

February 5, 2000

Steve Pennoyer
Administrator for Sustainable Fisheries
NMFS Alaska Region
P. O. Box 21668
709 W. 9th Street
Juneau, AK 99802

Dear Mr. Pennoyer:

Since the regulations implementing the Interim Observer Program expires at the end of 2000, the Association for Professional Observers (APO) would like to take the opportunity to make suggestions to improve any future regulations.

At the inception of the Domestic Groundfish Observer Program (DGOP), it was understood the Program had flaws and needed to be replaced as soon as possible. Unfortunately, ten years have passed under the flawed system and the status quo continues. All of the problems that initially afflicted the observer program are still with us. Section 301 of 16 U.S.C. 1851 (a)(2) states "conservation and management measures shall be based upon the best scientific information available." The current observer program in Alaska is not fulfilling its obligation to collect the best information possible. Therefore, its continuation under the status quo is a violation of a National Standard for Fishery Conservation and Management.

The MS-CDQ program has forced industry to realize the importance of collecting quality data. However, the MS-CDQ program accounts for only 7.5% of the TAC. The MS-CDQ regulations have not begun to address the bulk of the DGOP's overall shortcomings nor do they go far enough to create a truly effective observer program. The most sound solution is to revisit and implement the North Pacific Fisheries Research Plan. Since we realize this is an unrealistic proposition within the next year and under the current management process, the APO believes that NMFS needs to make a number of regulatory changes to fine tune the roles between NMFS, the contractors, observers and the fishing industry. The following is a list of concerns that the APO would like NMFS to address in future regulations regarding the DGOP:

1. **Modify current certification arrangement between NMFS DGOP and the contractors.**

Background: NMFS has exhibited minimal oversight of the contractors to date. Some uncertainty exists as to whether NMFS lacks the authority or to whether NMFS has chosen not to exercise its authority over the contractors. Regardless, NMFS' input concerning the treatment of their data collectors has been insignificant. NMFS publicly recognizes the potential for conflict of interest under the current system. Yet, the current contractor certification process has never been enforced. In fact, evaluation of contractors by NMFS was discontinued in 1991 and did not resume until 1997. The 1998 evaluations were a rubber-stamp to the status quo and offered little information regarding the contractor's ability to perform their duties as required by NMFS nor did they adequately address the contractor's responsibilities to the observers.

At a national workshop on NMFS Observer Programs held in 1993, guidelines were recommended for all Federal observer programs. One recommendation stated, "Contractual arrangements will only be successful if agency authority and responsibility is adequately defined by

legislation, regulation and/or contract. Contractors must contract directly with the agency responsible; when contractors contract with vessel or plant owners to provide observer coverage, agency oversight is inadequate and the potential for conflict of interest is unacceptably high.” Similar conclusions and recommendations were drawn at the most recent US/Canada Observer Program Workshop held in Seattle, WA, March 11-13, 1998.

Proposal: Establish a contractual agreement for the certification process between NMFS and the contractors. NMFS could solicit bids for a no-cost contract (which was originally proposed under the “Third Party” alternative). The Contract could be awarded annually and for a period of one year with biannual evaluations. Certification could expire after 2 consecutive negative evaluations. A decertified contractor could reapply during the next annual certification review period. We suggest no contractor additions should occur once the annual cycle has begun for a given year. The year need not be based on a calendar year.

2. Establish protocol for when an observer refuses an assignment for safety reasons.

Background: Regulations state that observers have the right to refuse a vessel for very specific safety reasons. If an observer refuses a vessel for safety reasons related to mechanical problems or related to the behavior of vessel personnel (i.e. drug use or unsafe deck practices), the reality of the situation is that the observer gets replaced with a less fussy observer and the refusing observer is likely out of a job. There is significant financial disincentive for an observer to refuse a vessel.

Proposal: If an observer refuses a vessel for safety reasons, the contractor, NMFS Observer Program staff and the U.S. Coast Guard should be notified. If available, Coast Guard personnel should go to the vessel immediately to evaluate the situation. If a vessel is at sea or in a port where there is no Coast Guard presence, the situation can be evaluated over the appropriate communication system. Vessels should not be held up without cause. However, NMFS should take the responsibility for making the decision and **NO observer should be allowed to ride the vessel until the problem is resolved.**

3. Establish equity for observers in the decertification process.

Background: Under the current system an observer or observer contractor has 30 days after receipt of notice to submit in writing any evidence and/or argument in opposition of the proposed decertification. The NMFS decertifying officer has no such time limit to come to a final decision. An observer can wait months after disputing a proposed decertification for the decertifying officer to reach a final decision. The observer is not allowed to work (as an observer) while the decision is being made. There is at least one observer who has been forced into more than 8 months of unemployment while the decertifying officer is making a final determination.

Proposal: APO recommends a 30-60 day limit after which the observer is either decertified or not. This would establish a 90-day limit on the amount of time the observer is out of a job. A specific time line would also strengthen NMFS’ position if an observer who is eternally waiting for that decision pursues legal action against NMFS.

4. Data quality is often questioned in the current program. **Data quality could be improved by decreasing the turnover rate of observers** and by providing extensive, supplementary training to the existing observers. The more consistency there is in data collection, the better the data quality.

Background: For several years the ADF&G Shellfish Observer Program has required through state regulations that 65% prior shellfish observers be deployed on an annual basis and no crab vessels have been prohibited from fishing due to an observer shortage. This is also the minimum stated by the current contracts between the Alaska Fisherman's Union (AFU) and four certified contractors. All contracts will be re-negotiated for the 2001 season and all contract language is up for negotiation. Relying on the AFU is not a guarantee that experience will be retained in the future.

Proposal: Establish a minimum 65% retention rate for observers in the DGOP. Some of the contractors already maintain a higher retention rate indicating this is possible. The APO's preferred definition of "Prior Observer" is an observer who has successfully completed 90 sampling days. The three week training of new observers is currently unlimited and free of charge. Tax dollars would be more efficiently spent with increased training for prior observers. In general, priors collect better data because they are more confident and have had sampling experience on a variety of vessel types. Many observers do this job not only for the money but because they enjoy the lifestyle and they genuinely care about the management of the North Pacific and Bering Sea resource.

5. Restrict distribution of personal information.

Background: Resume requests have been a vessel/contractor negotiation factor for one fishing company in particular. A contractor's unwillingness to distribute resumes can result in a threat for a vessel to change contractors. Resumes include personal information such as hobbies, outside interests and political associations which can be used to intimidate observers. NMFS Observer Program policy, as per a memo to contractors dated April 15, 1994, is to request the contractors not release this information without the written permission of the observer. The APO finds this unacceptable. In addition to this practice being an invasion of privacy, release of personal information by contractors potentially compromises NMFS' ability to meet the DGOP's objectives and obligations. If observers feel that fishing company personnel can contact them or their family directly, discouraging the observer from making reports which might lead to enforcement action, observers are likely to feel pressured to not file such reports. NMFS receives copies of resumes/transcripts and is responsible for determining if the applicant complies with the experience and education requirements in regulation. Industry doesn't need or have a right to any personal information unless the observer shares this information directly.

Proposal: Enact a regulation stating contractors will not distribute personal information such as resumes of observers to the fishing industry. Dissemination of resumes should be grounds for decertification of the contractor. Industry can receive from their observer and/or NMFS a copy of the certification letter which states that the observer is qualified.

6. Sample station guidelines, not regulations, need to be established for all vessels. An appropriate sample station should include a small table, adequate light, a place to hang a scale or position a platform scale, adequate space, and access to a source of water. NMFS should notify contractors when they feel a vessel has sampling problems that could be addressed by the contractor. A summary of observer sampling problems could be provided prior to each new year for all the vessels the contractor will work with. The APO feels many sampling problems could be resolved if there was increased outreach by NMFS to both the industry and the contractors.

7. The DGOP needs the regulatory flexibility to place NMFS Observer Program staff, especially in light of the establishment of the Cadre, on any vessel at any time. NMFS also needs to establish a protocol regarding the deployment of staff. Displacement of observers to accomplish this task is not acceptable to our membership.

Policies which benefit observers, benefit the Observer Program. Technically, observers may not be NMFS employees, but we are in effect agents of NMFS. The work observers perform and it's quality reflects directly upon NMFS. Observers need NMFS to propose regulatory changes that will have a positive effect on the DGOP.

Thank you for your time and consideration of these matters.

Sincerely,

Kimberly S. Dietrich
Executive Officer

cc: Dan Ito, Task Leader, DGOP
Vicki Cornish, National Observer Program
Heidi Lovett, MRAG Americas
Richard Lauber, Chairman, NPFMC
Penny Dalton, Assistant Administrator for Fisheries