms. Doe did 35 before the mid-cruise debriefing and 34 afterward.⁵⁴ Of the 35 average weight samples before the mid-cruise debriefing, only three samples did not contain 50 fish. Ms. Doe's performance sharply declined in the second half of the cruise. Of the 34 average weight samples for predominant species after the mid-cruise debriefing, 31 samples, or 91%, did not contain 50 fish.

I conclude that Ms. Doe did not meet the written standard in the Observer Manual for the sample size for average weight calculations.

Ms. Doe states that she did not meet these standards because [1] sometimes the fishing was weak and the randomly selected portion of a skate of gear did not have the required number of fish, [2] the roller man did not have enough space to retain the required number and [3] sometimes the fishing was too fast which made it impossible for the roller man to gather the required fish for Ms. Doe and do his job at the same time. [R. 18] Ms. Doe states that, in fact, she did take steps to solve the problem by making her sample frame bigger but she could not get enough fish anyway.⁵⁵

These are not valid defenses to Ms. Doe's failure to meet the average weight sampling requirements. First, in many of the hauls where Ms. Doe did not collect the required number for average weight samples, she counted more than the required number of those species in her tally period. This is striking in the case of grenadier, a non-predominant species. Ms. Doe sampled 63 hauls for average weight of grenadiers. In 49, or 77% of these average weight calculations, Ms. Doe sampled less than 15 grenadier. [R. 51 - 55] But in each of these 49 hauls, Ms. Doe counted more than 15 grenadier in her tally period and often quite a bit more.⁵⁶ In haul 157, Ms.

⁵⁴ I base this on the list of average weight samples at R. 51 - 55 and the dates of the hauls on the Vessel Haul Forms at R. 970 - 982. Haul 237 was the last haul before the mid-cruise debriefing on April 17, 2004.

⁵⁵ Hearing Testimony, May 17, 2005, Tape 3, Side B, log 66.

⁵⁶ Deck Forms [R. 1062 - 1228].

Doe weighed 14 grenadier for her average weight sample and counted 215 in her tally period. [R. 1064] In haul 189, Ms. Doe weighed 13 grenadier for her average weight sample and counted 240 in her tally period. [R. 1102] In haul 242, Ms. Doe weighed 12 grenadier for her average weight sample and counted 325 in her tally period. [R. 1150] The fishing was not too weak for Ms. Doe to have counted 15 grenadier.

Second, I acknowledge that there were a number of hauls, particularly when black cod or Pacific cod were the predominant species, where Ms. Doe did not record more than 50 fish in her tally period. The problem here is that Ms. Doe did not document that she was having trouble meeting this standard. The Observer Manual tells the observer that the Daily Notes should contain “notes on problems that occurred while you were aboard the vessel . . . [and] the reasons you chose all sampling methods used - including those for catch estimation [and] species composition sampling.”⁵⁷ The Daily Notes do not mention that Ms. Doe was failing to meet this standard, do not discuss why she was not meeting this standard, and do not describe any steps she took to try to meet it. It does not, for example, state that the rollerman was having trouble giving her the required numbers of fish or that she enlarged her tally sample to get the required numbers.

Ms. Doe’s e-mails to her inseason advisor discuss some problems, such as whether she could sample a haul if the gear parted, but these e-mails do not mention any problem in getting the required number of fish for the average weight calculation. [R. 56 - 70] In fact, at the end of Cruise 9022, when Ms. Doe answered the Vessel/Plant Survey, she was asked the following question for when the vessel was targeting Greenland turbot and when the vessel was targeting IFQ sablefish [Question 430]:

When using average weights to determine species weights for species composition, were you able to consistently obtain average weights of at least 50 fish from predominant species and 15 from non-predominant species from each set?

She chose answer B to both questions:

B) Yes, I obtained avg. weights from at least 50 fish from predominant and 15 from non-predominant species for every sampled haul/set in which avg. weights were used to calculate species weight. [R. 688]

Ms. Doe answered Question 440 on the Vessel/Plant Survey that she experienced “no difficulties” with collecting samples as defined in training/briefing.⁵⁸ It was only because the decertification official, as part of this process, reviewed Ms. Doe’s performance on Cruise 9022 that the NPGOP became aware of this problem.

⁵⁷ Manual at 2 - 6.

⁵⁸ Question 440, Vessel/Plant Survey [R. 689 - 690] Ms. Doe gave that answer three times to three different forms of Question 440: when the vessel was targeting turbot, sablefish and halibut.

I conclude that Ms. Doe has not shown any defense or valid mitigating circumstance for her failure to meet the standard for sample size for average weight calculations.

B. Lack of documentation of source of average weights.

For average weight calculations, if the observer does not use actual weights, the observer may use weights from a similar haul or the average of two similar hauls. [R. 1435] Ms. Doe states that she sometimes did that. [R. 1416] The NPGOP states that Ms. Doe did not document the source of other-than-actual-average weights in eleven instances. [R. 54] I have reviewed the record and find that Ms. Doe did not document the source of eleven average weights:

- [1] skates, haul 269 [R. 770, 769, 1172]
- [2] black cod, haul 278 [R. 772, 771, 1178]
- [3] grenadier, haul 280 [R. 772, 771, 1182]
- [4] skate, haul 285 [R. 774, 773, 1188]
- [5] thornyhead, haul 285 [R. 774, 773, 1188]
- [6] skate, haul 287 [R. 776, 775, 1190]
- [7] thornyhead, haul 287 [R. 776, 775, 1190]
- [8] grenadier, haul 288 [R. 776, 775, 1192]
- [9] turbot, haul 288 [R. 776, 775, 1192]
- [10] turbot, haul 292 [R. 778, 777, 1196]
- [11] black cod, haul 294 [R. 778, 777, 1198]

The question is whether this violates a written observer standard. The NPGOP states the subject “is not addressed in the manual, but is discussed extensively during the 3-week training class, and is incorporated in many of the homework exercises.” [R. 1435] The NPGOP did not introduce evidence of the content of the training class or the homework exercises. The NPGOP’s allegation as to the content of the class or the homework is insufficient to establish a written standard for observer conduct.

But the NPGOP points to Ms. Doe’s final debriefing from Cruise 8324 which states:

Although it is acceptable to record average weight calculations in the logbook I would recommend using the bottom of the deck form. If you do use the logbook, please clearly label calculations with haul numbers and clearly label if the average is a combination from other sets. [R. 86] [emphasis added]

I conclude that this comment in the debriefing, coupled with the Manual’s command to record all calculations and the fact that documenting the source of a calculation is accepted scientific procedure, establishes written instructions that observers should document the source of average weight calculations. Ms. Doe did document the source of her average weight calculations in many of her average weight calculations. For example, in haul 274, Ms. Doe documented she

used the average of the turbot weights from hauls 275 and 279. [R. 770] But, in eleven instances, she did not.

Ms. Doe agreed that she lacked documentation of the source of eleven average weights, although she states that she could now show where those eleven average weights came from. [R. 1416] An observer's memory weeks after the event may be faulty. The NPGOP wants, in accord with accepted scientific procedure, contemporaneous written documentation of data. I conclude that Ms. Doe violated other written instructions by not documenting the source of average weight calculations in eleven hauls.

IAD Finding # 8. Data discrepancies.

The NPGOP alleged data discrepancies in three areas. First, the NPGOP alleges discrepancies in Ms. Doe's reasons for not sampling particular hauls between the Daily Notes section of Ms. Doe's logbook and other documents. Appendix A lists the six alleged discrepancies and my conclusion as to each. The allegations involved hauls 161, 211, 212, 214, 231, 241 and 315.

I find that Ms. Doe showed there was no inconsistency in the documents regarding haul 161 and haul 231. I find that, through her testimony and other documents, Ms. Doe resolved the inconsistency for haul 241 and haul 315. I find that NPGOP proved two discrepancies in the data regarding hauls 212 and 214. The Daily Notes stated that she did not sample haul 212 because she fell back asleep and haul 214 because of illness. The Observer Haul Forms state she did not sample hauls 212 and 214 due to weather.

Second, in the species composition sample data, the NPGOP alleged sixteen discrepancies between the logbook calculations and the deck forms. [R. 49] I find that NPGOP proved sixteen discrepancies. Appendix B lists the discrepancies and my finding as to each.

Third, in the species composition sample data, the NPGOP alleged 33 discrepancies between the tick marks on the back of the deck forms and the total number of fish on the front of the deck forms. I find that NPGOP proved thirty discrepancies. Appendix C lists the discrepancies and my finding as to each.

The NPGOP states that even one error in recording data violates written observer standards.⁵⁹ The Manual uses "accurate," "accurately" or "accuracy" 82 times regarding sampling methodology, calculations, data recording and other observer tasks. Federal regulation 50 C.F.R. § 679.50(j)(2)(ii)(B) states: "Observers must accurately record their sampling data." The NPGOP cites the dictionary definition of "accurate" as "free from error or mistake."⁶⁰ The

⁵⁹ NPGOP Motion at 4 - 6.

⁶⁰ NPGOP Motion for Reconsideration at 4. The full definition of "accurate" is "free from error or mistake esp. as the result of care." The definition of accuracy is "freedom from mistake or error." The definition of "accurately" is "in an accurate manner: precisely, exactly." WEBSTER'S THIRD NEW

NPGP argues that the proper definition of “accurately” in this context is the dictionary definition. I do not have any reason to use a definition other than the common meaning, or dictionary definition, of accurate or accurately.

The Observer Program is based on the principle that high quality observer data are “a cornerstone of Alaska groundfish fisheries management.”⁶¹ I also give weight to the expertise of the Program in training and placing observers when it states that the Manual and the regulations should not be interpreted to communicate to observers that there is such a thing as a reasonable level of error in sampling data.⁶²

I therefore conclude that an observer, through any error in recording sampling data, violates the observer’s duty to accurately record this data.

That does not mean that the Program could decertify an observer based on any mistake in an observer’s work, no matter how small. And the NPGOP does not claim that right:

Although NPGOP contends that it is a violation to submit anything less than error-free calculations, an observer who submits calculations with errors is not necessarily a candidate for decertification. Certainly, the program would consider other factors prior to submitting a case for a decertification adjudication. Whether this type of violation results in decertification depends on consideration of the quantitative number of distinct errors, the qualitative consequences of the errors, and whether there are mitigating circumstances. Even if a case based exclusively on data errors makes it into the adjudicatory process, this is not a fate [sic] accompli that the observer would be decertified. As indicated, there are other variables and an observer may certainly present evidence that could alter the result.⁶³

In the next section, I analyze whether the NPGOP can rely on the inaccuracies in Ms. Doe’s data to conclude that Ms. Doe’s work was characterized by severe deficiencies and therefore warranted decertification. But here I conclude that NPGOP has shown that Ms. Doe violated the requirement for accuracy in recording sampling data through discrepancies in Ms. Doe’s sampling data in different data sources.

To summarize, I conclude that, for three IAD Findings, the NPGOP did not prove that Ms. Doe failed to perform her duties as described in the Observer Manual or other written instructions:

IAD Finding # 1. Inappropriate content in the Daily Notes section of the observer

INTERNATIONAL DICTIONARY (1986) (unabridged).

⁶¹ Final Rule, 67 Fed. Reg. 72,595, 72,595 (Dec. 6, 2002)(commentary).

⁶² NPGOP Motion for Reconsideration at 4.

⁶³ NPGOP Motion for Reconsideration at 6 n. 7 (Jan. 12, 2006).

logbook. Neither the Manual nor other written instructions contain a definition of inappropriate content. I conclude that Ms. Doe's comments do not violate the implied definition of personal comments in the Manual.

IAD Finding # 3. Non-retained raw data. I find that Ms. Doe did not retain at least six original deck sheets. I concluded that Ms. Doe did not violate a written Observer standard by not retaining these deck sheets because the Manual does not state that an observer is never supposed to recopy deck sheets and the Manual stresses that legibility of data is the highest value.

IAD Finding # 6. Improper collection of halibut injury assessment and length frequency data. The Manual is not sufficiently clear that, to collect halibut injury assessment data, an observer must collect length frequency data and not halibut injury assessment data on retained halibut.

I conclude that, for five IAD Findings, NPGOP proved that Ms. Doe failed to perform assigned duties as described in the Observer Manual or other written instructions:

IAD Finding # 2. Incomplete Vessel Safety Checklist. The Manual requires observers to completely fill out the Vessel Safety Checklist. Ms. Doe did not do that.

IAD Finding # 4. Infrequent hook counts. The Manual establishes that an observer should do two hook counts per week. Ms. Doe did not do this. It was possible for her to do this, in spite of the number of hauls she missed for documented reasons.

IAD Finding # 5. 50 kg Salter scale tared incorrectly. The Manual establishes that an observer should write all calculations. Ms. Doe did not write down her calculations whereby she accounted for the weight of the basket in which she weighed the fish for average weight calculations.

IAD Finding # 7. Unmet sampling requirements for average weights. The Manual establishes that, for average weight calculations, an observer should sample 50 fish of the predominant species, 20 of the shortraker/rougheye group and 15 from all other species from inside the observer's tally sample. Ms. Doe did not do this for approximately one-half of her average weight calculations. During the cruise, Ms. Doe did not document why she did not meet this standard or consult with an inseason advisor to solve the problem.

IAD Finding # 8. Data discrepancies. Federal regulation 50 C.F.R. § 679.50(j)(2)(ii)(B) states in part: "Observers must accurately record their

sampling data.” An observer violates this standard by one error in recording sampling data. Ms. Doe made at least one error in recording sampling data.

2. Did NPGOP abuse its discretion in concluding that decertification was warranted and that mitigating circumstances did not justify a penalty other than decertification? No.

Under the first issue, I made an independent judgment whether the NPGOP proved, by a preponderance of evidence, that Ms. Doe violated a written observer standard. I concluded that the NPGOP proved that Ms. Doe violated five written observer standards. Having decided that an observer violated written observer standards, the NPGOP has discretion to decide whether to decertify an observer. I evaluate whether NPGOP abused its discretion in concluding that Ms. Doe’s performance warranted decertification.

A. NPGOP’s conclusion that decertification was warranted.

The standard is whether NPGOP’s decision to decertify is reasonable rather than arbitrary. The NPGOP sought decertification based on eight violations and made arguments based on eight violations. I have concluded that NPGOP proved five violations. I therefore examine NPGOP’s arguments as they apply to the five proven violations and analyze whether it is an abuse of discretion for NPGOP to decertify based on these five violations.

As noted, the NPGOP does not claim the right to decertify an observer based on any violation of any written observer standard. Ms. Weikart noted with regard to the NPGOP’s claim that Ms. Doe put inappropriate content in the Daily Notes: “If this was the only mistake Ms. [Doe] made, we would not be sitting here today.”⁶⁴ The NPGOP states that it meets the Manual’s statements for when the Program will seek decertification. The Manual states: “If the debriefing staff agrees that *severe deficiencies* in the work [exist] or *lack of understanding of concepts is large*, the observer will be suspended and recommended for decertification.”⁶⁵

I apply the severe deficiency test to NPGOP’s decision to decertify. I conclude that the NPGOP reasonably concluded that Ms. Doe’s work is characterized by severe deficiencies based on the following facts. First, the standards for the number of hook counts and the size for the species composition samples are clearcut standards in the Manual that Ms. Doe knew and understood. These tasks relate to duties that the Observer Manual identifies as the observer’s second and third highest priority.⁶⁶ The standard to write down all calculations is also clear in the Manual

⁶⁴ Hearing Testimony (May 17, 2005), Tape 1, Side B, log 577.

⁶⁵ Manual at 19 - 7 [emphasis added].

⁶⁶ Manual at 2 -2. The first priority is to record incidental takes of short-tailed albatross and marine mammals; collect canine teeth from pinipeds (except walrus) and tissue samples from cetaceans; and rehabilitate live endangered seabirds. *Id.* I do not know if Ms. Doe encountered any first priority tasks.

and is part of accepted scientific procedure.

Second, Ms. Doe's deviation from the standard for the number of hook counts and the size of the species composition samples was significant. Ms. Doe was supposed to do a minimum of 17 hook counts. She did ten. Ms. Doe did not collect the required number of fish in 57% of her average weight calculations for predominant species. She did not collect the required number of fish in 77% of her average weight calculations of grenadier, a non-predominant species.

Third, Ms. Doe had been warned during the prior cruise [Cruise 8324] and the mid-cruise debriefing for this cruise [Cruise 9022] that she needed to perform two hook counts per week.

Fourth, Ms. Doe did not communicate through her Daily Notes, e-mails to her inseason advisors or the Vessel and Plant Survey that she was having any problems meeting the standard for hook counts or the size of the species composition sample. In fact, Ms. Doe stated in her answers to the survey that she did obtain the required average weights and encountered no problems with collecting required samples. [R. 688, R. 689] This – along with Ms. Doe's changing testimony as to how many deck sheets she recopied – reasonably raises questions in NPGOP's mind about Ms. Doe's credibility in collecting data and reporting problems to the Program.

Fifth, Ms. Doe's substandard performance led to a significant amount of unreliable data. Jennifer Ferdinand, the Observer Data Quality Manager for NPGOP, testified that the overall total catch [OTC] data and the species composition data for Cruise 9022 was unreliable.⁶⁷ Ms. Ferdinand testified that, although she considered the OTC data for Cruise 9022 unreliable, she did not take the extraordinary step of excluding the OTC data from the database because that would mean the database would have *no* data from this Cruise.⁶⁸

I credit Ms. Ferdinand's testimony that the OTC data and species composition data for Cruise 9022 were unreliable. The hook count is the basis for the OTC data and if the hook counts are not current, that undermines the reliability of the OTC data. The species composition data was unreliable because Ms. Doe did not gather the required numbers for her sample and because she did not document the method whereby she accounted for the weight of the scale when she collected her samples.

Based on these reasons, I conclude that the NPGOP reasonably concluded that Ms. Doe's work was characterized by severe deficiencies.

In reaching this conclusion, I note what I am not concluding. First, Ms. Ferdinand testified that she considered the species composition data so unreliable that she removed it from the database.⁶⁹ Ms. Ferdinand did this, in part, based on allegations that the NPGOP has either since

⁶⁷ Hearing Testimony (May 24, 2005), Tape 1, Side A, log 136 - 597.

⁶⁸ Hearing Testimony (May 24, 2005), Tape 1, Side A, log 497 - 546.

⁶⁹ [R. 94]; Hearing Testimony (May 24, 2005), Tape 1, Side A, log 154 - 197.

withdrawn or I have not sustained, namely that Ms. Doe did not sample enough hauls, was not counting hooks properly or violated a standard by recopying raw data.⁷⁰ I therefore do not conclude that Ms. Doe's substandard performance led to the *loss* of the species composition data, but I do conclude that it led to *unreliable* species composition data for Cruise 9022.

Second, the NPGOP also points to the loss of the halibut injury data for Cruise 9022. I do not treat this as evidence of a severe deficiency in Ms. Doe's work because I have concluded that the Manual or other written instructions did not establish a sufficiently clear standard for collection of that data. But since Ms. Doe made other errors that amount to a severe deficiency, the NPGOP may decertify without this error.

Third, although NPGOP, at one point, states that a severe deficiency in an observer's work is one that results in a significant amount of unreliable or lost data, I do not adopt that as the sole criterion for a severe deficiency. In addition to Ms. Doe's substandard work resulting in a significant amount of unreliable data, NPGOP proved several facts intrinsic to Ms. Doe's performance. It was her second cruise on the same vessel in the same fishery. Ms. Doe had been warned of one of the problems before. Ms. Doe did not communicate the problems and affirmatively communicated in the Vessel Plant Survey that she was not having any problems meeting the average sampling requirement for her species composition sample. I do not decide whether NPGOP could decertify if the only fact it proved was that the observer's work resulted in significant unreliable data because those are not the facts before me.

Fourth, I did not decide whether the discrepancies in Ms. Doe's sampling data constitute a severe deficiency in her work. Ms. Doe submitted much data that was accurate. To evaluate whether the number and severity of data discrepancies in Ms. Doe's work amount to a severe deficiency, I would need to evaluate her errors in the context of her total output of work on Cruise 9022. In my opinion, the record does not contain sufficient evidence for me to do that. Since I affirm the decertification on other grounds, I do not reopen the record to take more evidence on whether the discrepancies in Ms. Doe's sampling data constitute a severe deficiency in her work.

B. Mitigating circumstances.

I now examine whether the NPGOP reasonably concluded that Ms. Doe did not present mitigating factors that justified an action short of decertification. This Office has held that, in decertifying an observer, the NPGOP has a duty to consider mitigating circumstances.⁷¹ The NPGOP notice did not inform Ms. Doe that she had the right to present evidence of mitigating circumstances. [R. 23 - 31] The Notice was therefore deficient.

The appeal proceedings before this Office cured that problem. The IAD informed Ms. Doe that the NPGOP did not find any mitigating circumstances that supported a penalty other than

⁷⁰ Hearing Testimony (May 24, 2005), Tape 1, Side A, log 172 - 212, log 376 - 492.

⁷¹ *Jesse Agee*, Appeal No. 03-0013 at 4 - 5 (Sept. 26, 2003).

decertification. [R. 97] Ms. Doe presented evidence and argument about mitigating circumstances in her written appeal. [R. 1236 - 1237] The NPGOP, in written response to orders from me, informed Ms. Doe before the hearing why it concluded that her claims of mitigating circumstances were insufficient to prevent decertification. [R. 1409 - 1410] Thus, Ms. Doe received notice of her right to present evidence of mitigating circumstances and an opportunity to rebut the NPGOP's conclusion that she had not shown mitigating circumstances.

Ms. Doe argues three mitigating circumstances. First, Ms. Doe stated in her appeal that she was suffering from health problems and personal problems during Cruise 9022. [R. 1236] She submitted a statement from Dr. Garry Morash, dated July 8, 2004, that he had been treating Ms. Doe for back pains and headaches since June 2004 – right after the end of Cruise 9022 – and that he was still investigating these conditions. [R. 1239]

Dr. Morash did not draw a connection between Ms. Doe's physical ailments and her poor performance during Cruise 9022 and Ms. Doe did not testify to any connection. Ms. Doe did not sample 14 hauls that she was scheduled to sample during Cruise 9022 due to health problems, which suggests she paid attention to her health on the cruise.⁷² The NPGOP dropped its claim that Ms. Doe did not sample enough hauls precisely because she did document the reasons for not sampling. [R. 25] It proved other areas of poor performance. I conclude that the NPGOP did not abuse its discretion by concluding that Ms. Doe's personal or health problems did not mitigate her poor performance on Cruise 9022.

Second, Ms. Doe submitted a letter from an official with the State of Alaska Shellfish Observer Program that Ms. Doe performed well as an observer in her 17 deployments in 15 different fisheries and 3 vessel types for the State. [R. 1240] The letter concluded that Ms. Doe "requires little supervisory direction and meets the expectations of the Department, adheres to policies of the Shellfish Observer Program and has proven to be a trusted and valued observer." [R. 1238]

The NPGOP states this letter

is not useful as a mitigating circumstance. The sampling requirements and standards of the State of Alaska Shellfish Observer Program are significantly different than those of the North Pacific Groundfish Observer Program. Successful performance in the state program is not relevant to successful performance in the groundfish program. We do not base our evaluation of an observer on any performance indicator from the State program. [R. 1410]

The record has no evidence that an observer's work under the State and Federal observer programs is comparable. Therefore, I conclude that the NPGOP did not abuse its discretion by declining to consider Ms. Doe's good performance as a State observer as a mitigating circumstance for failure to meet federal standards.

⁷² See page 17 *supra*.

Finally, Ms. Doe states that she has learned from her errors and sincerely believes that she would and could correct her mistakes. The NPGOP states that, based on Ms. Doe's substandard performance, it is unwilling to risk a reoccurrence of these problems. Since the NPGOP has reasonably concluded that Ms. Doe's work is marked by severe deficiencies, it is under no obligation to risk a reoccurrence of these problems.

I conclude that the NPGOP did not abuse its discretion in concluding that decertification of Ms. Doe is warranted and that Ms. Doe has not shown circumstances that justify a penalty other than decertification.

FINDINGS OF FACT

I therefore find by a preponderance of the evidence the following facts.

1. Ms. Doe did not have any comments in the Daily Notes section of her Observer logbook that merely vent frustrations or are slanderous, derogatory or discriminatory.
2. Ms. Doe did not completely fill out the Vessel Safety Checklist.
3. Ms. Doe did not retain at least six original deck forms during Cruise 9022.
4. Ms. Doe did not do two hook counts per week during Cruise 9022.
5. Ms. Doe did not make written calculations whereby she accounted for the weighing basket in her average weight species calculations.
6. Ms. Doe did not collect 50 fish in her samples for predominant species in 57% of her average weight samples.
7. Ms. Doe did not collect 15 grenadier, a non-predominant species, in 77% of her samples for average weight calculations.
8. Ms. Doe did not document the source of her average weight calculations in eleven instances.
9. The Daily Notes in Ms. Doe's logbook were inconsistent with the Observer Haul Forms regarding why Ms. Doe did not sample hauls 212 and 214, as listed in Appendix A.
10. Ms. Doe's deck forms had 16 discrepancies in the data for her species composition samples between the logbook and her deck forms, as listed in Appendix B.
11. Ms. Doe had 30 discrepancies in the data for her species composition samples between the tick marks on the back of the deck form and the total number of fish on the front of the deck form, as listed in Appendix C.

CONCLUSIONS OF LAW

1. Written comments from a debriefing can constitute written instructions that specify an observer standard of behavior within the meaning of 50 C.F.R. § 679.50(j)(2)(ii).
2. Neither the Manual nor other written instructions from the Observer Program Office contain a definition of inappropriate content for the Daily Notes in the observer logbook.
3. The Manual contains an implicit definition of using the logbook as a personal journal, namely comments that merely vent frustrations or are slanderous, derogatory or discriminatory.
4. Ms. Doe's comments in the Daily Notes section did not violate a written standard of observer conduct for using the logbook as a personal journal.
5. The Observer Manual establishes a written standard that an observer must completely fill out the Vessel Safety Checklist.
6. Ms. Doe violated a written standard in the Observer Manual by not filling out completely the Vessel Safety Checklist.
7. The Manual, alone or coupled with the written debriefing comments from Cruise 8324, does not establish a standard that observers should not recopy an original deck form or, if the observer does, the observer should turn in the original form with the replacement form.
8. Ms. Doe did not violate a written standard for observer conduct by recopying deck forms and by not submitting the original deck form with the recopied form.
9. The Observer Manual establishes a written standard that an observer should perform two hook counts per week.
10. Ms. Doe did not show any defense to her failure to perform two hook counts per week.
11. Ms. Doe violated the written standard in the Observer Manual by not performing two hook counts per week.
12. The Observer Manual establishes a written standard that all calculations should be recorded in the observer's logbook.
13. Ms. Doe violated the written standard in the Observer Manual by not documenting her calculations concerning the weight of the weighing basket in her average species weight calculations.
14. The Observer Manual, alone or in conjunction with debriefing comments given to Ms. Doe,

does not establish a written standard that an observer, when collecting halibut injury data, must measure the length of halibut that the vessel retains but does not assess injury to those halibut.

15. Ms. Doe did not violate a written standard of observer conduct by failing to include retained halibut in her sample for halibut injury data.

16. The Observer Manual establishes a written standard that an observer, when collecting samples for average weights, should collect 50 individual fish of the predominate species, 20 from the shortraker/rougheye species and 15 from all other species inside the observer's tally sample.

17. Ms. Doe violated the written standard in the Observer Manual that an observer, when collecting samples for average weights, should collect 50 individual fish of the predominate species, 20 from the shortraker/rougheye species and 15 from all other species inside the observer's tally sample.

18. The final debriefing comments from Cruise 8324, in conjunction with the Manual's emphasis on documenting all calculations and the fact that it is accepted scientific procedure to document calculations, establishes a written standard for Ms. Doe to document the source of average weight calculations.

19. Ms. Doe violated the written standard of documenting the source of her average weight calculations.

22. An observer, through any error in recording sampling data, violates the observer's duty to accurately record sampling data, a duty established by the Observer Manual and federal regulation 50 C.F.R. § 679.50(j)(2)(ii)(B).

23. Ms. Doe violated her duty to accurately record sampling data.

24. The NPGOP did not abuse its discretion in concluding that decertification was warranted and that mitigating circumstances did not justify a penalty other than decertification.

DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. The NPGOP has proven five areas where Ms. Doe failed to satisfactorily perform the duties of an observer as specified in writing and the NPGOP has shown that decertification is warranted. The Decision on Reconsideration takes effect July 12, 2006, unless by that date the Regional Administrator takes further action pursuant to 50 C.F.R. § 679.43(o).

Mary Alice McKeen
Administrative Judge

Appendix A, IAD Finding #8, DATA DISCREPANCIES between Daily Notes in logbook and other documents [R. 1430 - 1431].

[1] NPGOP alleges an inconsistency in the documentation for **haul 161**. The Daily Notes state that the vessel set a third string on March 19, 2004 and that Ms. Doe did not sample that haul because of bad weather [R. 858] The Observer Haul Form states that Ms. Doe did not sample haul 161 because of bad weather [R. 983] and so is consistent. The inconsistency alleged by the NPGOP is that the Vessel Haul Form states that haul 161 was the first haul on March 20, 2004, not the third haul on March 19, 2004. [R. 970] Ms. Doe testified that she referred to haul 161 as the third string or haul on March 19, 2004, because the vessel *began* to retrieve the gear from that haul on March 19, 2004, even though the vessel finished retrieving the gear at 2:45 a.m. on March 20, 2004.⁷³ **I find no inconsistency.** But I note that Ms. Doe would completely avoid confusion if she referred to hauls by haul number rather than third string or haul.

[2] NPGOP alleges an inconsistency in the documentation for **haul 211** and **haul 212**. The Daily Notes for April 8, 2004 state “First haul of day was missed because I fell back to sleep after my wake up.” [R. 861] The Vessel Haul Form states that the first haul on April 8, 2004, by time of gear retrieval, was 211. The Observer Haul Form and the Deck Form show that Ms. Doe sampled haul 211. [R. 987, R. 1122.] The Observer Haul Form states that Ms. Doe did not sample haul 212 because of bad weather. [R. 987]

I find an inconsistency. First, haul 211 was not the first haul on April 8, 2004, by the time the gear was set, retrieved or begun to be retrieved. [R. 974] Second, the Daily Notes state Ms. Doe did not sample haul 212 because she fell back to sleep. The Observer Haul form states she did not sample haul 212 because of bad weather.

[3] NPGOP alleges an inconsistency in the comments about **haul 214**. [R. 1430 - 1431] The Daily Notes state that Ms. Doe did not sample haul 214 because of illness. [R. 861] The Observer Haul Form states that Ms. Doe did not sample haul 214 because of bad weather. [R. 987] **I find an inconsistency.**

[4] NPGOP alleged an inconsistency in the documentation for **haul 231**. [R. 1431] The Daily Notes state that “haul # 231 was preyed upon by whales (killer).” [R. 861] The NPGOP noted that Ms. Doe did not use code 8 for gear performance for haul 231 on the Vessel Haul Form. Code 8 means “considerable predication of the catch by killer whales.” [Observer Manual at 6 - 20] Ms. Doe testified that Mr. Seither told her to change the gear performance from code 8 to code 1 because she did not actually see the predation.⁷⁴ Mr. Seither’s written debriefing comments confirm Ms. Doe’s testimony. [R. 81 - 82] At the hearing, NPGOP accepted Ms. Doe’s explanation. **I find no inconsistency.**

[5] NPGOP alleges an inconsistency in the documentation for **haul 241**. [R. 1431] The Daily

⁷³ Hearing Testimony (May 17, 2005), Tape 1, Side A, log 423 - 426.

⁷⁴ Hearing Testimony (May 17, 2005), Tape 1, Side B, log 220 - 250.

Notes for April 16, 2004 state that “weather came up for last haul so missed.” [R. 861] The Observer Haul Form states that Ms. Doe sampled haul 241. [R. 989] Ms. Doe admitted that haul 241 was the last haul on April 16, 2004 and that the Observer Haul Form should have stated that she did not sample haul 241 because of bad weather.⁷⁵ **I find an inconsistency** between the Daily Notes and the Observer Haul Form.

Ms. Doe, in her testimony, stated that she did not sample haul 241 and pointed to the Observer Estimate for OTC for haul 241, which shows that she used average weights from other hauls for that estimate. [R. 758] **I therefore find that Ms. Doe’s testimony, coupled with this documentation, shows that Ms. Doe did not sample haul 241 and resolved the inconsistency.** [6] The NPGOP alleges an inconsistency in the documentation about **haul 315**. [R. 1431] The Daily Notes state that Ms. Doe did not sample haul 315 because she fell back to sleep after the crew woke her up. [R. 873] Ms. Doe did average weight calculations for Observer Estimate of OTC which she labeled “haul 315.” [R. 785] Ms. Doe stated that the calculations labeled haul 315 were in fact calculations for haul 316. **I find an inconsistency** between the Daily Notes and the Observer OTC Estimates.

Ms. Doe testified that the Observer OTC Estimate for haul 315 at R. 786, as distinct from the calculations for the Observer OTC Estimate for haul 315 at R. 785, shows that she used the average weight figures from other hauls for haul 315 and that the calculation labeled for haul 315 matches up – with the exception of one species – with the OTC calculation for haul 316. **I therefore find that Ms. Doe’s testimony, coupled with this documentation, show that Ms. Doe used average weight calculations for haul 315 and resolved the inconsistency.**

⁷⁵ Hearing Testimony (May 17, 2005), Tape 1, Side B, log 297.

#	Haul	Species	Logbook Calculations	Deck Form	JD Explanation - R. 19 - 20; Hearing, Tape 1, Side B, Log 94 -145, May 24, 2005	Discrepancy/comment
1	172	Pacific Cod	227.88	277.88	unclear writing	yes/disagree with JD explanation: it is a transcribing error
2	181	Thornyhead	73.66	73.63	transcribing error	yes/JD admits discrepancy
3	188	Thornyhead	93.38	93.48	transcribing error	yes/JD admits discrepancy
4	256	Black cod	4.92	52.92	mix-up with haul 259	yes/JD admits discrepancy
5	256	Grenadier	428.37	1108.93	mix-up with haul 259	yes/JD admits discrepancy
6	256	Slate	54.84	13.8	mix-up with haul 259	yes/JD admits discrepancy
7	256	Thornyhead		45.87	mix-up with haul 259	yes/JD admits discrepancy
8	256	Turbot		160.8	mix-up with haul 259	yes/JD admits discrepancy
9	259	Black cod	52.92	246.13	mix-up with haul 256	yes/JD admits discrepancy
10	259	Grenadier	1108.93	428.37	mix-up with haul 256	yes/JD admits discrepancy
11	259	Thornyhead	45.87		mix-up with haul 256	yes/JD admits discrepancy
12	259	Turbot		78.2	mix-up with haul 256	yes/JD admits discrepancy
13	259	Skate		54.87	mix-up with haul 256	yes/JD admits discrepancy
14	262	Grenadier	463.96	463.56	unclear handwriting	yes/disagree with JD explanation/ it is a transcribing error
15	294	Black cod	35.84	35.8	“average weight of black cod was surmised from like sets since there was no blackcod gathered during the haul.”	yes/JD does not deny discrepancy/no comment on explanation
16	316	Thornyhead	16.43	53.84	transcribing error	yes/disagree with JD explanation/I cannot find 16.43 in calculations for haul 316

APPENDIX B, IAD Finding # 8, DATA DISCREPANCIES between Logbook & Deck Forms [R. 49].

APPENDIX C, IAD Finding # 8, DATA DISCREPANCIES between tick marks on back of deck forms and numbers on front of deck forms, NPGOP alleged discrepancies [R. 49 - 50], Observer explanation [R. 19 - 20; Testimony (May 24, 2005), Tape I, Side B, log 148 - 428.

#	Haul	Species	Tick marks on back of deck form	#s on front of deck form	Observer Explanation	Discrepancy/comment
1	162	Skate	10	8	two tick marks erased during the time of tally period so no discrepancy	yes/disagree with explanation: appears to be 10 tick marks
2	167	Deep water tanner	3	4	“obviously there are four in my sample if I did measure 4 crab”	yes/no comment
3	171	Northern rockfish	10	11	miscounted tick marks	yes/no denial by observer
4	171	Halibut	284	293	miscounted tick marks	yes/no denial by observer
5	172	Big skate	9	10	miscounted tick marks	yes/looks like 10 tick marks and 10 in numbers BUT 9 in table/list on side of back page
6	175	Halibut	40	39	miscounted tick marks	yes/no denial by observer
7	181	Turbot	2	3	“Hauls 181, 185, 192 have the only explanation that the tick marks were rubbed off. in which total numbers were already placed in the total number section on the front of the deck form. There for the number on from [front] should be taken as correct.”	yes/no denial of discrepancy/do not understand why that is “the only explanation” as opposed to error in copying
8	181	Skate	3	5	same explanation as error # 7, haul 181 - turbot	yes/same comment as error # 7, haul 181 - turbot

9	183	Skate	5	6	“After looking at the back of the deck sheet I found that there are in fact 6 marks, which may be unclear to others, which match the number on the front.”	no/it is a bit hard to read but accept observer explanation
10	185	Turbot	1	2	same explanation as error # 7, haul 181 - turbot	yes/same comment as error # 7, haul 181 - turbot
11	192	Skate	1	2	same explanation as error # 7, haul 181 - turbot	yes/same comment as error # 7, haul 181 - turbot
12	195	Shortraker	1	2	no explanation	yes/no comment
13	193	Skate	2	1	miscounted tick marks	yes/no comment
14	204	RF (shortraker/rougheye)	4	5	hatch marks done differently - vertically - there are 5	no/accept observer explanation
15	207	RF (shortraker/rougheye)	2	4	miscounted	yes/no denial by observer
16	209	Halibut	218	220	miscounted	yes/no denial by observer
17	215	LD (light dusky)	6	4	miscounted	yes/no denial by observer
18	215	Northern RF	2	1	miscounted	yes/no denial by observer
19	215	Halibut	212	207	no explanation	yes/no denial by observer
20	217	Halibut	402	421	no explanation	yes/no denial by observer
21	226	Skate	3	4	unclear tick marks/there are 4 tick marks/2 overlapping	no/accept observer explanation
22	227	Skate	1	2	no explanation	yes/no denial by observer
23	235	Halibut	15	20	miscounted tick marks	yes/no denial by observer
24	242	Skate	50	77	no explanation	yes/no denial by observer

25	271	Skate	12	14	unclear tick marks/two tick marks overlapping	yes/2 tick marks are overlapping but there are still 13 tick marks & 14 on the front
26	287	RF (shortraker/rougheye)	5	4	miscounted tick marks	yes
27	288	Skate	11	12	miscounted tick marks	yes/unclear where the tick marks are for skates/I see 9
28	296	Skate	1	2	no explanation	yes
29	303	Turbot	26	46	JD started using deck sheet/changed over to thumb counter and counted 20	yes/there is a discrepancy/accept JD explanation that number on deck form is correct but she bases that on memory not written documentation
31	307	Unknown	31		the back of the deck form has "G" which was for grenadier/she started using thumb counter and forgot to cross out 31 on the back/ the total was 215 grenadier	yes/there is a discrepancy/accept observer explanation that the "G" on the back of the deck form stands for 31 grenadier and they are included in the 215 total on the front but she bases that on memory not documentation
32	309	Black cod	2	4	miscounted tick marks	yes/no denial by observer
33	319	Turbot	7	14	no explanation	yes/no denial by observer