

Recommended Observer Program Regulatory Revisions:

March 2007 NMFS Staff Discussion Paper

At its June 2006 meeting, the Council adopted a motion to extend regulations governing the Observer Program beyond December 31, 2007. This action was necessary to avoid expiration of the current Observer Program, and ensure the continued collection of observer data for supporting science and management functions. This action has been published as a proposed rule and the public comment period closed on March 23, 2007.

The Council's June 2006 motion indicated their intent to consider initiating a new amendment proposing restructuring alternatives for the Observer Program when: "1) legislative authority is established for fee-based alternatives; 2) the FLSA issues are clarified (by statute, regulation, or guidance) such that it is possible to estimate costs associated with the fee-based alternatives; and/or 3) the Council requests reconsideration in response to changes in conditions that cannot be anticipated at this time."

On January 12, 2007, the President signed the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act, Pub. Law No. 109-479, (MSA). The reauthorized MSA authorizes the North Pacific Council to adopt fee based alternatives which were considered in the analysis. Specifically, the MSA states that the Council may prepare a fisheries research plan which "establishes a system, or system, of fees, which may vary by fishery, management area, or observer coverage level, to pay for the cost of implementing the plan." This, along with other clarifying MSA language, provides the flexibility the Council needs to develop a new fee based Observer Program. However, the exact nature of the fee program authorized by the Magnuson-Stevens Act must be determined, the Council must consider a new amendment to restructure the current Observer Program, and NMFS must undergo rulemaking to implement a new Observer Program.

The second impediment to restructuring, however, remains unresolved. NMFS has not yet received a response to the November 29, 2005 letter from NMFS to the Department of Labor (DOL) which requested guidance on computing hours worked and the associated rules governing compensation of fisheries observers, and the applicability of the Service Contract Act (SCA) and Fair Labor Standards Act (FLSA) on land, in the territorial sea, the Exclusive Economic Zone, and international waters. We continue to seek guidance from DOL and have initiated an internal process which will document labor costs associated with current direct NMFS contracts for observer services. We intend to ensure that comprehensive observer cost information is available later this year.

While we continue to believe that the substantive data quality and operational issues facing the Observer Program can only be properly addressed through restructuring the entire program, we do not envision restructuring the Observer Program until the remaining impediment identified by the Council is adequately resolved. And, even if all impediments were resolved, it would still take several years before a restructured Observer Program could be implemented.

In the meantime, NMFS has identified several issues which should be addressed to make improvements to the current Observer Program. NMFS does not expect the identified issues to be labor intensive to analyze or implement. NMFS intentionally did not address complex issues which would best be solved by restructuring. This discussion paper briefly describes the issues we propose to address under the current Program, and offers some potential solutions. We would anticipate developing these issues, and the alternatives to address them, through the Council's Observer Advisory Committee (OAC).

Certifications/decertification appeal processes

Issues: The observer certification/decertification process and the observer provider permitting process were revised in 2002 to comply with the Administrative Procedure Act. Since that time, experience gained with the current process has highlighted 3 areas where the regulations need improvement or clarification.

A. Current regulations provide for an appeals process whenever NMFS denies an applicant a certification. This applies to both observers and observer providers. Thus, individuals who fail our training course and are denied certification can appeal these decisions to the NMFS Office of Administrative appeals. Additionally, an observer provider who is denied a permit can also appeal. NMFS can consider whether to make a permit or certification issuance a discretionary decision, not subject to further review under the APA. Once the permit or certificate is issued, however, observers and observer providers would be entitled to appeal any decision to revoke or sanction the permit or certification.

B. Current regulations attempt to control observer behavior so that certified observers present themselves professionally on vessels and at plants, at NMFS sites, and in fishing communities. We are advised by NOAA GC that many of these regulations are unenforceable, and/or are outside of our authority and need to be clarified or deleted.

C. The Observer Manual currently outlines the standards and methods which observers must adhere to. NOAA GC advises that our administrative processes would be improved by incorporating the Observer Manual standards in regulation text.

Potential solutions – NMFS believes each of these issues can be corrected by relatively simple regulatory changes. NMFS proposes to further develop potential regulatory solutions to these issues for discussion with the Observer Advisory Committee.

Observer providers' scope of authority regarding research and experimental permits

Issues: Current regulations allow observer providers to provide observers only for purposes of required groundfish coverage. Regulations are ambiguous as to whether observer providers may provide employees to aid in research activities, including exempted fishing permits, scientific research permits, or other research. The current practice is to allow these activities, but results in confusion for NMFS staff and observers when observers switch between data collections under research and management activities.

Potential Solution: Revise regulations to clarify that observer providers are allowed to provide observers or technical staff for purposes of research activities. The role of technical staff provided for research activities differs from the role of an observer. Observers are trained,

certified and directed by NMFS, and several regulatory provisions apply to them and their employers. Under some circumstances, technical staff are not directed by NMFS and would follow experimental protocols at the direction of the chief scientist or researcher. The technical staff would not follow observer program protocols and direction and would not submit data through the observer program. These technical staff conduct activities outside of the observer program, and NMFS observer program regulations would not apply to them or their employers. Note that there are circumstances where observers would be required to account for removals or the research is being conducted within the context of the normal fishery.

Fishing Day Definition

Issues: The term “fishing trip” for purposes of obtaining required observer coverage is defined in regulation at § 679.2. In many cases, observer coverage regulations are based on this definition. However, this regulation allows vessel owners or operators to use **any** observer coverage incurred during a 24 hour period to account towards coverage requirements. This has resulted in vessels fishing and being observed in ways that aren’t representative of actual fishing behavior, often for short periods of the day. In a January, 2005 memo, NMFS Enforcement staff identified this as an issue and requested that it be addressed through rule-making.

Potential Solution: Revise the definition of fishing day to alter vessel behavior and decrease the fleet’s ability to conduct fishing solely for the purposes of obtaining required observer coverage.

Program Cost Information

Issue: NMFS lacks precise information on the total costs, and the components of those costs, for the industry funded component of the observer program. This information is needed for various internal and external analyses. Costs are readily known by observer providers but they are not provided to NMFS.

Potential solution: Require mandatory reporting of costs broken out by the categories NMFS believes are necessary for analysis and understanding of costs. Note that mandatory reporting of cost information would be considered confidential information.

Completion of the Fishing Year

Issue: At the end of each calendar year, Observer Program staff complete all quality control processes for that year’s data set. However, compilation of data for a fishing year is always delayed because staff must wait for observers to return and debrief. Because observers can be deployed for 90 days, data collected in one year may not be debriefed until late March of the following year. For example, if an observer is deployed on a catcher/processor longliner in December 2006, that observer may not return for debriefing until February 2007. Thus, some data collected in 2006 would not be finalized until late in the first quarter of 2007. This delays finalization of the data and release of the complete data set to NMFS scientists and managers.

Potential solution: Establish a reasonable date when observers who have collected data in the previous fishing year would be required to complete debriefing.

Miscellaneous Modifications

Issue: The following is a list of various modifications recommended by staff to address observer program operational issues.

1. Regulations at § 679.50(c)(5)(i)(A) reference a workload restriction at (c)(5)(iii). The reference should be (c)(5)(ii).

Potential Solution: Replace (c)(5)(iii) with (c)(5)(ii).

2. Currently, regulations at § 679.50 require observer providers to submit each type of contract they have entered into with observers or industry. However, there is no deadline for submission of some of this information. While most providers currently operate as if there is already an annual deadline for all submitted information, resolution of this issue would provide clarity to observer providers.

Potential solution: Establish requirement and due date for annual submissions of information from providers.