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August 28, 2014

Dr. James Balsiger
Regional Administrator
NMFS Alaska Region
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Subject: **Immediate action needed on LL2 observer shortage for freezer longline fleet**

Dear Dr. Balsiger,

I am writing to raise to your attention to the critical and intensifying shortage of Lead Level 2 (LL2) observers for the Freezer Longline Coalition (FLC) member fleet and to urge immediate action by the National Marine Fisheries Service (NMFS) to minimize the adverse impacts on our members' operations.

About FLC

The FLC represents the owners and operators of over 30 U.S.-flag vessels that participate in the freezer longline sector of the Pacific cod fishery in the Bering Sea and Aleutian Islands (BSAI). FLC member vessels range in size from approximately 110 to 185 feet with a gross tonnage of approximately 140 to 1400 tons. The freezer longline fleet generates over \$160 million in revenues annually and employs over 1200 full-time workers in Washington and Alaska. All members of the FLC are also members of the Freezer Longline Conservation Cooperative (FLCC), a voluntary cooperative established in 2010. Since its establishment, FLCC has been a leader in efforts to promote more sustainable fishing practices in the BSAI.

Immediate Action Needed from NMFS

FLC members are enduring significant impacts to their operations as a result of the increasing shortage of LL2 observers available to serve on their vessels this summer. ***In August, LL2 observer shortages are resulting in freezer longline vessels being delayed at the dock while others are being forced to cut fishing trips short*** to accommodate the observer requirements. The impacts on our operations are resulting in fewer opportunities for harvest and lost dollars for our members and their crew. ***Pending action to address this problem, the shortage of LL2 observers threatens the freezer longline fleet's ability to fish their quota in the 2014 B season, with additional concern in 2015 if this issue persists.***

The following are examples from FLC members on the impacts of the LL2 observer shortage in the past month. These are coming at a substantial financial burden to each of these members, who have to incur additional costs for crew, supplies, and other expenses while adjusting their fishing plans for fewer days at sea.

Alaska Longline Company: The F/V Arctic Prowler arrived in Dutch Harbor for its offload on August 24th. The vessel was scheduled to return to sea by the 26th. However, due to a shortage of LL2 observers, the vessel will not be able to leave the dock until August 29th, ***resulting in a loss of three fishing days*** due the current shortage.

Clipper Seafoods: Clipper has had two instances in August in which one of their vessels was stranded at the dock in Dutch Harbor due to a lack of LL2 observers:

- The F/V Clipper Endeavor ***waited at the dock for five days***, from August 8-12 for a LL2 observer to become available.
- The F/V Clipper Surprise similarly ***waited for four days***, from August 20-23 for an LL2 observer.

Clipper has three more observer swaps scheduled before September 5th. Currently they have no guarantees that they will not face additional waits at the dock due to the observer shortage.

Coastal Villages Seafoods: On August 11th, Coastal Villages had to alter their fishing plan for the F/V Lilli Ann, scheduled to leave that day, so the existing LL2 observer on the vessel could return in time to be in compliance with their 90 day deployment limit. A new LL2 observer was to have been deployed on the Lilli Ann on the 11th, but none were available at the time, forcing Coastal Villages to either leave with the time-limited LL2 observer or to be stranded in Dutch Harbor. If the Lilli Ann was able to leave with a new LL2 observer, the vessel would have been at sea until September 11th, ***costing the Lilli Ann six days of fishing*** and forcing them to return to shore with less than a full load of fish. Coastal Villages is still awaiting confirmation on whether they will have a new LL2 observer for the Lilli Ann when it returns on September 5th. As a Western Alaska CDQ organization, these impacts not only come at a cost to Coastal Villages, but to the 20 Western Alaskan member villages that Coastal Villages supports through their operations. Additional details on the impacts of the LL2 observer shortage on Coastal Villages can be found in the enclosed letter from Ken Tippett of Coastal Villages.

These developments follow an instance in 2013 when a Blue North vessel was stranded at the dock after the LL2 observer scheduled for deployment incurred an accident on their way to Dutch Harbor. The observer required medical attention and was unable to be deployed on the vessel. No LL2 observer was immediately available in Dutch Harbor, requiring the vessel to wait until a replacement could be identified and flown to Dutch Harbor for the trip.

Observer providers are making every reasonable effort to secure LL2 observers for the freezer longline fleet. The providers track vessel and observer schedules in order to meet the fleet's needs, with hiring goals set months in advance. In cases when a provider is in need of additional observers, they typically work with other providers to sub-contract observers for deployment on their client vessels. Until recently, this has been effective in addressing the increasing concern

on LL2 observer availability, but as is evidenced above, these actions are no longer enough to avoid shortages for the freezer longline fleet. FLC members and providers are taking actions to replenish the pool of LL2 observers, as noted in more detail below, and continue to correspond with the NMFS Observer Program about short and long-term solutions, but action by NMFS is needed now to alleviate these immediate concerns.

The FLC urges NMFS to adopt a policy of non-enforcement, effective immediately, on “failure to maintain coverage” violations related to LL2 observers that would allow for our members’ vessels to leave the dock when an LL2 observer is not available for deployment. All vessels would still carry the requisite number of observers on board, as a non-LL2 observer would be deployed with the vessel in place of an LL2 observer. This is a reasonable and prudent action to address an adverse consequence of NMFS regulations and to facilitate the continued operation of our members’ fleet until a longer term solution is in place.

LL2 Observers on the Freezer Longline Fleet

LL2 observers have been required on freezer longline vessels since the implementation of the September 26, 2012 Final Rule addressing “Monitoring and Enforcement Requirements in the Bering Sea and Aleutian Islands Freezer Longline Fleet (Final Rule).”¹ This action included a requirement that freezer longline vessels carry a LL2 observer on all trips. Under the regulation, vessel owners were permitted the option to select between carrying an LL2 observer and an additional, non-LL2 observer, or to carry one LL2 observer and use a flow scale on their vessel. Following the enactment of the regulation, nearly all vessel owners opted to install flow scales, at a cost of nearly \$100K each. NMFS acknowledges in the Final Rule that the addition of these flow scales and other equipment in addition to 100% observer coverage serves to “improve the catch and fishing effort data in the freezer longline fleet,”² supporting the Observer Program’s efforts to improve the quality of monitoring efforts. All vessels that have installed flow scales continue to use them and to carry a LL2 observer on all trips, as required under the regulation. The one FLC-member vessel without a flow scale carries a LL2 observer and a non-LL2 observer when they are at sea.

When given the choice, FLC members prefer to have experienced, LL2-certified observers deployed on their vessels. Prior to the enactment of the Final Rule, LL2 observers were not required on freezer longliners, but members regularly carried LL2 observers on their vessels. There were never any significant difficulties with securing LL2 observers for our fleet, and members appreciated the additional knowledge and familiarity with our fleet that LL2 observers brought on board. FLC members continue to make every effort to ensure LL2 observers are deployed on our vessels, as is required. No freezer longline vessel has committed a “failure to maintain coverage” violation related to leaving the dock without a LL2 observer on board. That said, our investment in flow scales and the increased monitoring technologies (e.g. cameras) now in place on our vessels have dramatically increased observer data collection and monitoring capabilities relative to before the Final Rule, regardless of the qualifications of the observer on board. FLC knows of little reason to suggest that the quality of observer data collection and

¹ Federal Register /Vol. 77, No. 187/Sept. 26, 2012/pgs. 59053-59061/Fisheries of the EEZ Off Alaska; Monitoring and Enforcement Requirements in the BSAI Freezer Longline Fleet/Final Rule

² Federal Register /Vol. 77, No. 187/Sept. 26, 2012/p. 59058/Fisheries of the EEZ Off Alaska; Monitoring and Enforcement Requirements in the BSAI Freezer Longline Fleet/Final Rule

other responsibilities will be noticeably compromised if a non-LL2 observer is deployed on a vessel in cases when an LL2 observer cannot be secured.

NMFS Assurances on LL2 Availability

Prior to the implementation of the Final Rule, NMFS and the North Pacific Fisheries Management Council (NPFMC) heard from the FLC and others, including the observer providers and the Western Alaska Community Development Association (WACDA) stating explicitly that the requirement to carry a LL2 observer on all trips by freezer longline vessels would result in a shortage of available LL2 observers for the fleet. Since then, NMFS and the NPFMC have continued to be informed of the impending shortage of LL2 observers resulting from the enacted regulation. A sampling of comments submitted to NMFS and the NPFMC include:

- Sept. 27, 2011 letter from observer providers to NPFMC
- May 16, 2012 letter from observer providers to James Balsiger, NMFS Alaska Region
- July 16, 2012 comments from FLC on NMFS Draft Rule – Monitoring and Enforcement Requirements in the BSAI Freezer Longline Fleet
- July 16, 2012 letter from Alaskan Observers (AOI) on NMFS Draft Rule – Monitoring and Enforcement Requirements in the BSAI Freezer Longline Fleet
- July 16, 2012 letter from WACDA on NMFS Draft Rule – Monitoring and Enforcement Requirements in the BSAI Freezer Longline Fleet
- January 30, 2014 letter from observer providers to NPFMC
- May 28, 2014 letter from Alaskan Observers (AOI) to Martin Loefflad, NMFS Observer Program

Since 2011, the FLC and observer providers have likewise testified repeatedly at the NPFMC and have had many more separate conversations with NMFS and NPFMC officials, including the author of the NMFS analysis on LL2 availability used in the Final Rule, expressing our concerns about the observer shortage. In the issuance of the Final Rule, NMFS responded to concerns that the regulation would result in a shortage of LL2 observers. NMFS commented that the restructured observer program, in particular, would facilitate additional opportunities for observers to get the requisite experience/sets to become LL2 certified, thus providing for a sufficient availability of LL2 observers for the FLC fleet. Likewise, NMFS pointed to action to reduce the number of sampled sets required for LL2 certification by half as a measure to address concerns about training LL2 observers following the implementation of this rule. Specifically:

“The EA/RIR highlights that the restructured observer program will provide the most new opportunities for observers to acquire lead level 2 certification. In addition, through this action NMFS reduced the number of sampled sets required for lead level 2 certification by half. Both of these factors increase the likelihood that there will be sufficient lead level 2 observers in the long term. The analysis suggests that it is likely that the number of qualified lead level 2 observers will exceed the number required in any given year.”³

³ Federal Register /Vol. 77, No. 187/Sept. 26, 2012/p. 59055/Fisheries of the EEZ Off Alaska; Monitoring and Enforcement Requirements in the BSAI Freezer Longline Fleet/Final Rule

NMFS later comments in the Final Rule that “our analysis indicates that a sustainable supply of lead level 2 observers should be available in the short, as well as the long, term.”⁴ In total, NMFS comments four different times in the Final Rule that they believed, based on their analysis, that there would be a sufficient level of LL2 observers for the freezer longline fleet. NMFS also expressed this position in their June 12, 2012 response to the May 16, 2012 letter from observer providers noted above and in many other correspondences with industry and the NPFMC. Despite the repeated concerns raised from industry and other stakeholders, and some acknowledged uncertainties from NMFS themselves in the Final Rule about the effectiveness of the restructured observer program on the availability of LL2 observers⁵, NMFS determined that there would be a sufficient availability of LL2 observers for the freezer longline fleet.

Intensifying Shortage of LL2 Observers and its Impacts

The unfortunate reality is that that actions anticipated by NMFS to facilitate a sustainable supply of LL2 observers has not produced the needed results. In particular, the restructured observer program has done little to facilitate training of new LL2 observers for the freezer longline fleet. Despite the restructured program being in place since January 2013, the pool of available LL2 observers for the freezer longline fleet has continued to decrease, much as was anticipated by industry prior to passage of the Final Rule. Alaskan Observers’ May 28, 2014 letter to the Observer Program, referenced above, details the decrease in the LL2 observer pool in 2014.⁶ Since this letter, the availability of LL2 observers has only become a more critical concern for the observer providers and our fleet. The requirement for LL2 observers on the freezer longline fleet, coupled with the inability of the restructured observer program to sufficiently train up enough LL2 observers, has resulted in a critical shortage that threatens the operations of our fleet.

As detailed above, in the past month, concerns about shortages of LL2 observers have become the reality. Some FLC members are being forced to strand their vessels at the dock for multiple days and to alter their fishing trips as a result of a lack of LL2 observers to be deployed on their boats. All members are being forced to prepare for this to happen to them, creating uncertainty for their fishing plans for the remainder of the year and into 2015. This is an unacceptable outcome to regulatory action that must be addressed immediately.

Existing Actions Not Sufficient to Address Immediate Crisis

FLC members are actively engaged in efforts to alleviate the LL2 observer shortage and minimize further harm to their operations. In particular, FLC members are working with observer providers to temporarily deploy second, non-LL2 observers on FLC member vessels to help these observers secure the requisite training needed for LL2 certification. This is consistent with comments from NMFS in the September 26, 2012 Final Rule on actions industry may take to alleviate a shortage if sufficient numbers of LL2 observers are not available. These efforts come at a substantial cost to industry. FLC member Coastal Villages estimates the additional costs of taking an additional observer on just one trip to be \$10,000. However, results from these efforts are not expected to relieve the shortage of observers until the beginning of 2015, at the

⁴ Federal Register /Vol. 77, No. 187/Sept. 26, 2012/p. 59057/Fisheries of the EEZ Off Alaska; Monitoring and Enforcement Requirements in the BSAI Freezer Longline Fleet/Final Rule

⁵ Federal Register /Vol. 77, No. 187/Sept. 26, 2012/p. 59056/Fisheries of the EEZ Off Alaska; Monitoring and Enforcement Requirements in the BSAI Freezer Longline Fleet/Final Rule

⁶ Alaskan Observers letter to Martin Loefflad, NMFS Observer Program, May 28, 2014

earliest. It's important to note that these efforts will be also be impacted by a shortage of LL2 observers, as all vessels who agree to take on a second, non-LL2 observer still need a LL2 observer on board. If a vessel isn't able to leave the dock without a LL2 observer, then this will also limit training opportunities to replenish the LL2 observer pool.

In addition to taking on second observers, since the enactment of the Final Rule, the FLC and observer providers have met repeatedly with the NMFS Observer Program to consider potential regulatory or policy actions that could be enacted to avoid the problems we are now experiencing. Many of these proposals are detailed in the letters to NMFS and the NPFMC referenced above (and enclosed). The Observer Program has been cooperative in taking limited actions to facilitate second observers securing the needed training for LL2 certification. However, to date we have not been able to arrive at an action by the Observer Program that would facilitate a permanent solution to the LL2 observer shortage other than amending existing regulation. We hope to continue pursuing a long-term regulatory solution to this problem, but immediate actions to address the LL2 observer shortage do not appear to be available, short of not enforcing the regulation.

Policy of Non-Enforcement on LL2 Observer Violations

What is needed is action to, at a minimum, allow time for LL2 training and other measures to effectively reduce the shortage of observers so the freezer longline fleet is not stranded at the dock waiting for relief. The FLC proposes that a policy of non-enforcement on "failure to maintain coverage" violations related to LL2 observers on freezer longline vessels be implemented to address this concern and to help alleviate the adverse impacts of the Final Rule.

We understand that the NMFS Office of Law Enforcement (OLE) currently has the authority to consider reduced penalties or to not enforce "failure to maintain coverage" violations if there are "clear mitigating circumstances" that led to the violation. In a conversation with OLE⁷, we have been informed that, while each case is unique, this may include an injury to a LL2 observer that prevents the individual from deploying with a vessel. Should a vessel leave the dock with a non-LL2 observer in place of the injured individual for lack of an LL2-certified replacement, OLE would take this into account in their consideration of enforcement action.

In our conversation with OLE, they informed us that a general shortage of LL2 observers, such as what we are now experiencing, does not qualify as a "clear mitigating circumstance" for "failure to maintain coverage" violations. It's our understanding that any such violations resulting from the shortage (and not involving additional mitigating circumstances) would be passed on from OLE to NOAA General Counsel (NOAA GC) for further consideration and enforcement. The FLC proposes that NMFS consider a shortage of LL2 observers, regardless of reason, to be a "clear mitigating circumstance" in a "failure to maintain coverage" violation and that such violations not be subject to enforcement by OLE or NOAA GC. If needed, an end date could be applied to the policy, at which time industry and NPFMC would re-evaluate the continued need for this action. We welcome feedback from NMFS on this proposal and other potential options for facilitating our vessels to continue their operations while the LL2 observer shortage is addressed.

⁷ C. See call with N. Lagerwey/OLE, August 1, 2014

Long term, the shortage of LL2 observers presents cause to reexamine the LL2 requirement for the freezer longline fleet. In the final rule, NMFS states that they "could reconsider the monitoring requirements for the freezer longline fleet if there is a future shortage of lead level 2 observers."⁸ The feared shortage of observers is now upon us. We hope NMFS will act on this development and work quickly with observer providers and the freezer longline fleet to eliminate this unnecessary threat to the operation of our fleet.

Thank you for your attention to this important issue for the freezer longline fleet. We welcome the opportunity to talk with you in more detail soon to address our concerns.

Sincerely,



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Cora Campbell, Commissioner, ADF&G
Michael Lake, Alaskan Observers Inc.
Troy Quinlan, Techsea International Inc.
Stacey Hansen, Saltwater Inc.
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Nikky Teutschel, Legislative Assistant, Sen. Maria Cantwell (D-WA)
Anna Sperling, Legislative Assistant, Sen. Patty Murray (D-WA)
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⁸ Federal Register /Vol. 77, No. 187/Sept. 26, 2012/p. 59056/Fisheries of the EEZ Off Alaska; Monitoring and Enforcement Requirements in the BSAI Freezer Longline Fleet/Final Rule

Enc:

Observer providers letter to NPFMC, Sept. 27, 2011

Observer providers letter to James Balsiger, NMFS Alaska Region, May 16, 2012

FLC comments on NMFS Draft Rule – Monitoring and Enforcement Requirements in the BSAI Freezer Longline Fleet, July 16, 2012

Alaskan Observers (AOI) comments on NMFS Draft Rule – Monitoring and Enforcement Requirements in the BSAI Freezer Longline Fleet, July 16, 2012

WACDA comments on NMFS Draft Rule – Monitoring and Enforcement Requirements in the BSAI Freezer Longline Fleet, July 16, 2012

Observer providers letter to NPFMC, January 30, 2014

Alaskan Observers (AOI) letter to Martin Loefflad, NMFS Observer Program, May 28, 2014

Coastal Villages Seafoods letter re: LL2 observers on Cod Freezer Longliners, Aug. 22, 2014