



Report of the 2016 Observer Provider Insurance Workshop



NOAA
FISHERIES

Office of Science
and Technology

National Observer
Program

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NPFMC Observer Advisory Committee
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Events Leading to 2016 Workshop*

- 2014 Michael Lake (Alaskan Observers Inc.) letter to North Pacific Fishery Management Council (NPFMC)
 - Merchant Marine Act (Jones Act), Commercial General Liability (CGL), and Longshore and Harbor Workers Compensation Act (LHWCA) **inapplicable for observers**
 - Only 3 of 8 Regional Fisheries Management Councils implement coverage requirements
 - No uniform and/or national standards for observer coverage
- 2014 NPFMC requests NMFS guidance
- 2015 NMFS (Eileen Sobeck) response letter to NPFMC
 - **Agreed Jones Act, CGL, and LHWCA inapplicable for observers** and could be considered for removal by regulatory amendment
 - No discussion on coverage minimums

*Complete timeline of relevant actions/documents supplied at the end of the presentation

Objectives of 2016 Workshop Were to Discuss...

- Coverage for observers under State Workers' Compensation Insurance, Federal Employee's Compensation Act (FECA), and other types of insurance
- Gaps in coverage(s) and how to close them
- How to ensure observer providers carry adequate insurance to cover observers
- Regional and/or national approaches for **adequate coverage and minimum dollar amounts** of insurance coverage(s)

National Observer Program Panel Comments

(Jane DiCosimo, Alex Perry)

- Results of insurance cost questionnaire from NOP to observer providers were inconclusive
 - Minimum coverage standards are an important next step
 - Could reduce or eliminate duplicative coverages
 - Requires flexibility for different regions to meet minimums
 - Suggestions for NOP to conduct two anonymous surveys to collect more info on insurance issues from:
 - Insurance industry on coverages and pricing
 - Observers on insurance claims processes
- ... to be conducted following release of technical memo

Observer Provider Expert Panel Comments

(Bryan Belay, Stacey Hansen, Michael Lake, Ward McIntyre, Troy Quinlan, Sonja Valle)

- **Education** on claims processes for all staff is essential
- FECA **does not compensate for overtime**
 - Has been successfully supplemented by Marine Employers Liability (MEL)
- General Maritime Law and Jones Act **do not apply** to observers
- US Longshore & Harbor Workers (under LHWCA) **has been successfully applied to some land-based observer claims** (e.g., catch monitors)
- State Workers' Comp **can cover gaps** in US Longshore & Harbor Workers' insurance (USL&H)
- Application of **national** minimum coverage dollar amounts could be problematic due to regional variability

Insurance Expert Panel Comments

(Ian Greenway, Ivan Kolva, Paul McGreenery, Kevin Rocha)

- Beneficial to create unique **observer job code** for use nationally
- There are **no minimum/maximum coverage limits** on State Workers' Compensation and USL&H
 - Need to clarify that LHWCA **has been used successfully**
- Regulatory language/policy guidance could allow for **regional flexibility** in coverage minimums/maximums
 - Umbrella policies for extra coverage another option

Observer Panel Comments*

- FECA claims process is **time consuming and complicated**
- FECA customer service is reportedly **difficult to work with** during claims process
- **Gaps** in insurance coverage concerning illness proximately caused by employment (e.g. MRSA)

*No observers were present at this workshop. Observers were represented by written material from their union representative, Tracey Mayhew with United Industrial Workers Seafarer's Union (via webinar), observer providers, and general discussion by workshop participants

Government Subject Matter Expert Panel Comments

(Keith Hagg, Megan Heller, Tara Jones, Mohammad Sheikh, Derek Tukenmez)

- Filing FECA claims---5 requirements plus exclusions
 - Standard 30 day waiting period to accept or reject
- Accepted FECA claims
 - Typically the Department of Labor pays claim and is reimbursed by NMFS
 - Compensation claims based on pay rate for one year
- Office of Workers' Compensation Programs (OWCP)
offered outreach and education including:
 - Meeting at Cleveland Special Programs office (not yet occurred)
 - Outreach by OWCP to Division of Longshore and Harbor Workers' for clarification on applicability
 - Provide specific claims instructions on website

Insurance Expert and Observer Provider Comments on Government Subject Matter Expert Discussion

(Bryan Belay, Ian Greenway, Stacey Hansen, Ivan Kolva, Michael Lake, Paul McGreenery, Ward McIntyre, Kevin Rocha, Troy Quinlan, Sonja Valle)

- Potential for **economic loss** by observer providers/vessel owners
 - Marine Mammal Protection Act bars civil action by observer
 - Magnuson Stevens Act does not bar civil action by observer
 - Protection and Indemnity insurance
 - Unscheduled return to port due to observer
- FECA claims only for incidents occurring **on a vessel**
- Potential for **amending FECA** to cover shoreside duties
- National regulations and regional variability

Based on the discussions...

- General Maritime Law and Jones Act **inapplicable** to observers
- LHWCA **has been successfully applied** to portions of land-based duties
- Significant **gaps in FECA**
- NOAA General Counsel advises that:
 - a national insurance **contract** problematic
 - National **standards/regulations/policies** on types of insurance and minimum coverage amounts possible but may not provide regional flexibility

Summary of Workshop Discussions

	Acts and Laws			Federal/State Coverage		Observer Provider Coverage (not discussed in detail at the workshop)		
Observer Location	Jones Act	GML	LHWCA	FECA	State Workers' Comp	CGL	MGL	MEL
On Land*	<u>Not Applicable</u>	<u>Not Applicable</u>	<u>Applicable</u> Needs Further Investigation	<u>Not Applicable</u>	<u>Applicable</u> Needs Further Investigation	<u>Not Applicable</u>	<u>Applicable</u>	<u>Not Applicable</u>
At Sea*	<u>Not Applicable</u>	<u>Not Applicable</u>	<u>Not Applicable</u>	<u>Applicable</u> No Overtime Compensation	<u>Applicable</u> Needs Further Investigation	<u>Not Applicable</u>	<u>Applicable</u>	<u>Applicable</u> Could possibly supplement FECA

*Represents both industry funded and NMFS contracted observers

A Few Options for National Requirements*

(NOAA FISHERIES)

1. NMFS develops **guidance** on coverage types and minimums
 - Not binding
2. NMFS drafts observer provider **contracts** to include minimum coverage standards
 - Only legally applicable to NMFS contracts
 - Not applicable to industry funded programs
3. NMFS implements mandatory **national regulatory requirements**
 - Most substantial action which would create and regulate a national standard
 - May not provide regional flexibility

*Prior to taking any action, NMFS must justify why such steps are necessary, identify which policies are to be purchased and how each will benefit observers and observer providers, and how these actions will ultimately ensure the best coverage and compensation for US fisheries observers

After the Workshop



The Work Continued...

Picture from: https://www.google.com/search?q=fisheries+observers&source=lnms&tbm=isch&sa=X&ved=0ahUKewjyoI_Fub3TAhXDrIQKHTD4C4sO_AUICsgC&biw=1920&bih=1042#imgrc=AGcPZR_BUdJAEM:

Insurance Industry Suggested Minimums

(Ian Greenway)

- Minimum coverage standards suggestions
 - Marine General Liability **\$2 million minimum**
 - Marine Employer Liability **\$2 million minimum**
 - ONLY IF required by statute or regulation
 - State Workers' Compensation **\$1 million minimum**
 - USL&H included by endorsement in State Workers' Compensation or through separate policy

Next Steps

- NOP will consider webinar comments
- Workshop summary will be published as a NMFS Technical Memorandum (late Summer 2017)
- Councils and stakeholders may provide feedback to NMFS on the Technical Memorandum
- NMFS HQ and regions will recommend best approach (i.e., national regulations, policy guidance, contract language)
- Based on best approach, NMFS HQ and Regional Councils will take the next steps in implementation

Workshop Panelists

National Observer Program

Jane DiCosimo--NMFS Science & Technology
Alex Perry--NMFS Science & Technology (detail)

Insurance Expert Panel

Ian Greenway--LIG Marine Managers
Ivan Kolva--Gallagher & Co.
Paul McGreenery--Asgard Summit
Kevin Rocha--Smithwick Mariners

Observer Provider Expert Panel

Bryan Belay--MRAG Americas
Stacey Hansen--Saltwater, Inc.
Michael Lake--Alaskan Observers, Inc.
Ward McIntyre--Fathom Research
Troy Quinlan--Tech Sea International
Sonja Valle--AIS

Government Subject Matter Expert Panel

Keith Hagg--NOAA General Counsel
Megan Heller--DOC/OGC/GL
Tara Jones--DOL/OWCP
Mohammad Sheikh--DOL/OWCP
Derek Tukenmez--DOL/OWCP

Timeline of Events

1. 1994 Association for Professional Observers Insurance Technical Committee Recommendations
Available from:
http://www.apo-observers.org/docs/5_1994_Observer_Insurance_Technical_Committee_Recommendations.pdf
2. 1995 Lost at Sea - Sea Time Overdue for Observers
Available from:
<http://digitalcommons.law.seattleu.edu/sulr/vol18/iss3/11/>
3. 2001 Fisheries Observers Insurance, Liability and Labor Workshop Technical Memorandum
Available from:
https://www.st.nmfs.noaa.gov/Assets/Observer-Program/pdf/Insurance_Workshop_Final_%20Report.pdf
4. 2002 The Fisheries Observer Compensation Act (Annotated With Footnotes)
Available from:
http://apo-observers.org/letter/FOCA_APO_9-4-02.pdf
5. 2003 Plan to Manage Risks and Minimize Liabilities Associated With the Deployment of Contracted Fisheries Observers
Available from:
https://www.st.nmfs.noaa.gov/Assets/Observer-Program/pdf/ObserverLiabilities_Mar03.pdf
6. 2005 Applying the Longshore and Harbor Workers Act to Fisheries Observers (FOCA)
Available From:
https://www.st.nmfs.noaa.gov/Assets/Observer-Program/pdf/FOCA_Cost_%20Analysis_FINAL_Report_05Oct14.pdf
7. 2014 AOI (North Pacific observer provider) Proposal to Amend Insurance Requirements
Available from:
<https://www.npfmc.org/wp-content/PDFdocuments/CM/071114/ObserverInsuranceLtr070114.pdf>
8. 2014 North Pacific Fishery Management Council Letter to NMFS Regarding Insurance Amendment
Available from:
<https://www.npfmc.org/wp-content/PDFdocuments/CM/071114/ObserverInsuranceLtr070114.pdf>
9. 2015 NMFS Response to North Pacific Fishery Management Council Amendment Proposal
Available from:
<http://npfmc.legistar.com/gateway.aspx?M=F&ID=50eba36c-acc3-482c-85eb-1641bcb09146.pdf>