

Secretarial Review Draft

**Regulatory Impact Review/Initial Regulatory Flexibility Analysis
for a Regulatory Amendment to Revise Administrative and Procedural
Aspects of the North Pacific Groundfish Observer Program**

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ABBREVIATIONS & ACRONYMS

BSAI	Bering Sea and Aleutian Islands
CEY	Constant Exploitation Yield
E.O.	Presidential Executive Order
EEZ	Exclusive Economic Zone
GOA	Gulf of Alaska
IPHC	International Pacific Halibut Commission
IRFA	Initial Regulatory Flexibility Analysis
lb	Pounds
M	Million
MSA	Magnuson Stevens Fishery Conservation and Management Act
mt	metric ton
NMFS	National Marine Fisheries Service
NOAA GC	National Oceanic and Atmospheric Administration General Counsel
NPFMC	North Pacific Fishery Management Council
NPGOP	North Pacific Groundfish Observer Program
OAC	Observer Advisory Committee
OMB	Office of Management and Budget
RFA	Regulatory Flexibility Act
RIR	Regulatory Impact Review
SBA	U.S. Small Business Administration
SSC	Scientific and Statistical Committee

EXECUTIVE SUMMARY

This Regulatory Impact Review (RIR) was prepared to meet the requirements of Presidential Executive Order 12866 for an evaluation of the benefits and costs, and of the significance, of a proposed Federal regulatory action. Analysts have also drafted an initial regulatory flexibility analysis (IRFA) to comply with the Regulatory Flexibility Act. The IRFA evaluates potential adverse economic impacts on small entities directly regulated by the proposed actions.

The Council recommends amending Federal regulations relevant to numerous administrative, technical, and procedural requirements applicable to observer providers, observers, and industry participating in the North Pacific Groundfish Observer Program. Specifically, the proposed actions would:

- Modify the current permit issuance process so that observer and observer provider permit issuance is a discretionary NMFS decision. (Issue 1)
- Amend current Federal regulations addressing observer behavior involving drugs, alcohol, and physical sexual conduct to remove NMFS oversight of observer behavior that does not affect job performance. Require that observer providers submit policies related to these activities and continue to notify NMFS upon learning of an incident. (Issue 2)
- Clarify in Federal regulations that observer providers are allowed to provide observers or technical staff for purposes of exempted fishing permits, scientific research permits, or other scientific research activities. (Issue 3)
- Revise the definition of “fishing day” in Federal regulations. (Issue 4)
- Require observer providers to submit detailed economic information to NMFS every three years. (Issue 5)
- No action is recommended on Issue 6, which proposed specifying a date by which observers who have collected data in the previous fishing year would be required to be available for debriefing.
- Implement housekeeping issues related to errors or clarifications in existing regulations at 50 CFR 679.50. (Issue 7)

Alternatives Considered and the Council’s Preferred Alternative

Table E - 1 provides a summary of the issues, alternatives, and options considered in this analysis, and the following section provides a brief discussion of each alternative. Each of seven issues has associated alternatives, some of which contain options. Each issue represents a mutually exclusive decision point. Analysis of the entire suite of action alternatives, components, and options is provided in Section 2.5.

At its April 2008 meeting, the Council selected a preferred alternative under each of the seven separate issues. The Council’s preferred alternatives are identified in the discussion below, and a summary of the Council’s action is provided in Section 2.7. Overall, the Council recommended an action alternative to modify Federal regulations under every issue, with the exception of Issue 6. These actions are intended to remove Federal regulations that are either unnecessary, unenforceable, or outside the authority of NMFS (Issues 1 and 2); or to clarify existing regulations with regard to allowing observer providers to provide observers for exempted fishing permits and scientific research permits/activities (Issue 3). Other issues included in this proposed action would establish new regulations to prohibit activities that result in non-representative fishing behavior from counting toward an observer coverage day (Issue 4), and require observer providers to report economic information to NMFS (Issue 5). Finally, the action would also implement three minor ‘housekeeping’ changes to the regulations, for clarity and accuracy (Issue 7).

In sum, the proposed actions are intended to improve the operational efficiency of the Observer Program, as well as improve the catch, bycatch, and biological data provided by observers for conservation and management of the North Pacific groundfish fisheries, including that provided through scientific research activities. Section 2.7 provides a detailed discussion of the Council’s preferred alternative.

Table E - 1 Summary of the Issues, Alternatives, and Options Considered

ISSUE	ALTERNATIVES and OPTIONS			
ISSUE 1: Observer certification and observer provider permitting appeals processes	Alternative 1. No action.	Alternative 2. Remove the appeals processes for observer candidates that have failed training and observer provider applicants denied an initial permit.		
ISSUE 2: Observer conduct	Alternative 1. No action.	Alternative 2. Remove Federal regulations that govern observer behavior related to drugs, alcohol, and physical sexual contact. Require that each observer provider have such policies and submit them to NMFS. Option 1: Require observer providers to notify NMFS of a breach of the above policies within a set number (24, 48, or 72) of hours after becoming aware of a breach.		
ISSUE 3: Research and experimental permits	Alternative 1. No action.	Alternative 2. Clarify in Federal regulations that observer providers may provide observers or scientific data collectors for research associated with exempted fishing permits, scientific research permits, or other research activities.		
ISSUE 4: Fishing day definition	Alternative 1. No action.	Alternative 2. Revise the fishing day definition in Federal regulations to require that an observer be onboard for all gear retrievals in which groundfish are retained during the 24 hour period in order to count as an observed day. Option 1: Change the 24 hour period from midnight to midnight, to noon to noon.	Alternative 3. Establish Federal regulations to prohibit activities that result in unrepresentative fishing behavior from counting as an observed day.	
ISSUE 5: Economic data collection	Alternative 1. No action.	Alternative 2. Require observer providers to submit annual costs to NMFS according to defined cost subcategories and area, fishery, gear type, and coverage category.	Alternative 3. Require observer providers to submit annual costs to NMFS according to area, fishery, gear type, and coverage category.	Alternative 4. Require observer providers to submit copies of actual invoices to NMFS on a monthly basis. Invoices must contain specified information.
		Option 1: Limit this data collection to 3 years. Option 2: Prohibit a person/entity that receives this information on behalf of NMFS from being certified as a provider.		
ISSUE 6: Completion of the fishing year	Alternative 1. No action.	Alternative 2. Require that observers who collect fishing data on a deployment that spans two years return and be available for debriefing by Feb 28.		
ISSUE 7: Miscellaneous regulation modifications	Alternative 1. No action.	Alternative 2. Revise Federal regulations to correct inaccuracies and establish a deadline (Feb. 1) for observer providers to submit to NMFS copies of each type of contract they have with observers or industry.		

Note: This table provides a general summary outline of the issues, alternatives, and options. See the following section for the exact wording of the alternatives and options under consideration.

Issue 1. Observer certification and observer provider permitting appeals processes

Alternative 1. No action. No change would be made to existing Federal regulations at 50 CFR 679.50(j)(1)(iv) that provide an appeals process to an observer candidate in the case that NMFS denies an observer candidate who failed training the opportunity to pursue further Alaska groundfish observer training. No change would be made to existing Federal regulations at 50 CFR 679.50(i)(1)(v) that provide an appeals process to an observer provider applicant, in the case that NMFS denies an applicant an initial permit to become an observer provider.

Alternative 2. (Council preferred alternative) Remove the Federal regulations that provide an appeals process to an observer candidate in the case that NMFS denies an observer candidate initial certification and the opportunity to pursue further NMFS observer training. Remove the Federal regulations that provide an appeals process to an observer provider applicant, in the case that NMFS denies an applicant an initial permit to become an observer provider. (Note that this alternative does not affect the ability of observers and observer providers to appeal any decision to revoke or sanction a certification or permit that is already issued.)

Issue 1, Alternative 1 (no action) would not change Federal regulations related to the observer certification and observer provider permitting appeals processes; thus, regulations would continue to provide for an appeal opportunity to initial observer candidates and observer provider applicants. Alternative 1 would continue to require that NMFS provide staff resources to the appeals process for both observer candidates that fail training and are not allowed to retake training, and applicants that are denied observer provider permits.

Allowing unsuccessful observer provider applicants to appeal an agency denial may increase the chance of a lower quality applicant entering the pool of certified observer providers. This is expected to have negative effects on the management and conservation of the Nation's fisheries, NMFS, the fishing industry, current certified observer providers, and observers. However, future observer provider applicants trying to gain an observer provider permit may benefit from Alternative 1, as it would sustain their ability to appeal any agency denials, thus increasing their chances of receiving a permit upon final resolution of the appeal.

The fishing industry that relies on high quality observer data would be negatively affected if a lower quality observer candidate is certified or a lower quality observer provider applicant is permitted. Alternative 1 would continue to limit NMFS' discretion as to whether to grant or deny an initial observer certification or observer provider permit, by requiring that an appeals process be provided in the case of denials.

Issue 1, Alternative 2 (Council preferred alternative) would change Federal regulations to expand NMFS' discretion in whether to grant or deny an initial observer certification or observer provider permit. There is no statutory entitlement to receiving observer certification or an observer provider permit; thus, the granting or denial of observer certifications and observer provider permits are discretionary agency actions. NMFS discretion would be expanded two ways: 1) by revising regulations such that NMFS "may" grant a permit or certification rather than "will" grant a permit or certification; and 2) by establishing final agency action on the permit application as the point at which the observer program official issues a notice stating that the observer provider permit application is denied or that the observer candidate would not be permitted to re-enter the initial groundfish training course. Note that this alternative does not affect the ability of observers and observer providers to appeal any decision to revoke or sanction a certification or permit that is already issued. An observer or observer provider permit applicant who is denied a permit (although not entitled to a further NMFS review) could initiate an action against NMFS in a United States District Court.

Under Alternative 2, NMFS' role in granting observer certifications and observer provider permits would more clearly reflect the discretionary nature of these processes. NMFS would not have to apply limited staff resources to the appeals process when an observer certification or observer provider permit is denied. The change in observer certification processes is expected to better serve the Nation's interest in having competent observer providers, supplying well-qualified observers to monitor the North Pacific groundfish fisheries.

Issue 2. Observer conduct

Alternative 1. No action. No change would be made to existing Federal regulations that require that observers refrain from engaging in specified behaviors related to violating the drug and alcohol policy established by the Observer Program; engaging in illegal drug activities; or engaging in physical sexual contact with vessel or processing plant personnel (50 CFR 679.50(j)(2)(ii)(D)). NOAA GC advises that these regulations are unenforceable, and/or outside the authority of NMFS.

Alternative 2. (Council preferred alternative) Remove current Federal regulations at 50 CFR 679.50(j)(2)(ii)(D) that attempt to control observer behavior related to activities involving drugs, alcohol, and physical sexual contact, and remove references to the Observer Program's drug and alcohol policy in the regulations. Regulations would be revised to require each observer provider to have a policy addressing observer conduct and behavior, and current copies of each provider's policy would be required to be submitted to NMFS.

Option 1: (Council preferred alternative) Add a requirement under 679.50(i)(2)(x)(I)(5) to require observer providers to submit information to NMFS concerning allegations or reports regarding a breach of the observer provider's policy on observer conduct.¹ Notification of such information is required [24 hours, 48 hours, or 72 hours] after the provider becomes aware of the information.

Issue 2, Alternative 1 (no action) would make no changes to the existing Federal regulations which govern observer conduct related to drugs, alcohol, and physical sexual contact. NOAA GC has advised that these regulations are unenforceable, and/or outside the authority of NMFS. In effect, there may not be a sufficient direct connection between the sanctioned behavior and the activity that NMFS has the statutory authority to regulate (i.e., the collection of statistically reliable fisheries data).

Issue 2, Alternative 2 (Council preferred alternative) would remove current Federal regulations that attempt to control observer behavior related to activities involving drugs, alcohol, and physical sexual conduct and regulations that prohibit observers from engaging in any behavior that adversely affects the public's confidence in the integrity of the observer program or of the government. Further, regulations would be removed that prohibit observers from engaging in any illegal actions or other activities that would reflect negatively on (a) their image as professional scientists, (b) other observers, or (c) the Observer Program as a whole. NMFS would discontinue the Observer Program's existing drug and alcohol policy, as a drug and alcohol policy would instead be the purview of each observer provider. Thus, references to the Observer Program's existing drug and alcohol policy would be removed from Federal regulations.

In effect, Alternative 2 would require each observer provider to have a policy addressing observer conduct and behavior, and current copies of each provider's policy would be required to be submitted to NMFS. However, NMFS would not formally evaluate and approve the submitted policies. The agency's role would be limited to ensuring that the observer providers had developed a policy. All of the existing permitted observer providers currently have standards of professional conduct in their contracts with

observers, so expanding or maintaining these standards may involve a minimal amount of time and resources to implement. Alternative 2 would also require that observer providers submit information to NMFS on any allegations or reports of an observer's noncompliance with the observer provider's policy on observer conduct. Three options were considered to establish this notification period (24 hours, 48 hours, or 72 hours), and the Council's preferred alternative is 72 hours.

Alternative 2 is intended to clarify the responsibilities between NMFS and observer providers, which may result in less confusion for observers, if and when behavior issues arise. Submitting this information to NMFS would provide enforcement officials with additional information about potential MSA violations. It would also provide decertification officials information helpful in decertification proceedings. For example, if an observer had a drug or alcohol abuse issue, that information would be useful in determining whether an observer has a strong chance of rehabilitation, which may mitigate a full decertification and loss of employment as an observer.

Issue 3. Observer providers' conflict of interest limitations regarding research and experimental permits

Alternative 1. No action. No change would be made to existing Federal regulations, which are unclear as to whether observer providers may provide scientific data collectors to aid in research activities, including exempted fishing permits, scientific research permits, or other research. Current practice is to allow these activities, but the existing regulations are ambiguous.

Alternative 2. (Council preferred alternative) Revise Federal regulations to clarify that observer providers may provide observers or scientific data collectors for purposes of exempted fishing permits, scientific research permits, or other scientific research activities. In this role, NMFS observer program regulations would apply to observers operating under their NMFS certification, but would not apply to scientific data collectors.

Issue 3, Alternative 1 (no action) would maintain the current regulations, which do not explicitly indicate whether observer providers are allowed to supply observers or scientific data collectors for research activities in Federal regulations. NMFS would likely continue to allow these activities without pursuing enforcement action. However, it is possible that NMFS Enforcement and NOAA GC could determine that observer providers are in violation of Federal regulations. If this occurs, researchers would likely have to obtain scientific data collectors from a different source. In addition, NMFS may not be able to require observers as a condition of a permit, and research may not be able to be conducted within the context of the normal groundfish fishery.

Issue 3, Alternative 2 (Council preferred alternative) would clarify that, in addition to the provision of observer services for purposes of groundfish fisheries managed under the FMPs, observer providers could provide scientific staff for purposes of exempted fishing permits, scientific research permits, and other scientific research activities. There would likely be minimal impacts resulting from Alternative 2, as current practice is to allow these activities, but all parties involved would understand an observer provider's role. Additionally, there would be no chance of enforcement actions as a result of these activities, should interpretation of this rule subsequently change.

Issue 4. Fishing day definition

Alternative 1. No action. The current definition of "fishing day" in Federal regulations allows vessel owners or operators to use any observer coverage incurred during a 24-hour period to count towards observer coverage requirements, which has resulted in vessels fishing and being observed in ways that are

not representative of actual fishing behavior. No change would be made to existing Federal regulations at 50 CFR 679.2 which define “fishing day” as follows:

Fishing day means to (for purposes of subpart E) a 24-hour period, from 0001 hours A.l.t. through 2400 hours A.l.t., in which fishing gear is retrieved and groundfish are retained. Days during which a vessel only delivers unsorted codends to a processor are not fishing days.

Alternative 2. (Council preferred alternative) Revise the definition of “fishing day” in Federal regulations as follows:

Fishing day means ~~to~~ (for purposes of subpart E) a 24-hour period, from 0001 hours A.l.t. through 2400 hours A.l.t., in which fishing gear is retrieved and groundfish are retained. An observer must be on board for all gear retrievals during the 24-hour period in order to count as a day of observer coverage. Days during which a vessel only delivers unsorted codends to a processor are not fishing days.

Option 1. (Council preferred alternative) Revise the definition of “fishing day” in Federal regulations as follows:

Fishing day means ~~to~~ (for purposes of subpart E) a 24-hour period, from ~~0001~~ 1201 hours A.l.t. through ~~2400~~ 1200 hours A.l.t., in which fishing gear is retrieved and groundfish are retained. An observer must be on board for all gear retrievals during the 24-hour period in order to count as a day of observer coverage. Days during which a vessel only delivers unsorted codends to a processor are not fishing days.

Alternative 3. Establish regulations under 50 CFR 679.7 prohibiting activities that result in non-representative fishing behavior from counting toward an observer coverage day.

Issue 4, Alternative 1 (no action) would not clarify 30 percent observer coverage requirements, which pertain to all catcher/processors and catcher vessels equal to or greater than 60 ft length overall (LOA), but less than 125 ft LOA. NOAA Enforcement has documented instances in which vessel operators intentionally structure fishing activities only for purposes of obtaining observer coverage. For example, a vessel may fish unobserved until late in the day, pick up an observer and make a short tow prior to midnight, make one more short tow immediately after midnight, and then return the observer to port. Under current regulations, this is interpreted as two “observer coverage” days. Under Alternative 1, vessels would likely continue to conduct unrepresentative fishing, expressly with the intent of circumvent intended observer coverage requirements. Observers would continue to collect biased information on catch composition, PSC, and total catch, and that information likely would be used by NMFS to manage the groundfish fisheries.

Issue 4, Alternative 2 (Council preferred alternative) would revise Federal regulations to require that affected vessels carry an observer for all fishing activities that occur during a 24-hour period for that fishing day to count as an observer coverage day. This would affect all catcher/processors and catcher vessels greater than or equal to 60 ft LOA, but less than 125 ft LOA that are subject to 30 percent observer coverage requirements. Alternative 2 would likely reduce instances in which vessels conduct fishing operations specifically to meet coverage requirements, and likely increase catch data quality for this sector. Alternative 2 would also likely increase costs for vessels in some cases, requiring them to carry observers longer than they would be required to under Alternative 1 (status quo). Alternatively, vessels could choose to postpone fishing (in the example described above) such that they do not retrieve hauls without an observer during a 24-hour period in which they also retrieved hauls with an observer, thus increasing trip length and costs. For these reasons, Alternative 2 may have some significant cost implications for those elements of industry 1) who have adopted the aforementioned strategy to meet the technical letter of the law, while circumventing its true purpose, and 2) who are not undertaking strategic

behavior, but whose normal fishing behavior on a specific trip may mirror the problematic behavior due to unforeseen circumstances.

Option 1 under Issue 4, Alternative 2 (Council preferred alternative) still requires that affected vessels carry an observer for all fishing activities that occur during a 24-hour period for that fishing day to count as an observer coverage day. However, Option 1 would change the current 24-hour period from midnight to midnight, to a 24-hour period from noon to noon. This would also affect all catcher/processors and catcher vessels greater than or equal to 60 ft LOA, but less than 125 ft LOA that are subject to 30 percent observer coverage requirements. Option 1 may reduce instances in which vessels conduct fishing operations specifically to meet coverage requirements, more so than Alternative 2 alone, as vessels may have a higher financial disincentive to undertake strategic behavior during optimal (daylight) fishing hours. It is likely, however, that the change under Alternative 2 would provide the primary benefit, and the marginal benefit of Option 1 is unknown. Option 1 would also likely increase costs for vessels in some cases, requiring them to carry observers somewhat longer than they would be required to under Alternative 1 (status quo) or, potentially, Alternative 2.

Issue 4, Alternative 3 would establish regulations that would prohibit activities that result in unrepresentative fishing behavior from counting toward an observer coverage day. NMFS' intent for Alternative 3 is to identify, through analysis, activities or behaviors that are specific to vessels exhibiting strategic behavior only to obtain observer coverage, and prohibit those activities. Staff identified several candidate behaviors that could be prohibited in regulation. However, two problems with this methodology were identified. First, differentiating between strategic behavior and the same activity resulting from normal fishing behavior is difficult. Of the candidate fishing behaviors that could be used to regulate strategic behavior, all could potentially be explained by typical fishing operations. Second, for each candidate behavior that could be prohibited, staff determined that the regulatory fix could be circumvented and, in some cases, potentially exacerbate the existing problem.

For these reasons, NMFS has determined that Alternative 3 would not be enforceable, and would not decrease instances of vessel captains fishing only to obtain required observer coverage.

Issue 5. Observer program cost information

Alternative 1. No action. Observer providers would not be required to report various subcategories of costs to NMFS.

Alternative 2. Require observer providers to report annual costs to NMFS according to the following subcategories: labor, overhead, transportation, housing, food, and insurance. This information would be reported on an annual basis, broken out by BSAI versus GOA fisheries, and by shoreside, 30 percent, 100 percent, and 200 percent covered vessel/processor categories and gear type.

Option 1: Limit the mandatory economic data collection program to three years.

Option 2: Prohibit a person/entity that receives this confidential information on behalf of NMFS from being certified as an observer provider in the North Pacific.

Alternative 3. Require observer providers to report annual costs to NMFS by GOA and BSAI subareas; shoreside, 30%, 100% and 200% covered vessel/processor categories; and gear type.

Option 1: Limit the mandatory economic data collection program to three years.

Option 2: Prohibit a person/entity that receives this confidential information on behalf of NMFS from being certified as an observer provider in the North Pacific.

Alternative 4. (Council preferred alternative) Require observer providers to submit copies of actual invoices to NMFS on a monthly basis. Invoices must contain the following information:

1. Name of each individual vessel or shore plant
2. Name of observer who worked aboard each vessel or at each shore plant
3. Dates of service for each observer on each vessel or at each shore plant (include and identify dates billed that are not coverage days)
4. Rate charged per day for observer services
5. Total observer services charge (number of days multiplied by daily rate)
6. Specified transportation costs (i.e. airline, taxi, bus, etc.)
7. Any specified “other” costs not included above (i.e. excess baggage, lodging, etc.)

Option 1: (Council preferred alternative) Limit the submittal of economic data to every third year and limit access to these data to agency staff.

Option 2: Prohibit a person/entity that receives this confidential information on behalf of NMFS from being certified as an observer provider in the North Pacific.

Issue 5, Alternative 1 (no action) means that observer providers would not be required to report cost information to NMFS. As a result, NMFS would continue to lack sufficiently detailed information on the costs of observer services in order to inform baseline analyses of the industry-funded portion of the groundfish observer program. Analyses to support proposed regulatory changes would continue to rely on an average daily rate, multiplied by the number of observer days incurred by vessels and processors. Thus, NMFS and the Council would continue to make use of the best “available” data in the development of these analyses, recognizing the data limitations discussed below.

Issue 5, Alternative 2 would require observer providers to report costs and other economic and socioeconomic information to NMFS, by a specified date, according to various subcategories. The proposed subcategories of cost information include labor, overhead, transportation, housing, food, and insurance. The intent is that this information would be reported on an annual basis, broken out by BSAI or GOA fisheries, and by 30 percent, 100 percent, and 200 percent covered vessel/processor categories, and gear type. NMFS is not able to fully assess the various cost components of the existing groundfish observer program, utilizing the information currently required. Most, if not all, of the observer provider/vessel contracts submitted to NMFS provide only the daily rate for observer services (e.g., \$355/day). The proposed cost categories identify the specific types of information that would be collected to address common questions regarding the baseline costs of the existing program.

The primary benefit of this action is that this information would allow for a more accurate assessment of costs and benefits under potential program changes, which may benefit the groundfish observer program and the fisheries dependent upon observer data for management. The primary cost of this action would be the administrative costs incurred by the observer providers, in effect, the staff time and resources necessary to provide cost information on an annual basis. It is uncertain at this time whether the incremental cost of providing this additional information would represent a substantial cost to the observer providers.

This alternative includes two options. First, the alternative would include an option to limit the economic data collection program to three years. Second, it would include an alternative to prohibit a person or entity that receives confidential financial or business information from observer providers on behalf of

NMFS from being permitted as an observer provider in the North Pacific. This second option is intended to address a situation where a person or entity could use confidential information to compete with current observer providers.

Issue 5, Alternative 3 would require observer providers to supply NMFS with the total costs of providing observer services, split out by GOA and BSAI subareas; vessel/processor coverage categories; and gear type, on an annual basis. Compared to Alternative 2, Alternative 3 provides more generalized information. Alternative 3 would likely be less burdensome on observer providers than Alternative 2 and, therefore, could be less costly. This alternative includes the same two options as provided under Alternative 2.

Issue 5, Alternative 4 (Council preferred alternative) would require observer providers to submit to NMFS copies of actual, standardized invoices, containing specific information, on a monthly basis. The intent of this alternative is to reduce the administrative burden and costs associated with calculating and reporting the costs associated with Alternatives 2 and 3. Under Alternative 4, observer providers would submit copies of their standardized actual billing invoices to NMFS, and NMFS would enter the raw information into a database for analytical use, when needed. In addition to the benefits described for Alternatives 2 and 3, Alternative 4 has two main advantages. First, observer provider cost information could be verified by NMFS, increasing the overall data quality. Second, this approach to economic data collection allows increased flexibility in terms of data analysis.

This alternative included the same two options as provided under Alternatives 2 and 3. However, the Council's final preferred alternative revised Option 1. The Council's preferred alternative limits access to these data to agency staff and, more significantly, also limits the submittal of economic data to every third year. By taking the latter action, the program is less effective in acquiring empirical cost data with which to assess and monitor the observer program than would be annual data submissions, as provided for under Alternatives 2, 3, or 4 without Option 1 as revised.

Issue 6. Completion of the fishing year

Alternative 1. (Council preferred alternative) No action. No change would be made to existing Federal regulations allowing observer deployments to span two different fishing years and last for up to 90 days.

Alternative 2. Revise regulations to require that observers who collect fishing data in one fishing year during a deployment that extends into a second fishing year, return from sea and be available for debriefing by February 28 of the second fishing year.

Issue 6, Alternative 1 (Council preferred alternative) would not change existing regulations to require observers who collected fishing data over a span of two different years to return from sea and be available for debriefing by a specified date. In effect, this alternative allows for the potential to delay completion of the observer annual data set for the first year, until all observers have returned and debriefed. Under current regulations, an observer can be deployed for up to 90 days, meaning the maximum deployment could last through late March of the second year. This means that the completed data would not be available to end users, working on a variety of analytical projects, until some time well into the next fishing year, after the observer returns.

Issue 6, Alternative 2 would require that observers who collected fishing data over a span of two different years, return from sea and be available for debriefing by February 28 of the second year. Those observers whose cruises span two different fishing years would be impacted by this action. Alternative 2 would likely increase observer provider costs, because the efficiency of each deployment that spans two different years would be reduced, and fishing industry costs could increase to the extent observer provider

costs are incorporated into billable costs. Using the last fishing day as the cut-off, 7 observer deployments would have needed to be truncated under this rule, in 2006. The actual impact is difficult to predict, because it would depend on the composition of the observer providers' clients and the duration of the trips they take.

This action was proposed due to the potential benefit to NMFS and the clients to which it provides observer information, as it would provide a date certain, whereby observers would need to return from sea for debriefing, allowing consistency in the completion of the final annual data set. However, in July 2007, NMFS further consulted with the primary internal agency users of observer information to determine if their needs warrant consideration of this action. These consultations were conducted due to preliminary discussions with both the OAC and the Council that indicated the proposed action (Alternative 2) would potentially increase indirect costs to industry (shorten trips), with limited direct benefits. Upon review, while there is interest in obtaining a final observer dataset earlier in the year, there are no compelling analytical requirements that warrant a change to the status quo. Therefore, the Council recommended Alternative 1 (no action).

Issue 7. Miscellaneous modifications

Alternative 1. No action. Do not revise existing Federal regulations to address inaccuracies or housekeeping issues.

Alternative 2. (Council preferred alternative) Revise existing Federal regulations related to observer program operational issues as follows:

- a. Regulations at § 679.50(c)(5)(i)(A) incorrectly reference a workload restriction at (c)(5)(iii). Replace (c)(5)(iii) with the correct reference at (c)(5)(ii).
- b. Regulations at § 679.50 currently require observer providers to submit to NMFS each type of contract they have entered into with observers or industry. There is no deadline for submission of this information, although most providers currently operate as if there is an annual deadline for all submitted information. Establish a February 1 deadline for annual submissions of this information, which is consistent with the deadline for copies of 'certificates of insurance.'
- c. Update the NMFS Alaska Fisheries Science Center, Fisheries Monitoring and Analysis Division website address throughout 50 CFR 679.50.

Issue 7, Alternative 1 would not revise existing Federal regulations to address inaccuracies or housekeeping issues.

Issue 7, Alternative 2 (Council preferred alternative) would revise existing Federal regulations related to observer program operational issues. Three changes are proposed, which would serve to correct technical inaccuracies or clarify current regulations. Effects are expected to be *de minimus*.

Table E - 2 Summary of the Council's Preferred Alternatives

ISSUE	ALTERNATIVES and OPTIONS
ISSUE 1: Observer certification and observer provider permitting appeals processes	Alternative 2. Remove the appeals processes for observer candidates that have failed training, and for observer provider applicants denied an initial permit.
ISSUE 2: Observer conduct	Alternative 2. Remove Federal regulations that govern observer behavior related to drugs, alcohol, and physical sexual contact. Require that each observer provider have such policies and submit them to NMFS. Option 1: Require observer providers to notify NMFS of a breach of the above policies within 72 hours after becoming aware of a breach.
ISSUE 3: Research and experimental permits	Alternative 2. Clarify in Federal regulations that observer providers may provide observers or scientific data collectors for research associated with exempted fishing permits, scientific research permits, or other research activities.
ISSUE 4: Fishing day definition	Alternative 2. Revise the fishing day definition in Federal regulations to require that an observer be onboard for all gear retrievals in which groundfish are retained during a 24 hour period, in order to count as an observed day. Option 1: Change the 24 hour period from midnight to midnight, to noon to noon.
ISSUE 5: Economic data collection	Alternative 4. Require observer providers to submit copies of actual invoices to NMFS on a monthly basis. Invoices must contain specified information. Option 1: Limit this submittal of economic data to every third year, and limit access to these data to agency staff.
ISSUE 6: Completion of the fishing year	Alternative 1. No action.
ISSUE 7: Miscellaneous regulation modifications	Alternative 2. Revise Federal regulations to correct inaccuracies, and establish a deadline (Feb. 1) for observer providers to submit to NMFS copies of each type of contract they have with observers or industry.

Note: This table provides a general summary outline of the Council's preferred alternatives under Issues 1 – 7. See the preceding section for the exacting wording of the alternatives and options.

Implementation and enforcement issues

The following enforcement and monitoring issues were considered during the selection of a final preferred alternative:

- Removing the appeals process associated with initial observer certification, and with observer provider permitting, could enable significant resource reallocations towards necessary and more pressing program functions (Issue 1, Alternative 2)
- Placing the responsibility associated with regulating observer conduct on their employer, observer providers, rather than NMFS, could permit significant agency resource reallocations towards necessary and more pressing program functions (Issue 2, Alternative 2).

- Prohibiting non-representative fishing behavior would likely result in additional NMFS enforcement costs, but would help prevent strategic behavior used to evade, and thus undermine catch monitoring (Issue 4, Alternative 3).
- Requiring observer providers to report cost information would necessitate development and maintenance of a reporting and database system (Issue 5, Alternatives 2, 3, and 4).
- Issue 3 (Alternative 2), Issue 4 (Alternative 2), Issue 6 (Alternative 2), and Issue 7 (Alternative 2) would not result in any implementation issues, and attributable costs would be minimal. To the extent that there could be non-compliance with reporting regulations, enforcement burdens could potentially be increased.

1.0 INTRODUCTION

The groundfish fisheries in the Exclusive Economic Zone (EEZ) off Alaska are managed by the National Marine Fisheries Service (NMFS), under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (MSA). Under the authority of the MSA, the North Pacific Fishery Management Council (Council) developed Fishery Management Plans for the groundfish fisheries of the Gulf of Alaska management area (GOA) and Bering Sea and Aleutian Islands management areas (BSAI).

This Regulatory Impact Review (RIR) evaluates the costs and benefits of proposed regulatory amendments that would make changes to several administrative, technical, and procedural aspects of the North Pacific Groundfish Observer Program (Observer Program). This action is necessary to improve the existing Observer Program. Presidential Executive Order 12866 and the Regulatory Flexibility Act (RFA) mandate that certain issues be examined before a final decision is made.

The proposed actions under consideration are not primarily in response to a “market failure”, but rather are proposed to enhance and facilitate efficiency in government management programs, comply with statutory requirements, and correct inadvertent “technical” errors that are present in previously published regulatory language.

The RIR and IRFA are contained in Chapters 2.0 and 3.0, respectively. Chapter 4.0 includes a description of how the proposed action is consistent with the MSA. References and lists of preparers and agencies consulted are provided in Chapters 5.0, 6.0, and 7.0, respectively.

2.0 REGULATORY IMPACT REVIEW

An RIR is required under Presidential Executive Order (E.O.) 12866 (58 FR 51735; October 4, 1993). The requirements for all regulatory actions specified in E.O. 12866 are summarized in the following statement from the order:

“In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nonetheless essential to consider. Further, in choosing among alternative regulatory approaches agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.”

E.O. 12866 requires that the Office of Management and Budget review proposed regulatory programs that are considered to be “significant.” A “significant regulatory action” is one that is likely to:

- Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, local or tribal governments or communities;
- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.

2.1 Background

NMFS began placing observers on foreign fishing vessels operating off the Pacific Northwest and Alaska coasts in 1973, creating the North Pacific Foreign Fisheries Observer Program. Initially, observers were placed on vessels only upon invitation by host countries. In the early years of the program, the primary purpose of observers was to determine incidental catch rates of Pacific halibut in groundfish catches, and to verify catch statistics in the Japanese crab fisheries. Later, observers collected data on the incidence of king crab, Tanner crab, and Pacific salmon in the target groundfish catch, and obtained biological data on other important species. Following implementation of the Fishery Conservation and Management Act of 1976 (a.k.a, the Magnuson Act, then Magnuson-Stevens Act), which mandated that foreign vessels accept observers, observer coverage greatly expanded.

In 1978, U.S. fishermen began large scale fishing for groundfish in the North Pacific and Bering Sea, through joint ventures with foreign processing vessels. By 1986, all foreign fishing operations were halted in the U.S. EEZ off the west coast, and by 1991, all foreign joint-venture processing within the EEZ of the Bering Sea and Gulf of Alaska was terminated. NMFS began placing observers on domestic vessels in 1986. This was in support of an industry-funded data gathering program on domestic vessels fishing in an area of the Bering Sea, north of Port Moller, where bycatch of red king crab was of concern. Other small-scale domestic observer programs were implemented during the late 1980s.

The current domestic observer program was authorized in 1989, when the Secretary approved Amendments 13 and 18 to the groundfish FMPs for the BSAI and GOA, respectively. An Observer Plan to implement the program was prepared by the Secretary, in consultation with the Council, and implemented by NMFS, effective February 7, 1990 (55 FR 4839, February 12, 1990). An EA/RIR prepared for Amendments 13/18 examined the environmental and economic effects of the new program. Under this program, NMFS provides operational oversight, certification training, definition of observer sampling duties and methods, debriefing of observers, and management of the resulting data. Vessel and processing plant owners pay the cost of the observers, and the costs associated with managing the program are paid for by the Federal government.

Under the 1990 Observer Plan, groundfish vessels under 60' length overall (LOA) are not required to carry observers; groundfish vessels longer than 60', but shorter than 125', are required to carry observers during 30 percent of their fishing time; and groundfish vessels 125' and longer are required to carry observers 100 percent of their fishing time. Shoreside processors that process between 500 mt and 1,000 mt of groundfish in a calendar month are required to have observers 30% of the days that they receive or process groundfish. Shoreside processors that process 1,000 mt or more of groundfish in a calendar month are required to have observers 100 percent of the days that they receive or process groundfish. Refer to Appendix 7 for tables on the percent of observed catch by area, processing sector, gear type, target fishery, and vessel length, during 2004 through 2007.

These coverage levels have been increased to implement certain limited access programs with increased monitoring needs, such as the Western Alaska Community Development Quota (CDQ) Program and the American Fisheries Act (AFA) pollock fishery. However, aside from the CDQ and AFA programs, coverage requirements for the groundfish fleets of the BSAI and GOA have remained largely unchanged since 1990, except that coverage requirements for vessels 125' and over, using pot gear, were reduced to 30%. Since 1990, the number of observer deployment days per year ranged from about 20,000, to about 36,900, in 2005. In 2007, 373 individual observers served onboard 296 vessels and in 22 processing facilities, for a total of 35,335 observer days (Table 1). Table 2 provides the current observer requirements in Federal regulations.

Table 1 **Number of groundfish observers, platforms observed, and observer days in the North Pacific, 2002 - 2006**

<i>Year</i>	<i>Number of observers/vessels observed/plants observed</i>	<i>Number of observer days</i>
2007	373 observers, 296 vessels, 22 plants	35,335
2006	398 observers, 303 vessels, 24 plants	36,072
2005	321 observers, 304 vessels, 24 plants	36,907
2004	348 observers, 317 vessels, 21 plants	36,624
2003	332 observers, 325 vessels, 21 plants	37,371
2002	340 observers, 312 vessels, 20 plants	34,811

Source: NMFS, Observer Program Office.

Table 2 Current observer requirements in Federal regulations

<i>Vessel/processor type</i>	<i>Observer Requirement</i>	<i>Regulation¹</i>
halibut vessels	0% (no observer requirement)	n/a
groundfish vessels <60' LOA	0% (no observer requirement)	n/a
groundfish vessels ≥60 and <125' LOA and pot vessels of any length	30% of their fishing days or pot retrievals by quarter and one entire trip per quarter	50 CFR 679.50(c)(1)
groundfish vessels ≥125' LOA (With the exception of pot gear. See above.)	100% of their fishing time	50 CFR 679.50(c)(1)
motherships and shoreside processors that process 500-1000 mt of groundfish in a calendar month	30% of the days they receive or process groundfish	50 CFR 679.50(c)(1)
motherships, stationary floating processors, and shoreside processors that process ≥1000 mt of groundfish in a calendar month	100% of the days they receive or process groundfish	50 CFR 679.50(c)(1)
CPs fishing for Atka mackerel in the Aleutian Islands Subarea	200%	50 CFR 679.50(c)(1)
AFA CPs, motherships, and shoreside processors	200%	50 CFR 679.50(c)(5)
CDQ CPs (trawl and hook-and-line)	200%	50 CFR 679.50(c)(4)
CDQ pot CPs	100%	50 CFR 679.50(c)(4)
CDQ fixed gear CVs and trawl CVs ≥60'	100%	50 CFR 679.50(c)(4)

¹See 50 CFR 679.50 for further details on current observer requirements.

The North Pacific Groundfish Observer Program is the largest observer program in the United States and plays a critical role in the conservation and management of groundfish, other living marine resources, and their habitat. Data collected by the Observer Program are used for a wide variety of purposes, including: (1) stock assessment; (2) monitoring groundfish quotas; (3) monitoring the bycatch of groundfish and non-groundfish species; (4) assessing the effects of the groundfish fishery on other living marine resources and their habitat; and (5) assessing methods intended to improve the conservation and management of groundfish and other living marine resources.

The mission of the observer program is to provide the highest quality data, to promote stewardship of the North Pacific living marine resources for the benefit of the Nation. The goal of the observer program is to provide information essential for the management of sustainable fisheries, associated protected resources, and marine habitat in the North Pacific. This goal is supported by objectives that include:

1. Provide accurate and precise catch, bycatch, and biological information for conservation and management of groundfish resources and the protection of marine mammals, seabirds, and protected species.
2. Provide information to monitor and promote compliance with NOAA regulations and other applicable programs.
3. Support NMFS and the Council policy development and decision making.
4. Foster and maintain effective communications between managers, scientists, and participants in the fisheries.
5. Conduct research to support the mission of the North Pacific Groundfish Observer Program.

The Observer Program has an integral role in the management of North Pacific fisheries in the Bering Sea/Aleutian Islands and Gulf of Alaska (see Figure 1 below for a map of the EEZ off Alaska). Information collected by observers is used by managers, scientists, enforcement agents, and other agencies in supporting their own missions. Observers provide catch information for quota monitoring and management of groundfish and prohibited species, biological data and samples for use in stock assessment analyses, information to document and reduce fishery interactions with protected resources, and information and samples used in marine ecosystem research. The Observer Program provides information, analyses, and support in the development of proposed policy and management measures. Further, observers interact with the fishing industry on a daily basis and the Observer Program strives to promote constructive communication between the agency and interested parties. Observations are used by managers and enforcement personnel to document the effectiveness of the management programs of various entities, including NMFS, the U.S. Coast Guard, and the U.S. Fish and Wildlife Service. In order to provide these services, the Observer Program routinely conducts research projects and analyses designed to assess the efficacy of management programs.

Figure 1 Alaska's Exclusive Economic Zone



In designing the domestic Observer Program in 1989, NMFS and the Council had limited options, because the MSA provided no authority to charge the domestic industry fees to pay for the cost of observers, and Congress provided no funds to cover the cost of observers (which is still the case today). The need for observers, and the data they provide, was sufficiently critical and urgent that the Council and NMFS decided not to wait for the MSA to be amended and, instead, proceeded with Observer Program regulations under BSAI FMP Amendment 13 and GOA FMP Amendment 18. These regulations, which were considered “interim” at the time, established observer coverage requirements for vessels and processors participating in the BSAI and GOA groundfish fisheries, and required those vessels and processors to arrange for observer services from an observer provider certified by NMFS. Efforts to change the existing service delivery model for the program have been unsuccessful as of yet, for various reasons. As a result, the “interim” Observer Program has been extended three times since its inception.

2.2 Purpose and Need for Action

At its June 2006 meeting, the Council again considered replacing the existing service delivery model and restructuring the Observer Program, such that NMFS would contract directly with observer providers for observer services, and NMFS would place observers on vessels and in processing plants when determined necessary. The intent was to fund the program through a fee system and/or Federal funding. The Council ultimately recommended to the Secretary of Commerce to remove the sunset date of December 31, 2007, from regulations governing the existing Observer Program, given that two fundamental, external obstacles to restructuring the program continued to exist. 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 was published as a proposed rule in February 2007 (72 FR 7948; 2/22/07), and as a final rule in June 2007 (72 FR 32559; 6/13/07).

The Council's June 2006 motion on this issue identified the existing obstacles to a restructured program and indicated its intent to consider initiating a new amendment again proposing restructuring alternatives for the Observer Program when: "1) legislative authority is established for fee-based alternatives; 2) the Fair Labor Standards Act (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 June 2006 analysis. Specifically, the MSA states that the Council may prepare a fisheries research plan which "establishes a system, or system [sic], 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 undertake rulemaking to implement a new Observer Program.

The second impediment to restructuring, however, remains unresolved at present. Without further clarification, it is difficult to provide an adequate estimate of the costs resulting from a change to a fee-based system in the Observer Program. NMFS has not yet received a response to the November 29, 2005 letter from NMFS to the Department of Labor (DOL) that requested guidance on computing hours worked, and the associated rules governing compensation, of fisheries observers. NMFS specifically requested that the DOL clarify the applicability of the Service Contract Act (SCA) and FLSA on land, in the territorial sea, the Exclusive Economic Zone, and in international waters. NMFS has continued to seek guidance from DOL, without success, and has initiated an internal process to document labor costs associated with current direct NMFS contracts for observer services.

Given that the cost issues remained unresolved, in March 2007, NMFS recommended that the Council continue to set the restructuring amendment package aside, and focus its efforts on several administrative, operational, and procedural changes to the existing Observer Program that are necessary, regardless of observer restructuring.² NMFS has noted that, even if all impediments were resolved, it would still take several years before a restructured Observer Program could be implemented. A discussion paper outlining these proposed regulatory changes was provided to the Council at its April 2007 meeting. At that meeting, the Council requested that the Observer Advisory Committee (OAC) meet to review and provide recommendations on the proposed changes and alternatives outlined in the discussion paper, prior

²Letter from S. Salveson, NMFS to S. Madsen, NPFMC. March 12, 2007.

to the June Council meeting. The OAC convened May 21, 2007, in Seattle, and its report was provided to the Council in June.³ At its June meeting, the Council approved the suite of alternatives and options for analysis in this regulatory amendment package. (Note that the OAC met again in March, 2008, to provide final recommendations on preferred alternatives to the Council. This report is provided as Appendix 4.)

The regulatory amendments proposed in this analysis are organized under seven issues. The specific need for action associated with each issue is described in Section 2.5 under the expected effects of the alternatives. Generally, however, these actions are proposed to remove Federal regulations that are either unnecessary, unenforceable, or outside the authority of NMFS (Issues 1 and 2); or to clarify existing regulations with regard to allowing observer providers to supply observers for exempted fishing permits and scientific research permits/activities (Issue 3). Other issues included in this action would establish new regulations to: prohibit activities that result in non-representative fishing behavior from counting toward an observer coverage day (Issue 4); require observer providers to report more detailed annual billing information to NMFS (Issue 5); and specify a date by which observers who have collected data in the previous fishing year would be required to be available for debriefing (Issue 6). Finally, the action would also implement three minor ‘housekeeping’ changes to the regulations, for clarification and accuracy (Issue 7). In sum, the proposed actions are intended to improve the operational efficiency of the Observer Program, as well as improve the catch, bycatch, and biological data provided by observers for conservation and management of the North Pacific groundfish fisheries, including that provided through scientific research activities.

2.3 Related Documents

The documents listed below include detailed information on the Observer Program, the groundfish fisheries in the North Pacific, and on the natural resources, economic and social activities, and communities affected by those fisheries:

- Groundfish Programmatic Supplemental Environmental Impact Statement (PSEIS) (NMFS 2004)
- Essential Fish Habitat Environmental Impact Statement (EIS) (NMFS 2005b)
- The Harvest Specifications Environmental Impact Statement (EIS)(NMFS 2007)
- Extension or Modification of the Program for Observer Procurement and Deployment in the North Pacific (EA/RIR/IRFA) (NPFMC 2006)

2.4 Alternatives Considered

The analysis evaluates seven separate issues, with alternatives proposed under each issue. There are also options for consideration under some of the alternatives. Each of the seven issues is described and analyzed separately, and they represent mutually exclusive decision points. As structured, the Council selected a preferred alternative under each of the seven issues at its April 2008 meeting. The Council’s preferred alternative is noted in the analysis of each issue in Section 2.5. However, Section 2.7 of this RIR summarizes the rationale for the Council’s preferred alternatives, and Table 16 outlines the various components and options that comprise the Council’s preferred alternative.

The following provides the complete suite of alternatives, components, and options proposed in this amendment package, as considered by the Council at the April 2008 Council meeting.

³The May 2007 OAC report is available at: http://www.fakr.noaa.gov/npfmc/current_issues/observer/OACreport507.pdf.

Issue 1. Observer certification and observer provider permitting appeals processes

Alternative 1. No action. No change would be made to existing Federal regulations at 50 CFR 679.50(j)(1)(iv) that provide an appeals process to an observer candidate in the case that NMFS denies an observer candidate who failed training the opportunity to pursue further Alaska groundfish observer training. No change would be made to existing Federal regulations at 50 CFR 679.50(i)(1)(v) that provide an appeals process to an observer provider applicant in the case that NMFS denies an applicant an initial permit to become an observer provider.

Alternative 2. Remove the Federal regulations that provide an appeals process to an observer candidate in the case that NMFS denies an observer candidate initial certification and the opportunity to pursue further NMFS observer training. Remove the Federal regulations that provide an appeals process to an observer provider applicant in the case that NMFS denies an applicant an initial permit to become an observer provider. (Note that this alternative does not affect the ability of observers and observer providers to appeal any decision to revoke or sanction a certification or permit that is already issued. Nor does this alternative affect 15 CFR Part 4 hearings addressing MSA violations where permit sanctions can be imposed.)

Issue 2. Observer conduct

Alternative 1. No action. No change would be made to existing Federal regulations that require that observers refrain from engaging in specified behaviors related to violating the drug and alcohol policy established by the Observer Program; engaging in illegal drug use; or engaging in physical sexual contact with vessel or processing plant personnel (50 CFR 679.50(j)(2)(ii)(D)).

NOAA GC advises that these regulations are unenforceable, and/or outside the authority of NMFS.

Alternative 2. Remove current Federal regulations at 50 CFR 679.50(j)(2)(ii)(D) that attempt to control observer behavior related to activities involving drugs, alcohol, and physical sexual contact, and remove references to the Observer Program's drug and alcohol policy in the regulations. Regulations would be revised to require each observer provider to have a policy addressing observer conduct and behavior, and current copies of each provider's policy would be required to be submitted to NMFS.

Option 1: Add a requirement under 679.50(i)(2)(x)(I)(5) to require observer providers to submit information to NMFS concerning allegations or reports regarding a breach of the observer provider's policy on observer conduct.⁴ Notification of such information is required within [24 hours, 48 hours, or 72 hours] after the provider becomes aware of the information.

Issue 3. Observer providers' conflict of interest limitation regarding research and experimental permits

Alternative 1. No action. No change would be made to existing Federal regulations, which are unclear as to whether observer providers may provide scientific data collectors⁵ to aid in research activities, including exempted fishing permits, scientific research permits, or other research. Current practice is to allow these activities, but the existing regulations are ambiguous.

⁴This notification requirement would mirror the current requirement at 679.50(i)(2)(x)(I)(5) that requires observer providers to submit information to NMFS concerning allegations or reports regarding observer conflict of interest or breach of the standards of behavior within 24 hours after the provider becomes aware of the information. Observer conflict of interest and standards of behavior provisions are at 679.50(j)(2)(i) and (j)(2)(ii), respectively

⁵Note that NMFS has suggested a revision to this alternative. The word "employees" has been removed, and replaced with the words "scientific data collectors." This revision provides consistency with Alternative 2.

Alternative 2. Revise Federal regulations to clarify that observer providers may provide observers or scientific data collectors for purposes of exempted fishing permits, scientific research permits, or other scientific research activities. In this role, NMFS observer program regulations would apply to observers operating under their NMFS certification, but would not apply to scientific data collectors.⁶

Issue 4. Fishing day definition

Alternative 1. No action. The current definition of “fishing day” in Federal regulations allows vessel owners or operators to use any observer coverage incurred during a 24-hour period to count towards observer coverage requirements, which has resulted in vessels fishing being observed in ways that are not representative of actual fishing behavior. No change would be made to existing Federal regulations at 50 CFR 679.2 which define “fishing day” as follows:

Fishing day means to (for purposes of subpart E) a 24-hour period, from 0001 hours A.l.t. through 2400 hours A.l.t., in which fishing gear is retrieved and groundfish are retained. Days during which a vessel only delivers unsorted codends to a processor are not fishing days.

Alternative 2. Revise the definition of “fishing day” in Federal regulations as follows:

Fishing day means ~~to~~ (for purposes of subpart E) a 24-hour period, from 0001 hours A.l.t. through 2400 hours A.l.t., in which fishing gear is retrieved and groundfish are retained. An observer must be on board for all gear retrievals during the 24-hour period in order to count as a day of observer coverage. Days during which a vessel only delivers unsorted codends to a processor are not fishing days.

Option 1. Revise the definition of “fishing day” in Federal regulations as follows:

Fishing day means ~~to~~ (for purposes of subpart E) a 24-hour period, from ~~0001~~ 1201 hours A.l.t. through ~~2400~~ 1200 hours A.l.t., in which fishing gear is retrieved and groundfish are retained. An observer must be on board for all gear retrievals during the 24-hour period in order to count as a day of observer coverage. Days during which a vessel only delivers unsorted codends to a processor are not fishing days.

Alternative 3. Establish regulations under 50 CFR 679.7, prohibiting activities that result in non-representative fishing behavior from counting toward an observer coverage day.

Issue 5. Observer program cost information

Alternative 1. No action. Observer providers would not be required to report various subcategories of costs to NMFS.

Alternative 2. Require observer providers to report annual costs to NMFS according to the following subcategories: labor, overhead, transportation, housing, food, and insurance. This information would be reported on an annual basis, broken out by BSAI versus GOA fisheries, and by shoreside, 30 percent, 100 percent, and 200 percent covered vessel/processor categories and gear type.

Option 1: Limit the mandatory economic data collection program to three years.

⁶Note that there are circumstances in which observers would be required to account for removals or the research is being conducted within the context of the normal fishery.

Option 2: Prohibit a person/entity that receives this confidential information on behalf of NMFS from being certified as an observer provider in the North Pacific.

Alternative 3. Require observer providers to report annual costs GOA and BSAI subareas; shoreside, 30%, 100% and 200% coverage level categories; and gear type.

Option 1: Limit the mandatory economic data collection program to three years.

Option 2: Prohibit a person/entity that receives this confidential information on behalf of NMFS from being certified as an observer provider in the North Pacific.

Alternative 4. Require observer providers to submit copies of actual invoices to NMFS on a monthly basis. Invoices must contain the following information:

1. Name of each individual vessel or shore plant
2. Name of observer who worked aboard each vessel or at each shore plant
3. Dates of service for each observer on each vessel or at each shore plant (include and identify dates billed that are not coverage days)
4. Rate charged per day for observer services
5. Total observer services charge (number of days multiplied by daily rate)
6. Specified transportation costs (i.e. airline, taxi, bus, etc.)
7. Any specified "other" costs not included above (i.e. excess baggage, lodging, etc.)

Option 1: Limit the mandatory economic data collection program to three years.

Option 2: Prohibit a person/entity that receives this confidential information on behalf of NMFS from being certified as an observer provider in the North Pacific.

Issue 6. Completion of the fishing year

Alternative 1. No action. No change would be made to existing Federal regulations allowing observer deployments to span two different fishing years and last for up to 90 days.

Alternative 2. Revise regulations to require that observers who collect fishing data in one fishing year during a deployment that extends into a second fishing year return from sea and be available for debriefing by February 28 of the second fishing year.

Issue 7. Miscellaneous modifications

Alternative 1. No action. Do not revise existing Federal regulations to address inaccuracies or housekeeping issues.

Alternative 2. Revise existing Federal regulations related to observer program operational issues as follows:

- a. Regulations at § 679.50(c)(5)(i)(A) incorrectly reference a workload restriction at (c)(5)(iii). Replace (c)(5)(iii) with the correct reference at (c)(5)(ii).
- b. Regulations at § 679.50 currently require observer providers to submit to NMFS each type of contract they have entered into with observers or industry. There is no deadline for submission of this information, although most providers currently operate as if there is an annual deadline for all submitted information. Establish a February 1 deadline for

annual submissions of this information, which is consistent with the deadline for copies of ‘certificates of insurance.’

- c. Update the NMFS Alaska Fisheries Science Center, Fisheries Monitoring and Analysis Division website address throughout 50 CFR 679.50.

2.5 Expected effects of the alternatives

2.5.1 Issue 1: Observer certification and observer provider permitting appeal processes

Current Federal regulations at 50 CFR 679.50(j)(1)(iv) grant appeal rights to a candidate for observer certification that fails training and is notified through an Initial Administrative Determination (IAD) that they may not pursue further training.

In addition, current regulations allow an observer provider applicant who is denied an observer provider permit to appeal that decision (50 CFR 679.50(i)(1)(v)). Because there is no statutory entitlement to receiving observer certification or an observer provider permit, the granting or denial of observer certifications and observer provider permits are discretionary agency actions. Thus, there is no requirement that an observer candidate or new observer provider applicant be provided an appeals process. Because of the discretionary nature of granting observer certifications or observer provider permits, an alternative is proposed to remove the appeal rights granted to observer candidates that fail training and are notified that they may not retake the course, and to observer provider applicants whose permit application is denied. It is not feasible to quantitatively assess the benefits and costs associated with this issue, thus, a qualitative discussion of the tradeoffs is provided below.

Alternative 1 -- No action

Alternative 1 would not change Federal regulations related to the observer certification and observer provider permitting appeals processes; thus, regulations would continue to provide for an appeal opportunity to observer candidates that fail training and who are not allowed to pursue further training. Likewise, observer provider applicants who are denied permits would continue to have access to an appeals process. Alternative 1 would continue to require that NMFS provide substantial staff resources to these appeals processes.

When an observer candidate fails training, either: 1) they are not certified for that class, but are allowed to retake the training (i.e., given another chance to become certified); or 2) they are not allowed to retake the training and are denied certification. In the first case, failing the course cannot be appealed, but the applicant can continue to pursue certification in future training classes. Issue 1 does not apply in this case. Issue 1 addresses the second case, in which the applicant's ability to continue to retake training is revoked. Under Alternative 1, the observer is able to appeal this decision. Alternative 2 proposes to remove the ability for applicants to appeal a NMFS decision to not allow future training, if the applicant failed the certification course.

Significant efforts are made by NMFS to ensure that observers succeed in training and then in the field. NMFS routinely devotes extra time to tutoring observer candidates who are having difficulty with classroom concepts or laboratory exercises. Observer candidates who are struggling are encouraged to spend extra time with instructors, before and after class, to ensure they understand the material. The labs and study materials are always available to candidates, and staff is made available to assist. The majority of observer candidates pass the training course, are certified, and perform well during their deployments. However, even with individual attention, a small minority of trainees fail the class. Table 3 below provides data on the observer training pass/fail rates from 2004 through 2007.

Currently, the process undertaken to notify an observer candidate that he/she has failed training and will not be allowed to retake the training class is relatively extensive. Notification of training performance standards are provided to observer candidates on the first day of training. At that time, training staff explain that the course is rigorous, time-consuming, and hands-on job training. Training staff make it

clear to observer applicants that they need to demonstrate the proficiency level of a certified observer to successfully complete the class, gain certification, and become employed as an observer.

Most often when an observer applicant fails training, it is due to not meeting the required 80 percent passing score on exams, either written or practical. The training course includes two written exams, which test methodology, sampling theory and application, and data recording skills. Applicants are allowed to take these exams only once. There are three additional species identification exams, which test dichotomous key use, comprehension of issued field guides, and various other identification skills. Trainees who fail one of these three exams are usually allowed to retake the test during the same training session. However, trainees who perform extremely poorly on their exams are not given a second opportunity. When an observer candidate fails training, they are immediately notified verbally by their instructor, shown their exam, allowed to ask any questions of the instructor, and then asked to leave the class.

The process is then passed to the certification official.⁷ The certification official formally decides not to certify the observer candidate for the failed training period and decides whether the candidate is allowed to retake the training at a later date. The process continues under the certification official with the following actions:

- The instructor provides all materials completed by the observer candidate to the certification official; including any previous exams, quizzes, and written assignments.
- The instructor provides the certification official with a grade sheet noting the performance of all observer candidates in the course.
- The certification official reviews the entire body of work completed by the candidate during the course. Any trends of poor performance are identified and weighed against the performance standards, which were provided to the candidate at the beginning of the class.
- The standing of the failing candidate in the class is noted, to help determine if the deficiencies began early in the course or if the individual is struggling with a single concept, or with the pace of the class.
- The observer candidate's performance relative to other participants in the same class is also considered in order to rule out instructor error or extremely common mistakes made by most new observers.
- In determining whether a deficiency is not resolvable, the certification official may consider the applicant's resume, background, and any tutoring opportunities provided. For example, if an observer applicant received one-on-one tutoring from NMFS staff and subsequently failed two fish identification exams, this inability may be considered unresolvable.
- The certification official also considers the number of deficiencies that would have to be successfully addressed to achieve certification. This allows NMFS to consider the overall performance of an applicant, rather than focusing only on a single exam. For example, in many cases in which an applicant was not allowed to retake training, an applicant had failed a written exam and also had an established pattern of turning in incomplete or unacceptable written assignments.

Once an individual's training failure case is entirely reviewed, the certification official decides whether the candidate is allowed to retake the training. If the certification official decides not to allow retraining, he/she prepares a formal written Initial Agency Decision (IAD), which lays out the observer candidate's unresolvable deficiencies, the rationale for the decision, and includes an explanation of the candidate's appeal rights.

⁷The certification official is an observer program staff person, specifically, the Fisheries Monitoring and Analysis Division Supervisor of Field Office and Training.

To issue this IAD, the certification official currently has 10 business days to complete the review of the observer candidate's failure, write an IAD, complete legal review of the IAD and send the IAD to the observer candidate. Generally, the IAD is sent to the observer applicant by certified mail. If the certification official is aware that the applicant is not at their address of record, an electronic version is also sent to their e-mail.

To appeal the IAD, an observer candidate submits a request for reconsideration to the NOAA Office of Administrative Appeals (OAA). Operating under regulations found at 50 CFR 679.42, OAA reviews the appeal. Reviews can include requests for issues briefing and evidentiary hearings, where NMFS and the observer candidate present their arguments and any witnesses in support of their case. OAA, at the conclusion of its review, issues a written decision, either upholding the IAD or reversing it. If OAA reverses the IAD, NMFS may address OAA concerns and reissue a revised IAD or choose to allow the observer candidate to retake training. If the decision upholds the IAD, the decision becomes final agency action within 60 days. During that time, the Regional Administrator reviews the decision and may reverse or modify it, or let it stand as written. The observer may appeal a decision to uphold the IAD to the United States District Court of jurisdiction.

The following table (Table 3) provides data on the observer training pass/fail rates from 2004 through 2007. Note that observer candidates who voluntarily withdrew from observer training are also included in Table 3. Observer instructors encourage any struggling candidate to withdraw from the class, while they are in passing status, if the candidate is uncertain of how he/she will perform on the written exams. Applicants who withdraw do not incur a "penalty" from NMFS and can participate in a future training, when they are better prepared for the course.

Table 3 Number of observer applicants who enrolled in, failed, and appealed a decision to deny further observer training, 2004 - 2007

Year	2004	2005	2006	2007 (Jan – July 1)	2004 - 2007
Total number of applicants enrolled	120	123	180	56	479
Number of applicants who dropped out of training	2	5	3	2	12
Number and percent of applicants who failed training	3 (2.5%)	12 (10.2%)	14 (7.9%)	3 (5.5%)	32 (6.9%)
Number of failed applicants who were not allowed to retake training and were issued an IAD	3	5	3	1	12
Number of applicants who appealed their IAD	1	1	0	0	2
Number of successful appeals	1 ¹	1 ²	n/a	n/a	2

¹The first IAD was appealed and eventually vacated by OAA based on process/review grounds. A new IAD was issued, and it was not appealed.

²To date, this applicant has not re-taken the training.

Note: As of the 2007 training cycle (which began in December 2006), the minimum score required to pass written exams was raised from 75% to 80%. The revised standard is consistent with other NMFS observer programs in the U.S. and would comply with a draft National Standard currently under development.

Note that in 2004, the Observer Program operated under a policy that no observer candidate who failed training was allowed to retake the certification course. In 2004, only one of the three candidates who were issued IADs, not allowing them to retake the training class, appealed the decision. This individual IAD was vacated by the OAA in a ruling that stated, “The certification official must make a determination that a candidate has unresolvable deficiencies in meeting the requirements for observer certification and must provide a basis for that determination.” As was stated earlier, in 2004 internal policy did not allow for the case-by-case nature of such a review. NMFS thus rescinded the IAD, reviewed the case in depth, and issued a new IAD, finding that the observer candidate demonstrated an unresolvable deficiency in the proper identification of fish and determining that the individual would not be allowed to retake the training. This second IAD was not appealed and the more lengthy, case-by-case review has since been undertaken in all subsequent actions.

In 2005, 12 observer candidates failed the training, and 7 of those 12 were allowed to retake the training. Of those 7 provided a second opportunity, 4 chose to retake the training. All four passed the course the second time, but not all are considered successful observers. The performance of these observers runs the entire spectrum, with one excelling at the job, one being a good performer, one being an adequate observer who makes many minor errors, and one who was recommended for decertification after his first cruise. As in 2004, there was one appeal in 2005, which also resulted in OAA reversing the IAD. In 2005, the observer candidate did not contest the fact that they failed training or that their training issues were “unresolvable”. The candidate contested whether they had adequate notice that they could drop out of class due to sickness and have a chance to return and retake the course. OAA found that, after hearing witness testimony, NMFS did not clearly or adequately tell the observer candidate that they could drop out and return to class. The observer has not returned to training to date.

In 2006, 14 candidates failed training, and 11 were allowed to retake it. Of those 11, three candidates chose to retake the training, and all three passed the course the second time. According to Observer Program staff, one of those observers has performed adequately, but suffered from seasickness and has not returned for additional cruises. Another observer has performed adequately on two cruises, and continues to show improvement. The third observer has completed four cruises, continues to be deployed, and is performing very well.

In 2007, 3 candidates failed training, and 2 were allowed to retake it. One applicant is currently retaking the training, thus, there is no further information regarding subsequent performance in the class or in the field.

In sum, Table 3 shows that NMFS has received two IAD appeals to not allow further training. Only one of these appeals considered the substantive issues surrounding the case. This particular appeal took just over one year to complete. The appeal process, as described above, is difficult and lengthy, usually requiring several weeks of NOAA time, both from Observer Program staff and NOAA GC.

Issue 1 also addresses the appeals process for an observer provider applicant, should NMFS deny the applicant an initial permit. Under the current regulations, one entity has applied for, and been issued, an observer provider permit. There have been no denials under these regulations, and thus, no appeals.

Alternative 1 would continue to allow an appeals process for observer applicants who have failed the observer training and are denied the opportunity to retrain. Although there have only been two appeals in the past four years, the agency time and resources necessary to serve this process can be extensive. Alternative 1 would thus continue to draw on limited staff resources, and has the potential to negatively affect other areas of agency responsibility. Since the observer training program is relatively standardized, and work assignments and test questions do not vary between classes or on an annual basis, a poor quality observer candidate who is successful in his or her appeal may have an increased chance of passing subsequent classes without having adequate skills. As a result, additional NMFS staff resources are typically necessary, as poorer quality observers usually require more staff assistance during deployments, more extensive mid-cruise and final debriefings, and lengthier re-briefings before future deployments.

Other observers undergoing training may also be affected by Alternative 1, if a poor performing observer candidate is allowed to retrain. This is because lower quality students often require more instructor attention and frequently slow the pace of training. Generally, a lower quality observer candidate entering the ranks of other certified observers may also negatively affect the image and credibility of the overall observer sector.

Poor performing observers also potentially have an overall negative effect on the quality of observer data, data which are crucial to effective management of the fisheries. In this sense, the fishing industry that relies on high quality observer data, and who pays for observer coverage, may be negatively affected if a lower quality observer candidate is certified.

Similarly, allowing unsuccessful observer provider applicants to appeal an agency denial may increase the chance of a lower quality applicant entering the pool of certified observer providers. This could have negative effects on NMFS, the fishing industry, and current certified observer providers. However, future observer provider applicants, trying to gain an observer provider permit, may benefit from Alternative 1, as it would retain their ability to appeal any agency denials, thus increasing their chances of receiving a permit upon final resolution of the appeal.

In sum, Alternative 1 would continue to limit NMFS' discretion as to whether to grant or deny an initial observer certification or observer provider permit, by requiring that an appeals process be provided in the

case of denials. NOAA GC has determined that because there is no statutory entitlement to receiving observer certification or an observer provider permit, the granting or denial of observer certifications and observer provider permits are discretionary agency actions. Thus, there is no statutory requirement that an observer candidate or new observer provider applicant be provided an appeals process.

Alternative 2 (Council preferred alternative)

As stated previously, because there is no statutory entitlement to receiving observer certification, or an observer provider permit, the granting or denial of observer certifications or observer provider permits are discretionary agency actions. Under Alternative 2, NMFS' discretion would be reflected two ways in Federal regulations: 1) by revising regulations such that NMFS "may" grant a permit or certification rather than "will" grant a permit or certification; and 2) by establishing final agency action on the permit application as the point at which the observer program official issues a notice stating that the observer provider permit application is denied or that the observer candidate will not be permitted to re-enter the initial groundfish training course. Because final agency action will occur at this stage, the regulations allowing for an appeal to NOAA OAA would be unnecessary. Therefore, Alternative 2 would remove relevant language from Federal regulations at 50 CFR 679.50(j)(1)(iv) and 50 CFR 679.50(i)(1)(v) that allow for these appeal processes.

Under Alternative 2, NMFS' role in granting observer certifications and observer provider permits would more clearly reflect the discretionary nature of these processes. NMFS would have more control over applying limited staff resources to the process of granting or denying certifications and permits. The change in observer certification processes is expected to better serve NMFS' interest in having well-qualified observers monitoring the North Pacific groundfish fisheries. To the extent that observer data are improved under Alternative 2, the groundfish fisheries, NMFS, and the fishing industry that relies on high quality observer data may benefit. Industry is not expected to be directly affected by changes to the observer provider permitting or observer certification processes.

Note that this alternative does not affect the ability of current observers and observer providers to appeal any decision to revoke or sanction a certification or permit that is already issued. The subject action is limited to new observer certifications and new observer provider permits. Table 3 shows that since 2004, the observer candidate training failure rate has been less than 7 percent, or 32 of 479 candidates. Observer provider companies plan for this possibility, while recruiting new observers.

The entities potentially affected by this alternative are future observer candidates and future observer providers seeking permits. It is not possible to speculate as to how many observer candidates this could potentially affect in the future. Note, however, that this action would not affect the failure rate of observer trainees taking the certification course. NMFS would continue to evaluate each observer candidate's performance carefully, prior to issuing a final decision as to whether the candidate can re-take the course. NMFS would maintain the option for trainees in passing status to withdraw from the training course with no penalty, should they feel unable to meet the performance standards required for certification.

It is also not possible to speculate as to how many observer provider applicants could potentially be affected in the future. To date, there have not been any observer provider candidates that have sought a permit and been denied. Under Alternative 2, future entities seeking observer provider permits will experience a process less like applying for a permit that must be granted if all requirements of the application are met, and more closely resembling the submission of a contract proposal.

2.5.2 Issue 2: Observer conduct

Current regulations attempt to control observer conduct so that certified observers present themselves professionally on vessels and at plants, at NMFS sites, and in fishing communities. NMFS has been advised by NOAA GC that many of these regulations are unenforceable, and/or are outside of NMFS' authority. For instance, in order for NMFS to decertify an observer that has violated the Observer Program's drug and alcohol policy or the regulation that requires observers to refrain from engaging in physical sexual contact with personnel of the vessel or processing facility to which the observer is assigned, a connection must be made between the sanctioned behavior and the activity that NMFS has the statutory authority to regulate, namely, the collection of reliable fisheries data. Proving that a connection exists between the sanctioned behavior and data collection, especially in cases in which the sanctioned behavior occurs outside of the workplace, can be very difficult.

Preliminary consultations with the USCG indicate that the USCG can ask observers to voluntarily submit to random breath and/or chemical testing for drugs and alcohol. USCG does not have the authority to require observers to submit to these tests, except in cases of serious marine incidents. However, if an observer refuses a chemical or breath test, it is unclear if the USCG could impose a sanction against an observer or the observer's employer. Official guidance from the USCG to field offices and vessels is pending. In the event local law enforcement officials have probable cause that an observer was involved in a crime where drugs and/or alcohol were involved, law enforcement may require, through a search warrant, that an observer undergo breath or chemical testing. However, these instances are expected to be rare, and may or may not affect job performance.

NOAA GC has also advised that some of the observer conduct regulations are worded in a broad and ambiguous manner, thus making them unenforceable. For example, current regulations require observers to "refrain from engaging in any activities that would reflect negatively on their image as professional scientists, on other observers, or on the Observer Program as a whole" (50 CFR 679.50(j)(2)(ii)(D)). While it may be possible to promulgate regulations that establish professional standards, investigating violations of these standards, establishing whether violations directly affect observer job performance, and potentially defending appeals cases is extremely difficult with current enforcement resources. In any case, NMFS is not authorized to regulate observer behavior that does not directly affect observer job performance.

Alternative 1

Alternative 1. No action. No change would be made to existing Federal regulations that require that observers refrain from engaging in specified behaviors related to violating the drug and alcohol policies established by the Observer Program; engaging in illegal drugs; or engaging in physical sexual contact with vessel or processing plant personnel (50 CFR 679.50(j)(2)(ii)(D)). NOAA GC advises that these regulations are unenforceable, and/or outside the authority of NMFS.

Alternative 1 would not change existing Federal regulations that govern observer conduct related to drugs, alcohol, and physical sexual contact, as treated immediately above. Based upon those facts, as well as advice from NOAA GC, Alternative 1 may not be a viable alternative for the agency in terms of authority and enforceability.

Alternative 1 could cause confusion regarding NMFS's role in controlling observer behavior, as unenforceable regulations will remain. As a result, observer providers may fail to take remedial action to address behavioral issues, given that they may erroneously believe this authority is the purview of NMFS. NMFS, however, would likely be unable to correct negative behaviors for the reasons noted above. As a

result, negative behaviors may be engaged in that adversely affect vessel and crew safety, as well as the integrity of the data collected. Also, inaction on the part of both NMFS and the observer providers may send the wrong message to observers. Observers should expect immediate and significant action to be taken when violations of behavioral policies occur. When very little or no action is taken, observers may think the behavioral policies are not important or that there are not significant consequences for violating behavioral policies.

Another impact of adopting Alternative 1 would be the continued confusion caused by mixing the roles of NMFS and observer providers. When NMFS attempts to address observer conduct issues and enforce behavioral standards, they are acting in the role of an employer. Since NMFS is not the employer of observers, this may cause confusion for observers and others. Also, NMFS has been cautioned by NOAA GC to not act as the employer of observers. NOAA GC contends this increases the liability of NMFS when observer actions result in personal injury, property damage, etc.

Alternative 2 (Council preferred alternative)

Alternative 2. Remove current Federal regulations at 50 CFR 679.50(j)(2)(ii)(D) that attempt to control observer behavior related to activities involving drugs, alcohol, and physical sexual conduct, and remove references to the Observer Program's drug and alcohol policies in the regulations. Regulations would be revised to require each observer provider to have a policy addressing observer conduct and behavior, and current copies of each provider's policy would be required to be submitted to NMFS.

Option 1: Add a requirement under 679.50(i)(2)(x)(I)(5) to require observer providers to submit information to NMFS concerning allegations or reports regarding breach of the observer provider's policy on observer conduct. Notification of such information is required within [24 hours, 48 hours, or 72 hours] after the provider becomes aware of the information.

Alternative 2 would remove Federal regulations that pertain to observer behavior involving drugs, alcohol, and physical sexual conduct, and instead mandate that each observer provider formally assume this responsibility.⁸ Thus, references to the Observer Program's existing drug and alcohol policies would be removed from Federal regulations.

Currently, all five observer providers operating in the groundfish observer program have their own drug policies in contracts with their observers, and all but one observer provider has their own alcohol policy. This observer provider, instead, requires compliance with the current NMFS alcohol policy. If NMFS eliminates their drug and alcohol policy as a result of Alternative 2, it is the intent of the observer provider to include its own alcohol policy in its observer contracts (pers. comm., 7/17/07).⁹ All observer providers also currently include a "no sexual contact" provision in their observer contracts. In addition, three observer providers have union agreements, each with an extensive "Observer Codes of Conduct".

Note that none of the current observer provider policies are identical to the current NMFS drug and alcohol policies. However, NMFS considers all to be similarly written, with adequate detail and clarity. Currently, all observer provider contracts require observers to also abide by the NMFS drug and alcohol policies. Therefore, if NMFS policies are eliminated, the observer provider contracts would need to be revised to reflect this.

⁸These policies are available at: http://www.afsc.noaa.gov/FMA/PDF_DOCS/drug_policy_final.pdf and http://www.afsc.noaa.gov/FMA/PDF_DOCS/alcohol_policy_final.pdf.

⁹Personal communication between B. Maier, NMFS and B. Belay, MRAG, 7/17/07.

Note also that the use, possession, or distribution of illegal drugs is forbidden by NMFS. This is commonly called a “zero tolerance” drug policy. At the June Council meeting, questions arose about whether observers could be held to a zero tolerance drug policy, similar to other crew onboard a vessel. All current observer provider contracts with observers have essentially the same zero tolerance policy as NMFS. Under the drug laws of the U.S., a vessel owner risks seizure of his vessel if any drugs are found onboard. Because of this strict enforcement of drug laws, NMFS does not anticipate that observer providers would eliminate their current zero tolerance drug policies in the future. NMFS, thus, finds it unnecessary to issue a regulation requiring observer providers to have zero tolerance drug policies. Also, because of the potential severe penalties inflicted upon vessel owners for violations of U.S. drug laws, NMFS expects that the fishing industry will ensure that strict zero tolerance drug policies continue to be placed in observer contracts. The importance of this issue is also made evident by the fact that all observer provider contracts require observers to submit to random drug testing, as well as drug testing when required by vessel operators or the U.S. Coast Guard.

Additionally, NMFS would continue to monitor observer job performance. To the extent that the use of drugs or alcohol interferes with observer job performance, these activities could indirectly result in decertification actions against an observer. Procedures for monitoring and measuring observer performance are well established, and NMFS has authority to decertify poor performing observers, even if identified deficiencies are related to drug and alcohol use. Note, however, that decertification can be appealed and the observer could continue to work while the appeal was in process.

Alternative 2 should not be interpreted to mean that NMFS does not consider these issues seriously. NMFS continues to consider inappropriate conduct, especially the use of illegal drugs and the abuse of alcohol, a serious issue that warrants appropriate sanctions. Alternative 2 is intended to clarify that the responsibility for addressing these types of issues lies with observer providers in their role as observer employers. In contrast to NMFS, observer providers also have more options available for addressing these behaviors, as well as the ability to take immediate action.

In effect, Alternative 2 would impact the (currently five) observer providers, as NMFS would be removed from regulating non-work behavior, and observer providers would have the responsibility of addressing observer conduct issues. Alternative 2 would require each observer provider to have a policy addressing observer conduct and behavior, and current copies of each provider’s policy would be required to be submitted to NMFS. NMFS would not formally evaluate and approve the submitted policies; the agency’s role would be limited to ensuring that the observer providers had developed a policy.

Note that current regulations at 50 CFR 679.50 (i)(2)(x)(G) require observer providers to annually submit a complete, unaltered, signed, and valid copy of each type of contract they have with observers (including all attachments, appendices, addendums, and exhibits incorporated into the contract). Regulations at 50 CFR 679.50 (i)(2)(i)(C) also require observer providers to have a signed contract with each observer, prior to the observer’s deployment, and require that the contract contain certain provisions for continued employment. The first provision states that the observer must comply with the Observer Program’s drug and alcohol policies. Alternative 2 would change this provision to require compliance with the observer provider’s drug and alcohol policies, since the NMFS policies will be eliminated. Therefore, regulations are already in place that will allow NMFS to review each observer provider’s contract to ensure that it contains a drug and alcohol policy and that the policy requires strict adherence for continued employment. NMFS would not formally approve the observer provider’s drug and alcohol policies as they will remain incorporated as part of the observer provider contracts; NMFS is not party to these contracts.

At both the May 2007 OAC meeting and the June 2007 Council meeting, there was discussion regarding whether NMFS would continue to emphasize in observer training the importance of professional observer conduct and the policies governing observer conduct. Under Alternative 2, NMFS would not

substantially change the training addressing observer conduct (including drug, alcohol, and physical sexual contact), as only minor changes to the curriculum would be necessary. For example, instead of referring to the NMFS drug and alcohol policies in the Observer Manual, reference will be made to the observer providers' policies. Similar changes would be made during class presentations and lectures. However, NMFS will not distribute copies of each observer provider's drug and alcohol policies during training. Federal regulation already requires that each observer provider have contracts with their observers, and that observer providers submit copies of their contracts and any attachments or addendums to NMFS, which would include drug and alcohol policies. Since these documents are submitted to NMFS in compliance with Federal regulations promulgated under the MSA, the documents are considered confidential and cannot be disclosed. Furthermore, they may be confidential as "commercial and financial" information under the Freedom of Information Act. Therefore, the observer provider drug and alcohol policies will not be disseminated to observers or used in training class. However, during observer training, NMFS will direct observers to read the policies in their contracts and emphasize their importance. NMFS will continue to stress the importance of observing the requirements of drug, alcohol, and sexual contact policies during training and instruction on the topic of conduct and behavior will remain in the training curriculum.

In addition, NMFS will continue to require observers to sign a "Groundfish Observer Letter of Understanding" (Appendix 1). This document does not represent a Federal regulation or carry the force of law; it is limited to a signed acknowledgement that the observer was presented with the North Pacific Groundfish Observer Manual and that the observer fully understands the guidelines and agrees to abide by the observer duties and responsibilities, groundfish observer standards of conduct, conflict of interest standards, and confidentiality standards. The statement also acknowledges that the observer understands that if these standards are violated, the observer's certification may be revoked, and any illegal activities may result in civil or criminal penalties. If Alternative 2 is adopted, NMFS intends to revise the Groundfish Observer Letter of Understanding to also require observers to abide by any code of conduct or drug and alcohol policy held by their observer employer.

Option 1

Alternative 2 is intended to clarify the responsibilities between NMFS and observer providers, which may result in less confusion for observers, observer providers, and industry, when behavior issues arise. NMFS would retain its responsibility for maintaining data quality and integrity, without the responsibility of enforcing observer standards of behavior. Because certain negative behaviors have the potential to affect data quality and integrity, Option 1 would require that NMFS continue to be informed of these behaviors if they occur. The difference under Alternative 2 is that the responsibility for taking remedial action would clearly reside with the observer's employer.

Current regulations at 50 CFR 679.50(i)(2)(x)(I) require observer providers to notify the Observer Program via fax or email, within 24 hours after the observer provider becomes aware of:

1. Any information regarding possible observer harassment;
2. Any information regarding any action prohibited under 679.7(g) or 600.725(o), (t) and (u) – (*These are general prohibited actions against observers*);
3. Any concerns about vessel or processor safety or marine casualty;
4. Any observer illness or injury that prevents the observer from completing any of his or her duties; and
5. Any information, allegations or reports regarding observer conflict of interest or breach of the standards of behavior.

Under Alternative 2, Option 1, the wording under item five would be revised to include the requirement that observer providers must also submit information to NMFS concerning a breach of the observer

provider's policy on observer conduct, which includes issues related to drugs, alcohol, or sexual physical contact. Option 1 also provides a choice regarding the time period within which the notification must occur – either within 24 hours, 48 hours, or 72 hours after the provider becomes aware of the information.

One of the primary reasons that NMFS supports including a notification requirement is because of the potential link between these negative behaviors and the quality and integrity of observer data. While establishing such a link is very difficult, and NMFS would not be responsible for enforcing the observer providers' policies, Alternative 2 would continue to allow NMFS to consider such behaviors in the decertification process of an observer. In effect, violation of an observer provider's drug and alcohol policy could be a mitigating factor in a future decertification of the observer involved. When deciding whether an observer has violated performance standards, the decertification official must consider mitigating circumstances. If substantiated by evidence and facts, mitigating factors could mean the decertification official will not decertify the observer. For example, if the observer's performance was affected by alcohol or drug use, as shown through the observer provider's report to NMFS, the observer could potentially resolve the issue with treatment. If done, this would be considered a mitigating factor. The observer, having accomplished rehabilitation, could return to duty, notwithstanding poor performance on a cruise. Consequently, notification of a breach of a behavioral policy is relevant to observer decertification because it will assist NMFS in determining other causes for poor performance.

A recent informal survey of observer providers, conducted in July 2007 by NMFS Observer Program staff, showed that most observer providers did not have difficulty in complying with the existing notification regulations listed above. All five categories of information involve potentially serious matters, usually involving the safety of the observer and/or others. Given that the notification requirement does not appear to be unduly burdensome to observer providers, and because a violation of an observer provider's drug and alcohol policy could represent a mitigating factor in a future decertification of an observer, NMFS believes it necessary to remain informed of any violations of an observer provider's drug and alcohol policy.

At its June 2007 meeting, the Council recommended making the notification requirement an option under Alternative 2, and approved the consideration of suboptions which would allow a longer timeframe (e.g., 48 hours or 72 hours) within which observer providers must report knowledge of observers violating the drug, alcohol, and sexual physical contact policies.¹⁰ Current regulations require that observer providers notify the Observer Program via fax or email, within 24 hours after the observer provider becomes aware of one of the behaviors listed above. Because of potential safety implications, NMFS suggests that the 24-hour notification period is important to maintain, if it is extended to behaviors related to a breach of the observer provider's policy on observer conduct under Alternative 2. Note that the 24-hour period begins when the observer provider becomes aware of a problem and not when the problem actually occurs. The provision also does not require that an observer provider speak with Observer Program staff personally or by phone, as fax or email is acceptable.

This notification requirement has not been difficult for observer providers to meet in the past, relative to other notifications regarding possible observer harassment, vessel safety, injuries, etc. Thus, there does not appear to be a compelling reason to lengthen the notification timeframe for specific categories of serious incidents, i.e., those related to drugs, alcohol, or physical sexual contact. Options to lengthen the notification requirement to 48 hours or 72 hours may add confusion, since other regulations requiring notification within 24 hours, would not be changed.

¹⁰This was also a recommendation of the Observer Advisory Committee. See the May 21 – 22, 2007 OAC report provided as Appendix 4.

Summary

The proposed action under Alternative 2 is not expected to significantly affect observers or the vessels and processing plants that contract with observer providers for observer services. To the extent that the roles and responsibilities of NMFS and observer providers are clarified, this action may serve to resolve behavioral issues more expeditiously than under Alternative 1. Many industry members currently perceive the observer provider as the point of contact for observer behavior issues, thus, there may not be a substantive practical effect. When a behavioral problem involving drugs, alcohol, or inappropriate sexual contact arises, the vessel owner/operator would continue to be able to contact their observer provider directly. The observer provider would be able to take immediate action, including the removal of an observer from a vessel or processing plant, without first receiving approval from NMFS. The notification requirement is not intended as an approval mechanism for NMFS. In practice, many observer providers informally consult with Observer Program staff prior to taking a serious action, such as removing an observer from a vessel. NMFS encourages observer providers to continue this practice, and would be informed of the circumstances of such an action under Option 1, but NMFS approval would not be necessary prior to taking such action.

Finally, the impacts of Alternative 2 on NMFS are expected to be relatively minimal, but beneficial. NMFS would not be responsible, and not be perceived to be responsible, for developing and enforcing standards of observer behavior that it cannot effectively enforce. NMFS would retain its ability to confirm that each observer provider has drug, alcohol, and sexual contact policies in observer provider contracts, but it would not be approving these policies. If it appeared the policies were deficient, NMFS would recommend changes to the observer providers, but NMFS would not have authority to require changes. Industry, in its role as clients to the observer providers, may take a more active and effective role in making changes to perceived deficient or ineffective observer provider policies. In addition, NMFS would continue to require observer providers to notify them of any violations of their drug, alcohol, or sexual contact policies, and NMFS would continue to act upon any behavior issues that directly affected the observer's work performance.

Note that the Council's preferred alternative is Alternative 2, Option 1, with a 72 hour notification requirement. The Council's preferred alternative is discussed in detail in Section 2.7.

2.5.3 Issue 3: Observer providers' scope of authority regarding scientific and experimental research permits

Currently, regulations at 679.50(i)(3)(i) state that observer providers:

(i) Must not have a direct financial interest, other than the provision of observer services, in a North Pacific Fishery managed under an FMP for the waters off the coast of Alaska, including, but not limited to,

(A) Any ownership, mortgage holder, or other secured interest in a vessel, shoreside or stationary floating processor involved in the catching, taking, or harvesting or processing of fish,

(B) Any business involved with selling supplies or services to any vessel, shoreside or stationary floating processors participating in a fishery managed pursuant to an FMP in waters off the coast of Alaska, or

(C) Any business involved with purchasing raw or processed products from any vessel, shoreside or stationary floating processors participating in a fishery managed pursuant to an FMP in the waters off the coast of Alaska.

These regulations were implemented to limit observer providers from other business relationships with industry that could be perceived as compromising objectivity in the Observer Program. However, observer providers have historically provided observers and “scientific data collectors” to researchers operating under exempted fishing permits (EFPs), scientific research permits (SRPs), stock assessment cruises, and other research activities in the North Pacific. While the regulations above do not specifically prohibit observer providers from providing observers or scientific data collectors in support of research activities, they are ambiguous as to whether these activities are allowed.

It is important to distinguish between the roles of observers and scientific data collectors. First, NMFS may require observers as a condition of an EFP (see 679.6(e)(5)). Typically, an observer is required when the permit holder will be conducting research within the context of the normal groundfish fishery, and the data collected by the observer is entered into a commercial groundfish fisheries database for use by NMFS managers. Observers in this role are trained and directed by NMFS, and all of the regulations that apply to observers and observer deployments are applicable. In this case, the captain, crew, and research staff do not dictate sampling activities of an observer.

In contrast, NMFS may require a permit holder to employ a scientific data collector for purposes of monitoring catch, collecting biological samples or specimens, and other activities specific to the project being conducted under the EFP or SRP. Scientific data collectors are not trained or directed by NMFS. Their work is typically directed by the research plan for the specific project, under the supervision of the principal investigator or vessel personnel. The data are not collected using NMFS observer protocols and they are not used by NMFS to manage fisheries in the normal manner. Lastly, regulations that apply to observers and observer deployments do not apply to scientific data collectors.

NMFS staff determines whether an observer or a scientific data collector would be needed for a research effort, and their duties are outlined in the EFP or SRP issued to the permit holder. However, if this information is not disseminated to everyone involved in the research effort, significant confusion can result for the permit holder, crew, and observer or scientific data collector, because the role of the observer or scientific data collector is ambiguous. This situation is exacerbated if the same person switches between observer and scientific data collector roles during the same deployment.

As previously stated, Federal regulations are ambiguous as to whether observer providers are prohibited from providing observers or scientific data collectors for purposes of research activities. Therefore, two alternatives are proposed under this issue, one of which would revise Federal regulations to explicitly allow observer companies to provide observers or scientific data collectors for purposes of EFPs, SRPs, and other research activities (Alternative 2). Alternative 1 would not change current Federal regulations, thus retaining the status quo.

Alternative 1

Alternative 1. No action. No change would be made to existing Federal regulations, which are unclear as to whether observer providers may provide scientific data collectors¹¹ to aid in research activities, including exempted fishing permits, scientific research permits, or other research. Current practice is to allow these activities, but the existing regulations are ambiguous.

Alternative 1 would not clarify whether observer providers could provide observers or scientific data collectors for research activities in Federal regulations. Likely, NMFS would continue to allow these activities without pursuing enforcement action. However, it is possible that NMFS Enforcement and

¹¹ Note that NMFS has suggested a revision to this alternative. The word “employees” has been removed, and replaced with the words “scientific data collectors.” This revision provides consistency with Alternative 2.

NOAA GC could determine that observer providers are in violation of Federal regulations. If this occurs, researchers would likely have to obtain scientific data collectors from a different source. In addition, NMFS may not be able to require observers as a condition of a permit, and research may not be able to be conducted within the context of the normal groundfish fishery.

Alternative 2 (Council preferred alternative)

Alternative 2. Revise Federal regulations to clarify that observer providers may provide observers or scientific data collectors for purposes of exempted fishing permits, scientific research permits, or other scientific research activities. In this role, NMFS observer program regulations would apply to observers operating under their NMFS certification, but would not apply to scientific data collectors.¹²

Alternative 2 would clarify that, in addition to the provision of observer services for purposes of groundfish fisheries managed under the FMPs, observer providers could provide observers and scientific data collectors for purposes of EFPs, SRPs, and other NMFS-sponsored research activities as defined under 50 CFR 600.10. Section 600.10 currently contains the following definitions:

Exempted educational activity means an activity, conducted by an educational institution accredited by a recognized national or international accreditation body, of limited scope and duration, that is otherwise prohibited by part 635 or chapter VI of this title, but that is authorized by the appropriate Director or Regional Administrator for educational purposes.

Exempted or experimental fishing means fishing from a vessel of the United States that involves activities otherwise prohibited by part 635 or chapter VI of this title, but that are authorized under an exempted fishing permit (EFP). These regulations refer exclusively to exempted fishing. References in part 635 of this title and elsewhere in this chapter, to experimental fishing mean exempted fishing under this part.

Scientific research activity is, for the purposes of this part, an activity in furtherance of a scientific fishery investigation or study that would meet the definition of fishing under the Magnuson-Stevens Act, but for the exemption applicable to scientific research activity conducted from a scientific research vessel. Scientific research activity includes, but is not limited to, sampling, collecting, observing, or surveying the fish or fishery resources within the EEZ, at sea, on board scientific research vessels, to increase scientific knowledge of the fishery resources or their environment, or to test a hypothesis as part of a planned, directed investigation or study conducted according to methodologies generally accepted as appropriate for scientific research. At-sea scientific fishery investigations address one or more issues involving taxonomy, biology, physiology, behavior, disease, aging, growth, mortality, migration, recruitment, distribution, abundance, ecology, stock structure, bycatch, and catch estimation of finfish and shellfish (invertebrate) species considered to be a component of the fishery resources within the EEZ. Scientific research activity does not include the collection and retention of fish outside the scope of the applicable research plan, or the testing of fishing gear. Data collection designed to capture and land quantities of fish or invertebrates for product development, market research, and/or public display are not scientific research activities and must be permitted under exempted fishing procedures. For foreign vessels, such data collection activities are considered scientific research, if they are carried out in full cooperation with the United States.

¹²Note that there are circumstances in which observers would be required to account for total catch or the research is being conducted within the context of the normal fishery.

Alternative 2 would likely result in minimal impacts, as current practice is to allow observer providers to supply observers and scientific data collectors for these types of activities. However, Alternative 2 would serve to help all parties involved clearly understand an observer provider's role. Additionally, there would be a reduced chance of enforcement actions as a result of these activities, if the regulations were clarified and fully complied with.

While the intent of Alternative 2 would be to clarify that observer providers are allowed to supply observers and scientific data collectors for research activities, members of the industry expressed concern about how observer and scientific data collector duties would coincide, during the same contract. Currently, the most common practice for vessel owners that conduct groundfish fishing requiring an observer under an FMP in the same trip as fishing under an EFP or SRP that requires a scientific data collector, is to have the same individual fulfill both the observer and scientific data collector roles. This reduces the cost for the vessel owner, because the observer does not need to be replaced with a different person who acts as the scientific data collector. However, in these situations, regulations governing the observer would also apply to the scientific data collector.

Current regulations in 50 CFR 679.50 place limits on deployment length and the maximum number of vessels on which an observer may be deployed before debriefing, as well as require observers to record information concerning their sampling efforts in the form of an electronic survey, before performing other jobs or duties that are not part of NMFS groundfish requirements. These regulations are listed below, and no changes are proposed:

- Regulations at § 679.50(i)(2)(vii)(A) limit the amount of time an observer may be deployed on any vessel or processor to 90 days during a 12 month period.
- Regulations at § 679.50(i)(2)(vii)(B) limit an observer's cruise duration to 90 days.
- Regulations at § 679.50(i)(2)(vii)(C) limit the number of assignments for an observer to 4 vessels or processors per deployment.
- Regulations at § 679.50(i)(2)(ii)(B) require observers to complete a NMFS electronic vessel and/or processor survey, before performing other jobs or duties which are not part of NMFS groundfish observer requirements. These may include working as an ADF&G shellfish observer, a NMFS marine mammal observer, or a scientific data collector aboard a vessel fishing under an EFP or SRP.

The intent of these regulations is to: (1) help avoid situations where an observer establishes close relationships with vessel crew that could compromise his or her objectivity, and (2) maintain high levels of data quality, by requiring debriefings every 90 days or before too much data accumulates (after working on 4 vessels or processors); and (3) ensure data quality, by requiring the observer to provide a complete description of their work, in the form of an electronic vessel and/or processor survey, before the observer moves on to other work outside of NMFS groundfish observer duties. NMFS Observer Program staff have found that data quality and recollection of sampling events could be reduced as cruise lengths are increased beyond 90 days; more than four vessels are observed during a single deployment; or the observer works on a job that is not related to his or her prior observer duties.

Regulations limiting observer deployments in the North Pacific have been in existence for many years and have proven to be important tools used by NMFS to provide high quality data to the fisheries scientists and managers. Observer providers have expertise in managing logistics to maximize an observer's utility through multiple assignments, without exceeding the 90 day or 4 vessel/processor limits. Under Alternative 2, observer providers would continue to work with vessel and processing companies to ensure observers or scientific data collectors are available in a cost efficient manner. Therefore, the effect of Alternative 2 on industry should be minimal.

All of the existing regulations, cited above, could limit an observer's ability to work as a scientific data collector under a research activity without first debriefing. An observer that has been deployed for 90 days, or has been deployed on 4 boats, must return for debriefing prior to further employment. An observer who has not reached these limits may be deployed as a scientific data collector, until these limits are reached. For example, if an observer was deployed on three groundfish vessels during a 60 day deployment, that observer could complete an electronic survey, and then be deployed as a scientific data collector on one additional boat for up to 30 days before being required to return for debriefing. Industry has expressed interest in reducing costs, travel in particular, for scientific data collectors. The desire for such cost savings must be balanced by NMFS' need to obtain and provide quality observer information in a timely manner.

In 2006, NMFS issued 29 SRPs. The average length for each SRP was 25 days, with a minimum of 11 days, to a maximum of 69 days. In 2006, fishing occurred under five EFPs. EFPs were issued for intervals of 61, 92, 29, and 90 days. In the fifth EFP, fishing occurred within the normal context of the groundfish fishery, from May 15 through the end of the 2006 calendar year, and observers were deployed under regulations governing the groundfish fishery.

Alternative 2 does not propose to change the existing limits regarding the duration of observer deployments. Relaxing current requirements on observer deployments could adversely impact data quality. For example, if an observer had been allowed to be deployed as a scientific data collector, prior to debriefing, that observer could have deployed for an extra 92 days, in the most extreme case observed in 2006. Much of the information necessary to determine sampling and data collection proficiency may have been forgotten during that time period, as the observer switches to a different role as a scientific data collector. While it is unlikely that an observer/scientific data collector would be deployed for this extended amount of time without debriefing, NMFS is concerned about the effects of additional deployments, in general, on data quality. In turn, any corrections that would be made to the observer's data, as a result of debriefing, would also be delayed, and these corrections could adversely impact inseason management. For these reasons, the proposed action does not contemplate relaxing existing deployment standards.

Some members of industry have inquired about whether final debriefings could be held in the field, which would allow the individual to be deployed as either an observer or scientific data collector, without incurring the expense of additional airfare from Seattle or Anchorage for debriefing. NMFS has found that conducting debriefings in the field places demands on a limited field work force, which conflict with their ability to perform their regular functions.

The Observer Program currently maintains offices in Kodiak and Dutch Harbor. One staff member is permanently stationed at each of these offices. These staff members' time is fully allocated performing basic core functions necessary to support observers in the field. Field personnel duties include: maintaining and distributing sampling and safety gear, answering sampling questions, providing a conduit for information exchange between the fishing industry and the observer program, conducting pre-cruise meetings, and conducting mid-cruise debriefings. During busier times, additional staff is deployed to handle additional workload.

Note that mid-cruise debriefings are not the same as final debriefings. The intent of mid-cruise debriefings is to provide an opportunity for inseason coaching on sampling methodologies, conduct some initial data checking, and ensure no major problems are occurring. New observers, and observers in their second cruise, are typically required to report to a NMFS field office for a mid-cruise debriefing. Additionally, NMFS may require observers to complete a mid-cruise debriefing during a subsequent cruise, if the observer had significant deficiencies identified during a previous debriefing. Mid-cruise

debriefings typically occur when an observer is between vessels, or the vessel he or she is assigned to is offloading. A mid-cruise debriefing typically involves the observer leaving his or her data set with Observer Program staff, the staff member reviewing all data collected to date, and the staff member conducting an interview with the observer. The process is typically completed within the same day.

Final debriefings are significantly more involved. They typically take several days, and there may be a waiting period before an observer can complete a debriefing, during busier times of the year. The complete debriefing process is described in Section 2.5.6 in detail, and is not repeated here. To summarize however, the process includes completion of an electronic survey, submission of data to NMFS, data review by the debriefer, an interview, an evaluation, and gear check-in.

Because of the significant resource allocations necessary to complete final debriefings, the Observer Program has historically conducted almost all final debriefings in Seattle or Anchorage. The Observer Program currently has 3 staff at the Anchorage field office, all of whom conduct debriefings. Thirty-one staff members are located in the Seattle office. Of these, 10 routinely conduct debriefings. Additionally, one debriefer has been contracted to assist in Seattle during busier debriefing times. While each of the staff members deployed to the Dutch Harbor and Kodiak field offices are capable of conducting debriefings, they have significantly different roles, and are currently fully employed. To complete debriefings in Dutch Harbor and Kodiak would require resource reallocation to these offices, at a significant expense to NMFS.

Based on communication with two current observer providers, regulations limiting observer cruise durations and vessel deployments may constrain flexibility in the deployment of an observer who is also deployed as a scientific data collector. However, observer providers have learned to work with research permit holders to reduce costs as much as possible.¹³ For example, observer providers can work with a research permit holder to conduct research prior to actual groundfish fishing, and avoid the requirement to complete a vessel survey before performing other jobs or duties. In some cases, however, it may not be possible for an observer provider to arrange for a groundfish observer to also work as a scientific data collector during the same cruise.

Note that EFP permit holders are often allowed to retain and sell fish harvested during the course of their research. Often, these catch amounts are beyond those available to participants in the normal groundfish fisheries. Revenues are intended to cover the cost of research activities, including the cost of the research platform and scientific data collector.

In sum, final debriefings conducted in field offices are counterproductive to the overall data quality goals of the observer program. Current regulations and policies are in place as data quality control measures. Additionally, observer providers have learned to reduce costs for research permit holders as much as possible. Consequently, current debriefing regulations and policies would not be revised under this alternative.

2.5.4 Issue 4: Fishing day definition

On January 3, 2005, the NMFS Sustainable Fisheries Division received a memorandum from NOAA Fisheries Office for Law Enforcement (OLE), requesting revision of a regulation defining “fishing day” for purposes of enforcing observer coverage requirements (refer to Appendix 2). Specifically, OLE related concerns that Federal regulations governing the 30 percent observer coverage requirement are unclear as to whether they allow vessel owners and operators to use *any* amount of observer coverage incurred during a 24-hour period to count towards coverage requirements. To clarify 30 percent observer

¹³ Diana Star, Saltwater Inc. and Pam Gale Alaskan Observers Inc., pers. comm., 10/18/2007.

coverage regulations, and to reduce a vessel's ability to conduct unrepresentative fishing operations specifically for purposes of obtaining coverage, NOAA OLE recommended revising the definition of "fishing day." The specific recommendation is included as Alternative 2. The Council added Option 1 to Alternative 2 at its February 2008 meeting. An alternative approach is included as Alternative 3.

Alternative 1

Alternative 1. No action. The current definition of "fishing day" in Federal regulations allows vessel owners or operators to use any observer coverage incurred during a 24-hour period to count towards observer coverage requirements, which has resulted in vessels fishing and being observed in ways that are not representative of actual fishing behavior. No change would be made to existing Federal regulations at 50 CFR 679.2, which define "fishing day" as follows:

Fishing day means to (for purposes of subpart E) a 24-hour period, from 0001 hours A.l.t. through 2400 hours A.l.t., in which fishing gear is retrieved and groundfish are retained. Days during which a vessel only delivers unsorted codends to a processor are not fishing days.

Note that observer coverage requirements are currently based on the following regulations at 679.50(c)(1)(v):

(v) A catcher/processor or catcher vessel equal to or greater than 60 ft (18.3 m) LOA, but less than 125 ft (38.1 m) LOA, that participates for more than 3 fishing days in a directed fishery for groundfish in a calendar quarter must carry an observer during at least 30 percent of its fishing days in that calendar quarter and at all times during at least one fishing trip in that calendar quarter for each of the groundfish categories defined under paragraph (c)(2) of this section in which the vessel participates.

For purposes of meeting observer coverage requirements, these regulations have been interpreted to mean that an observer must only be onboard a vessel at some point, no matter how briefly, during a 24-hour period when fishing occurs and groundfish are retained, to count as a "fishing day." This would continue to be the interpretation under Alternative 1 (no action). While many vessels operate with an observer as they would without an observer, others intentionally alter their fishing behavior, specifically to meet observer coverage requirements. For example, if a vessel needs two additional days to meet coverage requirements, the owner or operator could retrieve one haul at 11:30 p.m., retrieve a second haul one hour later, at 12:30 a.m. the next day, and accrue credit for two observer coverage days. Often, these hauls are not representative of normal haul durations, location, and depth, and catch composition may vary significantly from that associated with the vessel's normal fishing behavior. Thus, there is a concern that the resulting observer data do not comprise a representative sample.

NOAA OLE has also documented instances in which vessel operators intentionally structure fishing activities such that they fish unobserved until late in the day, pick up an observer and make a short tow prior to midnight, make one more tow immediately after midnight, and then return the observer to port. Additional fishing activities then occur during the remainder of the day, during which the observer is not onboard. Under the current regulations, this scenario may be interpreted as meeting the requirements for two "observer" days.

Alternative 1 would not clarify 30 percent observer coverage requirements, which pertain to all catcher/processors and catcher vessels equal to or greater than 60 ft LOA, but less than 125 ft LOA. Vessels would likely continue to conduct non-representative fishing, specifically with the intent of meeting observer coverage requirements. Observers would continue to collect information on total catch, and that information likely would be used by NMFS to manage the groundfish fisheries.

For most 30 percent vessels, NMFS currently bases its calculation of species composition, including halibut and crab prohibited species catch (PSC), on basket samples of approximately 300 kg (approximately 660 lb) or less, depending on the time and space available to the observer. Catch composition data are extrapolated (the term commonly used is “expanded”) to estimate species composition and PSC use for the entire haul. The catch composition for sampled hauls is expanded to estimate the catch composition for unsampled hauls during a trip. NMFS then calculates an estimate of the species composition and PSC catch rate from the sampled hauls for each directed fishery. These species composition and PSC catch rate estimates are then applied to all unobserved catch to estimate total species composition and PSC use. The degree to which a given quantity of groundfish or PSC in a sample is expanded varies substantially, depending on the fraction of total observed hauls and the fraction of sampled catch in each of the observed hauls.

To the extent that catch composition estimates, based on vessels that conduct fishing operations expressly to meet observer coverage requirements, are not representative of normal fishing operations, additional error could be introduced into the management system under Alternative 1. This error could result in inaccurate fishery removal information. If unrecognized, in-season managers may fail to close a fishery in a timely manner, with implications for optimal resource management. If the problem is recognized, it may result in managers making more conservative closure decisions, thereby affecting full attainment of TAC (e.g., allocations, quotas, etc.) by fishery participants.

Alternative 2 (Council preferred alternative)

Alternative 2. Revise the definition of “fishing day” in Federal regulations as follows:

Fishing day means ~~to~~ (for purposes of subpart E) a 24-hour period, from 0001 hours A.l.t. through 2400 hours A.l.t., in which fishing gear is retrieved and groundfish are retained. An observer must be on board for all gear retrievals during the 24-hour period, in order to count as a day of observer coverage. Days during which a vessel only delivers unsorted codends to a processor are not fishing days.

Alternative 2 would revise the definition of a ‘fishing day’ in existing regulations at 50 CFR 679.2. Alternative 2 was proposed by NOAA OLE in its original letter to NMFS Alaska Region and approved for consideration by the Council. Alternative 2 would affect all non-pot gear catcher/processors and catcher vessels greater than or equal to 60 ft LOA, but less than 125 ft LOA that are subject to 30% observer coverage requirements. These are primarily trawl or hook-and-line catcher vessels $\geq 60'$, but $< 125'$ LOA, and hook-and-line catcher processors $\geq 60'$, but $< 125'$ LOA. Alternative 2 would revise Federal regulations to require that affected vessels carry an observer for all fishing activities that occur during the 24-hour period for that fishing day, to count as an observer coverage day. This would likely reduce instances in which vessels conduct fishing operations specifically to meet coverage requirements, and likely increase data quality for this sector. Another potential effect is improved accuracy in NMFS closure decisions, which may result in allowing vessels to fish for longer periods of time and increase revenues.

The discussion under Alternative 1 provides examples NOAA OLE has documented in which vessel operators with 30% observer coverage requirements intentionally structure fishing activities to accrue “observer coverage days,” without having an observer present during normal fishing activities. Under Alternative 2, it is anticipated that these situations would be somewhat mitigated. Under Alternative 2, the observer must be present for all hauls within the 24-hour period in order to meet the definition for “fishing day” and accrue an observer coverage day.

Alternative 2 could increase costs for vessels in some cases, resulting in their carrying observers longer than they would be required to, under Alternative 1 (status quo). Alternatively, vessels could choose to postpone fishing (in the example described above) such that they do not retrieve hauls without an observer during a 24-hour period in which they also retrieved hauls with an observer, thus increasing trip length and costs. For these reasons, Alternative 2 may have some operating cost implications for industry.

In July 2007, NMFS reviewed the results of an electronic survey, which is completed by all observers in debriefing, in order to better understand how frequently and by what methods the fleet conducts unrepresentative fishing operations specifically for purposes of obtaining coverage. The following question was added to the observer survey in 2004: “Did this vessel ever fish solely for the purpose of obtaining observer coverage?” NMFS asks this question for each vessel the observer boarded during their cruise (cruises last up to 90 days and observers may be onboard four different vessels during a single cruise). Individuals who answer yes to this question are required to then enter a comment field asking them for the specific tow numbers and an explanation for their response. In analyzing the responses to these questions, most observers understood that this question was intended to identify non-representative fishing behavior, which was conducted just to obtain coverage for that day. In only one case did the observer appear confused, responding that all fishing was conducted for coverage. A review of the fishing records from that observer indicates that representative fishing effort occurred. This report was excluded from the following results as an error.

Of the 4,820 total cruise/vessel surveys completed between January 2004 and July 2007, 356 (7.4%) responded that the vessel had fished solely for the purposes of obtaining observer coverage. These tows or sets are commonly referred to as “observer tows/sets”. All of the vessels on which “observer tows/sets” were reported were less than 125 feet LOA. Trawl and hook-and-line vessels greater than 125 feet LOA are required to have at least 100% observer coverage, thus, this issue is not relevant to these vessels.

Each of the 356 observer reports can represent one to several days of actual coverage obtained through “observer tows/sets”. NMFS reviewed the responses from each of these reports to determine how many days of coverage were obtained (see Table 4). In some cases, the number of days was obvious from the comments. In other cases, the original logbook was consulted to ensure the observer data were correct. In cases where there was any ambiguity, NMFS estimated a single observer day was obtained. In many cases, the observer was aware when a tow was being taken solely to obtain coverage, because the captain or crew told him or her that this was what they were doing.

Table 4 shows, on an annual basis between 2004 to mid-2007, the number of observer coverage days that were obtained by employing ‘observer tows/sets’ for at least part of a fishing trip. This varied between 18 and 28 days in the hook-and-line sector, and between 120 and 186 days in the trawl sector. This represents between 1.2% and 4.7% of the total observed fishing days for the hook-and-line sector, and from 4.3% to 6.2% for the trawl sector. Note that the highest percentages for the hook-and-line sector are in 2007, for which data are limited to that reported as of July 20.

Table 4 does not split out the data between catcher processors and catcher vessels by gear type. Relatively few catcher processors are subject to the 30% observer coverage requirement and participate in the groundfish fisheries (see Table 9). In the trawl sector, while catcher processors accounted for a range of 17.8% to 22.6% of the total number of observed fishing days for the 30% observed trawl sector, few vessels were identified as ‘fishing for observer coverage’ during this time period. In 2006, two trawl catcher processors were identified as ‘fishing for observer coverage’, as reported in the observer debriefing survey; in 2007, one trawl CP was identified. While the number of ‘fishing for observer coverage’ days cannot be reported for these trawl catcher processors, due to confidentiality rules, it is a

small percentage of the overall trawl sector's total number of 'fishing for observer coverage' days (537 days total during 2004 – 2007, see Table 4). There were no hook-and-line catcher processors identified through the survey with 'fishing for observer coverage' days during 2004 - 2007. The 90 total 'fishing for observer coverage' days for the hook-and-line sector during 2004 - 2007 are attributed to catcher vessels.

Table 4 Percentage of observer days obtained by “fishing for observer coverage” as reported in the observer debriefing survey, by gear type, 2004 – 2007 for 30% observer coverage vessels

Year	Gear type	Number of “fishing for coverage” days	Total number of observed fishing days for the 30% hook-and-line and trawl sectors	Percent days obtained by fishing for coverage
2004	Hook-and-line	18	1,564	1.2%
2005	Hook-and-line	22	1,450	1.5%
2006	Hook-and-line	22	1,516	1.5%
*2007	Hook-and-line	28	593	4.7%
Total**	Hook-and-line	90	5,123	n/a
2004	Trawl	148	2,965	5.0%
2005	Trawl	120	2,769	4.3%
2006	Trawl	186	2,984	6.2%
*2007	Trawl	83	1,716	4.8%
Total***	Trawl	537	10,434	n/a

*Data reported as of July 20, 2007.

** No hook-and-line CPs 'fishing for observer coverage' during 2004 - 2007.

*** Two trawl CPs in 2006, and one in 2007, identified as 'fishing for observer coverage'

Table 5 provides data on the target fisheries and areas associated with the observer coverage days in Table 4. Note that the target fisheries are as identified by the observer in the debriefing survey. Often, observers enter multiple targets; those are categorized as “mixed.” In the hook-and-line fisheries, very few instances of “observer sets” were reported by observers in the BSAI; almost all of them were reported in the GOA Pacific cod or sablefish fisheries. In 2006, 3,007 mt of Pacific cod and 5,332 mt of sablefish were harvested in the GOA by vessels with 30 percent observer coverage requirements. With the exception of 2005, the majority of the trawl “observer tows” reported by observers were also in the GOA. These were reported as occurring in several fisheries, primarily the flatfish, Pacific cod, pollock, mixed, rockfish, and rock sole fisheries. In 2006, 30% vessels harvested 114,617 mt in these fisheries. Those reported in the BSAI were primarily in the pollock fishery. In 2006, 30% pollock vessels harvested 261,601 mt in the BSAI.

Table 5 Target fisheries associated with number of observer days obtained by “fishing for observer coverage” as reported in the observer debriefing survey, by gear type, 2004 – 2007 for 30% observer coverage vessels

Area	Target	2004		2004 Total	2005		2005 Total	2006		2006 Total	2007		2007 Total	Grand Total
		H&L	Trawl		H&L	Trawl		H&L	Trawl		H&L	Trawl		
BSAI	Flatfish											2	2	2
	IFQ	2		2	4		4							6
	Mixed		7	7		2	2		4	4		12	12	25
	Pacific Cod		20	20		10	10		13	13		8	8	51
	Pollock		23	23		60	60		40	40		9	9	132
	Yellowfin Sole		2	2					1	1				3
BSAI Total		2	52	54	4	72	76	58	58	58	31	31	219	
GOA	Arrowtooth					4	4		20	20		5	5	29
	Flatfish		37	37		3	3		10	10		3	3	53
	IFQ	13		13	10		10	13		13	14		14	50
	Mixed		14	14		13	13		27	27		22	22	76
	Pacific Cod	3	6	9	8	3	11	8	4	12	14	1	15	47
	Pollock		8	8		11	11		35	35		6	6	60
	Rex Sole								1	1				1
	Rock Sole		11	11		8	8		23	23		12	12	54
	Rockfish		5	5					2	2				7
		Yellowfin Sole										2	2	2
GOA Total		16	81	97	18	42	60	21	122	143	28	51	79	379
BSAI and GOA	IFQ							1		1				1
	Mixed		12	12		3	3		6	6				21
	Pacific Cod		2	2							1		1	3
	Pollock		1	1										1
	Rex Sole					3	3							3
BSAI and GOA Total		15	15	15	6	6	6	1	6	7	1	1	1	29
Grand Total		18	148	166	22	120	142	22	186	208	28	83	111	627

Source: Observer debriefing surveys, 2004 – 2007. 2007 data are reported as of July 20, 2007.

IFQ = sablefish IFQ; or sablefish and halibut IFQ in the same trip, if retained sablefish is over the maximum retainable amount. (30% observer coverage applies to these vessels ≥ 60 and $< 125'$ LOA.)

In analyzing responses from observers in the observer debriefing surveys, it is clear there are two distinct strategies being employed by vessels to inappropriately obtain observer coverage. The first strategy combines “observer tows/sets” with actual fishing effort on a trip. In these cases, the vessels may set and retrieve gear shortly after departing to ensure that the first day of a trip is counted as a coverage day. Alternatively, the vessel makes a tow or set after midnight on the last day of a trip to ensure that day is also counted toward the observer coverage requirements. As stated previously, making observer tows or sets at the beginning and end of each trip would be credited as two additional days of coverage under the current regulations. These observer tows or sets are generally very short and result in a relatively small amount of fish harvested, generally less than two metric tons. Observers on vessels that have ceased fishing due to weather have also reported taking a single observer tow or set in order for the bad weather day to count as an “observed day.” Many vessels will obtain one to two additional days of coverage on trips using this strategy.

In contrast, it is also clear that some vessels will take entire trips for the sole purpose of obtaining observer coverage days, and only observer tows or sets are made. These trips are typically of very short duration and consist of taking the observer just outside of port and deploying gear both before and after midnight. No true fishing effort is associated with these gear deployments as they are off the fishing grounds and very short. Based on the observer debriefing surveys, NMFS classified the observer information obtained to assess how much coverage was obtained by the strategies of: 1) combining “observer tows/sets” with actual fishing on a trip, and 2) only taking “observer tows/sets” during a trip. A summary (Table 6) shows that of the 627 total coverage days received by making observer tows or sets, 158 days (25%) of observer coverage credit accrued when a vessel made only observer tows/sets on a given trip and no representative fishing occurred. Of those coverage days associated with observer tows/sets only, the great majority (87%) were acquired by trawl catcher vessels.

Note that neither of these strategies violates existing Federal regulations with regard to 30% observer coverage for the specific classes of vessels that must meet these requirements. However, neither strategy fully comports with the intent of the 30% observer coverage regulations, and each results in significant concern with the quality of the associated effort, catch, and species composition data. In addition,

understanding the percentage of the observer coverage days, or total catch for that matter, that is affected by this behavior does not sufficiently define the problem, since observer data are also supposed to provide an adequate representation of the spatial and temporal distribution of the harvest in a target fishery.

Table 6 Number of coverage days obtained by taking observer tows/sets only or by taking observer tows/sets in conjunction with fishing, by gear type, 2004 – 2007

Gear Type	Year	Observer Tows/Sets Only	Fishing and Observer Tows/Sets	Total
Hook-and-line	2004	0	18	18
	2005	10	12	22
	2006	0	22	22
	*2007	10	18	28
Hook-and-line total 2004 -07		20	70	90
Trawl	2004	46	102	148
	2005	20	100	120
	2006	50	136	186
	*2007	22	61	83
Trawl total 2004 - 07		138	399	537
Grand total # of coverage days		158 (25%)	469 (75%)	627 (100%)

Source: Observer debriefing surveys, 2004 – 2007.

*Data reported as of July 20, 2007.

The details of one case, included in Table 6, are provided as an example. In this case, a trawl vessel took an observer on four consecutive trips, on which only “observer tows” were made. Each trip consisted of one tow before midnight and another tow after midnight. The largest catch of any tow was 0.01 metric tons (approximately 22 lbs). These trips were repeated every other day for a total of eight observer coverage days. While most vessels obtain needed coverage with an occasional “observer tow,” several vessels repeatedly use the strategy described in this example.

Table 7 provides additional data on the number of vessels that obtained observer coverage days by: 1) taking trips in which only observer tows/sets were made; or 2) observer tows/sets were made during at least part of the fishing trip. For example, in 2006, the 22 coverage days for the hook-and-line sector identified as observer sets combined with fishing, were obtained by 9 hook-and-line vessels. In the 30% observer coverage trawl sector, 33 to 53 vessels employed one or both of the two strategies during the same time period. In total, a high of 62 hook-and-line and trawl vessels (2004) were reported as having exhibited this type of fishing behavior, according to observer debriefing surveys.

Table 7 Number of individual vessels employing at least one of the two strategies to obtain observer coverage days

Year	Hook-and-Line	Trawl	Total
2004	9	53	62
2005	8	49	57
2006	9	50	59
*2007	8	33	41

Source: Observer debriefing surveys, 2004 – 2007.

*Data reported as of July 20, 2007.

The subset of individual vessels that observers reported took trips in which *only* observer tows/sets were made is provided in Table 8. For example, the 50 observer coverage days, obtained by trawl vessels reported as taking “observer tows” in 2006, were taken by 19 individual trawl vessels.

Table 8 Number of individual vessels employing the strategy of taking trips in which only observer tows/sets were made to obtain observer coverage days

Year	Hook-and-Line	Trawl	Total
2004	0	12	12
2005	2	7	9
2006	0	19	19
*2007	1	7	8

Source: Observer debriefing surveys, 2004 – 2007.

*Data reported as of July 20, 2007.

NMFS has received reports of “observer tows/sets” for many years, and it is possible that the numbers reported above are underestimates. Three reasons why these events may not be reported by observers in all cases include: 1) the observer may have previously reported such activity and has since ceased reporting, because the issue has not been corrected (as reporting does not result in action); 2) the observer did not understand the question and failed to report correctly; and 3) the observer did not fully recognize the vessel activity. For example, NMFS identified one vessel whose behavior appeared to be consistent with observer tows, but the observer did not identify the activity as such in the survey. In this case, NMFS reviewed the logbooks and found that the observer correctly reported several days of “observer tows” in their log, but not in the survey.

To further examine whether under-reporting should be of concern, NMFS identified the number of fishing days in the database from vessels less than 125 feet where a single tow/set was made in a day, the catch was less than 2 metric tons, and the observer answered no to the question about fishing for observer coverage in the debriefing survey. This resulted in 466 additional fishing days across all gear types and years (2004 through July 2007) which could potentially be “observer tows/sets.” However, it is difficult to differentiate between the results of strategic behavior and similar results arising from poor fishing or inclement weather. Of the 466 fishing days identified above, NMFS systematically selected 22 fishing days that were examined in further detail by retrieving and reading the observer logbooks for further explanation. Of these 22 fishing days, NMFS found that 3 were identified as “observer tows” in the observer logbook, but were not reported in the survey; 8 were possibly “observer tows/sets”, but inadequate information exists to reach a conclusion; and 11 were not observer tows or sets.

Note that NMFS was unable to readily determine if additional fishing activity occurred on days where “observer tows” occurred, because the logbooks which contain this information are not available electronically. It was clear from the survey comments that on many days, the “observer tow/set” was the only fishing effort that day. Thus, in assessing this relatively small sample, one could assume that the survey report records are more likely to underestimate the number of coverage days obtained from “observer tows/sets.”

NMFS is also concerned that pot vessels have been known to exhibit strategic behavior to obtain observer coverage. NMFS issued a final rule January 7, 2003 (68 FR 715) that revised observer coverage requirements for all pot vessels and was intended to address this issue. No strategic behavior on pot vessels was identified in the survey responses.

Under Alternative 2, the definition of ‘fishing day’ in Federal regulations would be modified, such that an observer must be onboard for all gear retrievals during the 24-hour period in which fishing gear is retrieved and groundfish are retained, in order to count that activity as a day of observer coverage. Recall that Alternative 2 is limited to potentially affecting hook-and-line and trawl vessels that are required to have 30% observer coverage (pot vessels have different 30% coverage requirements, based on a percentage of gear retrievals). For the general sectors identified, Table 9 provides the number of trawl and

hook-and-line vessels that participated in the GOA or BSAI groundfish fisheries in 2006 – 2007 that are required to have 30% observer coverage.

Table 9 Number of individual trawl and hook-and-line vessels participating in the GOA and/or BSAI groundfish fisheries by 30% sector, 2006 – 2007

Sector	2006	2007
Trawl CV >60' but ≤125'	95	90
Trawl CP >60' but ≤125'	12	10
H&L CV >60' but ≤125'	97	74
H&L CP >60' but ≤125'	11	11

Source: NMFS catch accounting database, 2006 - July 2007.

Alternative 2 may, thus, increase operating costs for the subset of vessels shown above in some cases, requiring them to carry observers longer than they would be required to under Alternative 1 (status quo), in order to accrue a coverage day. Vessels could also choose to postpone fishing, such that they do not retrieve hauls without an observer during a 24-hour period in which they also retrieved hauls with an observer. This modification still increases trip length and costs, although it is not possible to provide a quantitative estimate of those potential costs. However, given that this represents a substantial change from the requirements of the status quo, Alternative 2 may have the potential to result in some significant cost increases for this portion of the industry.

One of the primary concerns discussed at the May 2007 OAC meeting was that there could be legitimate situations in which this type of activity occurs, most notably when nearing a fishery closure or due to (inadvertent) poor planning. This issue is primarily a concern for the 30% covered hook-and-line and trawl sectors in the GOA. Gulf representatives noted that there have been, at times, observer availability problems, resulting in some vessels becoming apprehensive that they will not be able to meet their coverage requirements before the fishery closes. One vessel may drop an observer off at the dock early, in order for another vessel to take that observer aboard, and not be found in violation. However, OAC members also generally agreed that non-representative fishing occurs in various forms, and that this serves to degrade the credibility of observer data. The primary concern was that Alternative 2 would increase costs to all vessels, including those who do not purposefully manipulate the system.¹⁴

Note also that, while this issue may have been of concern for both the GOA hook-and-line sablefish and Pacific cod sectors and the GOA trawl flatfish, Pacific cod, pollock, rock sole, and rockfish sectors in the recent past, several subsequent management changes have been approved that will reduce the number of fisheries that are subject to the 30% observer coverage requirements. The GOA rockfish pilot program, effective in 2007, which permits harvesters to form voluntary cooperatives and receive an exclusive harvest privilege to the primary rockfish species in the Central GOA, requires 100% or 200% observer coverage for catcher vessels and catcher processors, respectively.¹⁵ Those catcher processors that opt out of the program are also required to have 100% observer coverage.

In addition, the GOA trawl pollock and Pacific cod fisheries are fairly short, three or four-day fisheries, the duration of which make it less likely for a vessel to manipulate the system by doing observer tows. In

¹⁴At the May 2007 OAC meeting, several members of the OAC and NMFS agreed that true resolution of this issue in the 30% fleet is only possible through a change in the service delivery model for the groundfish observer program (i.e., restructuring of the program). Any other potential solution within the current service delivery model will only offer limited benefits. The OAC, thus, discussed whether these limited benefits were worth potentially penalizing legitimate operations.

¹⁵Catcher processors that opt out of the program are required to have 100% observer coverage in July in any Gulf fishery (except Southeast Outside) for purposes of monitoring the July sideboards.

effect, the only Gulf fisheries in the near future to which this issue would likely apply are the flatfish fisheries and the hook-and-line fisheries, although very few vessels $\geq 60'$ LOA fish in the GOA with hook-and-line gear and are, thus, subject to 30% coverage requirements.

While the focus has been on GOA fisheries, due to the large number of 30% covered fisheries in the GOA prior to implementation of the rockfish pilot program in 2007, 30% covered vessels in the BSAI have also been documented to exhibit “observer tow/set” behavior. As noted previously, in Table 5, which summarized observer tow information from the debriefing survey, 379 coverage days were obtained from observer tows in the GOA, 219 in the BSAI, and 29 in both the GOA and BSAI. However, as noted above, it is important to remember that these are likely underestimates. Table 10 displays the fisheries that would be subject to 30% coverage regulations, assuming implementation of Amendment 80 in the BSAI, and the number of vessels that participated in those fisheries in 2006. This serves as a proxy for the number of 30% vessels likely to be operating with those management programs in effect. However, note that some vessels participate in multiple fisheries and, therefore, the total number of unique vessels in the 30% coverage category may be overestimated.

Based on the analysis, to date, and informal consultations with industry, Alternative 2 does not appear to wholly correct the problem identified under the status quo, as vessel operators may still be able to alter their behavior to manipulate observer coverage levels, relative to actual fishing effort. If vessels were required to carry an observer for all hauls made within a 24-hour period, the following example is likely to occur. A vessel could carry an observer for hauls that occur in the early morning, offload, and, rather than retrieve hauls the evening of the same day, delay fishing activities until the following day. The likelihood of widespread use of this fishing practice cannot be predicted. Nonetheless, this behavior would still be allowed under Alternative 2, and would perpetuate concerns that observed effort is not representative of what would have occurred, had the vessel not carried an observer during that 24-hour period.

Table 10 Number of vessels in 2006 required to carry an observer 30% of their fishing days, reported by fishery, gear type, and area, and would not be subject to 100% observer coverage requirements under current or pending management programs

Gear type	Fishery	Number of vessels	
Longline	Catcher/processor turbot	4	
	Catcher vessel IFQ sablefish	63	
	Catcher/processor IFQ sablefish	6	
	Catcher vessel Pacific cod	11	
	Catcher/processor Pacific cod	10	
	Total	94	
Trawl	Catcher vessel shallow water flatfish in GOA	25	
	Catcher vessel deep water flatfish in GOA	23	
	Catcher vessel western GOA rockfish outside of July	0	
	Catcher vessel west Yakutat rockfish	4	
	Catcher vessel pollock (BSAI and GOA)	83	
	Catcher vessel Pacific cod	73	
	Catcher vessel yellowfin sole	3	
	Catcher vessel rock sole	0	
	Catcher vessel rockfish in Aleutian Islands	0	
	Catcher vessel Atka mackerel	0	
	Catcher/processor not subject to Amendment 80 or Rockfish Pilot Program sideboards in GOA	0	
	Total	211	
	Jig	Vessels in BSAI	0
		Vessels in GOA	0
Pot	All vessels regardless of size or target	68	
	All gear types	373	

Note that regulations at 679.50(c)(1)(v) require catcher/processor or trawl vessels equal to or greater than 60 ft (18.3 m) length over all (LOA), but less than 125 ft (38.1 m) LOA to meet 30 percent coverage requirements. Regulations at 679.50(c)(1)(vii) require all pot vessels to carry an observer for 30 percent of its pot retrievals. Vessels reported above include only those which fall into these categories. Source: NMFS, Alaska Region.

Option 1

Option 1, under Alternative 2, is also included as part of the Council's preferred alternative. Option 1 would revise the 24-hour period from its current "midnight to midnight" definition (i.e., from 0001 hours through 2400 hours Alaska local time), to a "noon to noon" definition (i.e., 1201 hours through 1200 hours Alaska local time). Option 1 would also retain the requirement that an observer must be on board for all gear retrievals during a 24-hour period, in order for that period to count as a day of observer coverage. Thus, Alternative 2 may reduce the cost effectiveness of making a fishing trip solely for the purpose of accruing observer coverage, because the coverage will be negated if non-observed fishing also occurs within that 24-hour period. The only difference under Option 1 from the status quo is its definition of the 24-hour period.

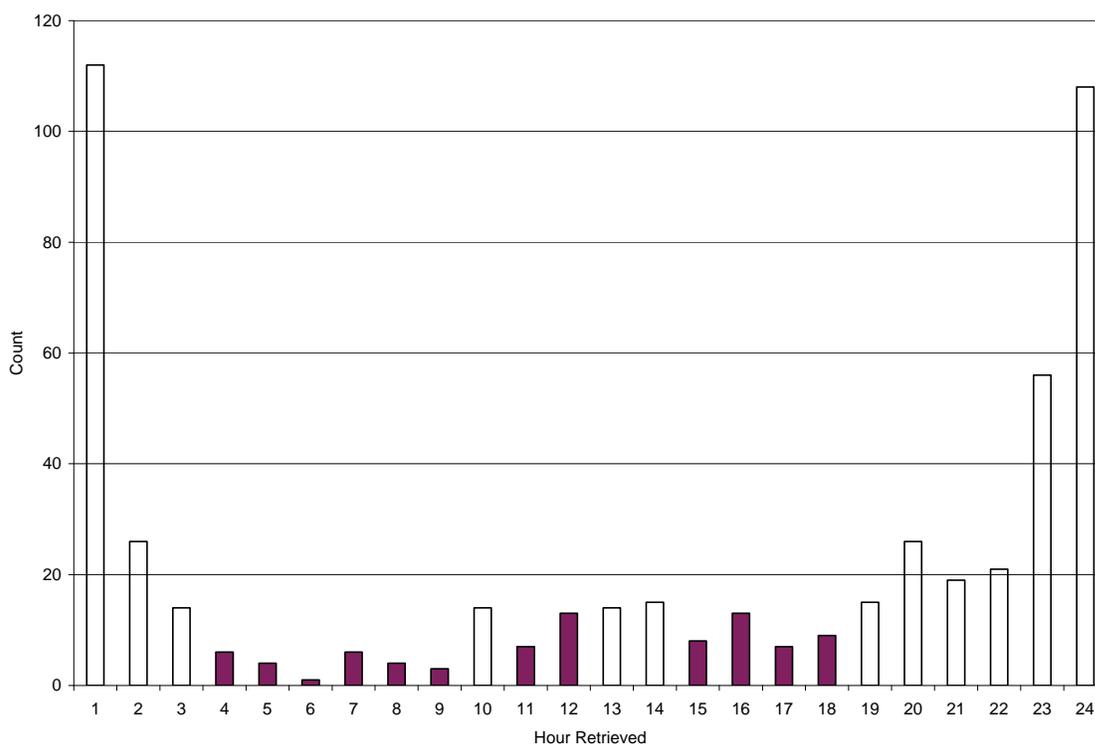
Option 1. Revise the definition of "fishing day" in Federal regulations as follows:

Fishing day means ~~to~~ (for purposes of subpart E) a 24-hour period, from ~~0001~~ 1201 hours A.l.t. through ~~2400~~ 1200 hours A.l.t., in which fishing gear is retrieved and groundfish are retained. An observer must be on board for all gear retrievals during the 24-hour period in order to count as a day of observer coverage. Days during which a vessel only delivers unsorted codends to a processor are not fishing days.

Figure 2 shows the distribution of “observer tows” from trawl vessels with 30% coverage requirements over a 24-hour period, during the period 2004 through mid-2007.¹⁶ The “observer tows” were identified as such through the observer surveys, and include trips during which only “observer tows” were made and trips during which “observer tows” were combined with actual fishing effort. The value for the retrieval hour signifies the time at the end of the hour. For example, hour 1 runs from 1 minute after midnight, until 1 am Alaska local time, and hour 2 runs from 1 minute after 1 am until 2 am Alaska local time. Figure 3 shows the same information for the hook-and-line sector with 30% coverage requirements. Both figures show that “observer tows” tend to cluster just before and after midnight, with relatively few “observer tows” during daylight hours.

By contrast, Figure 4 and Figure 5 show the hourly distribution of all tows from 30% trawl vessels, and all sets from 30% hook-and-line vessels, respectively, during 2004 through mid-2007. There is no clustering effect indicated in these figures, and the data indicate that the majority of fishing effort occurs during daylight hours.

Figure 2 Observer tows from 30% trawl vessels by hour retrieved, 2004 – 2007



¹⁶Data for Figures 2 through 5 include tows/sets retrieved from 2004 through July 20, 2007.

Figure 3 Observer sets from 30% hook-and-line vessels by hour retrieved, 2004 – 2007

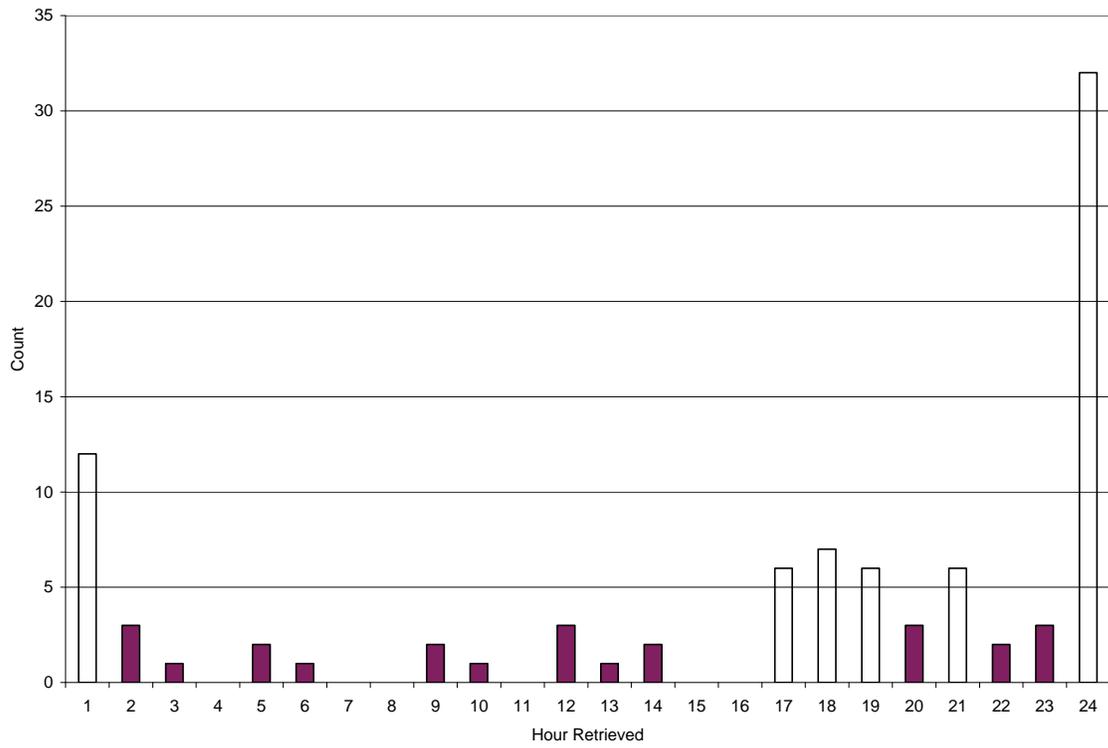


Figure 4 All tows from 30% trawl vessels by hour retrieved, 2004 – 2007

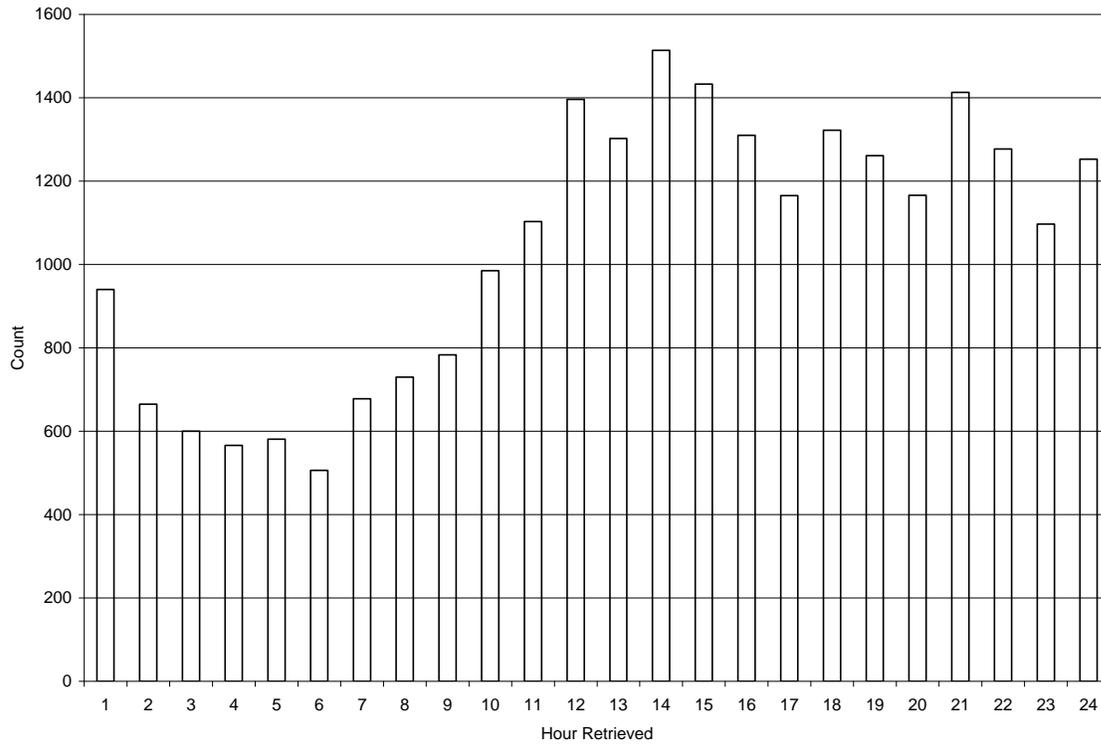
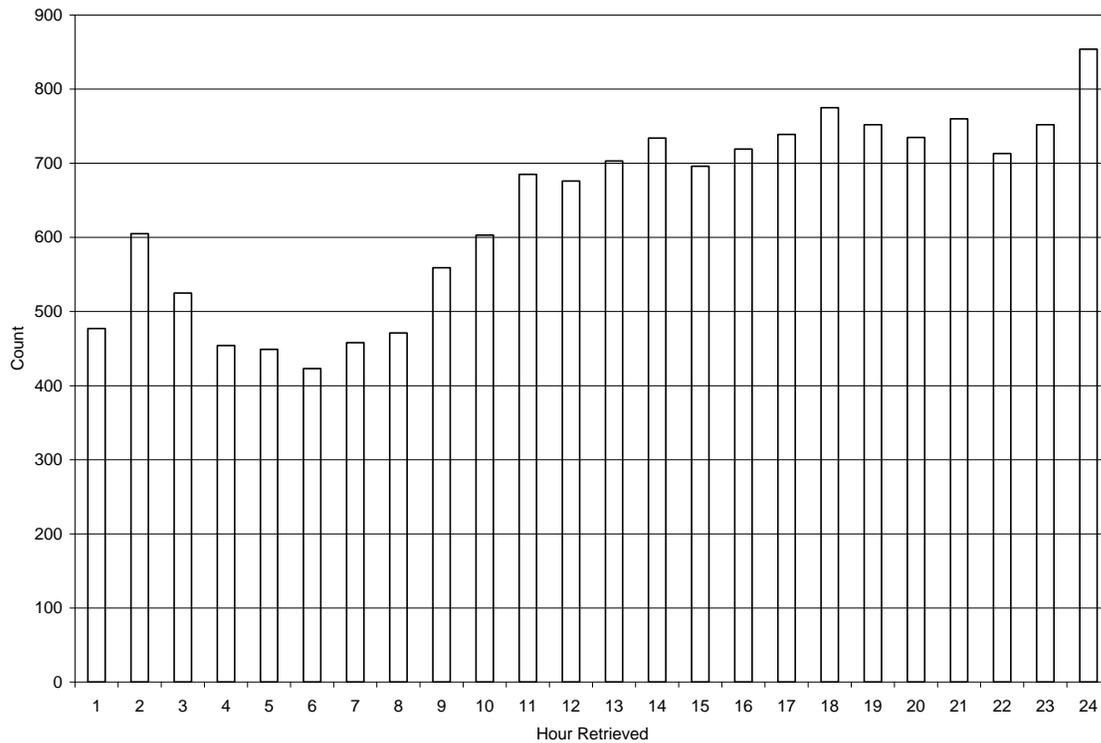


Figure 5 All sets from 30% hook-and-line vessels by hour retrieved, 2004 – 2007

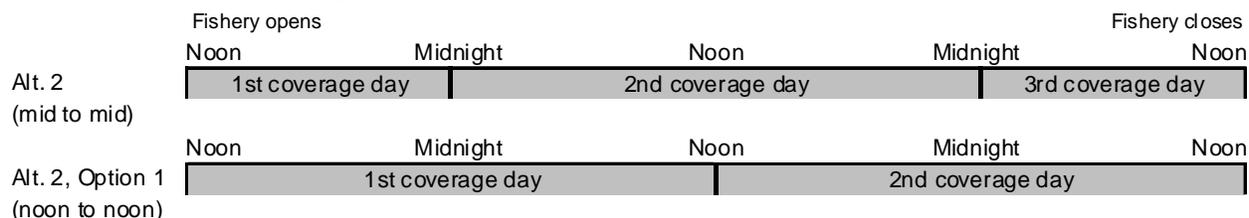


It is possible that revising the fishing day to noon to noon would simply shift the observer tows to cluster around the noon hour, instead of midnight. Given the vessels' desire to optimize observer coverage and reduce costs, one would expect vessels operating under Option 1 to begin fishing in the morning, continue fishing throughout the day, and then repeat the pattern the following morning, ensuring they make at least one tow after noon on the last day of fishing. Thus, for every fishing/observer day, one may anticipate that a high percentage of vessels would have a tow/set covered before noon on the first day, and after noon on the last day, in order to maximize the number of observer coverage days derived from the trip.

However, it is also possible that fishery participants would be less likely to use the time period around noon to take observer tows, because the daylight hours correlate with better fishing. Figure 4 and Figure 5 illustrate that most fishing effort occurs during the daylight hours, and anecdotal evidence suggests that participants would be less likely to attempt to manipulate the system during daylight hours at the risk of foregoing key fishing time.

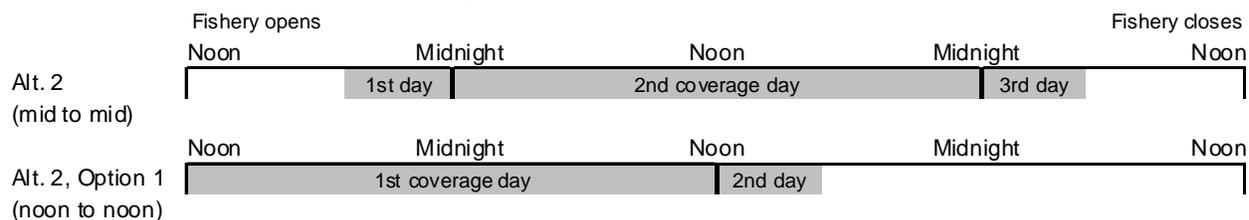
Most Federal fisheries open and close at noon, thus, the noon to noon interval for accrual of observed fishing credit under Option 1 better corresponds to this Federal fishery management practice, than does the current midnight to midnight rule. One way to illustrate how this may result in more representative fishing data is by considering a 48-hour fishery (e.g., the 2008 Central Gulf pollock fishery A season). Assume Option 1 is implemented. If the fishery opens at noon on Day 1 and closes at noon on Day 3, a vessel can receive no more than two coverage days, if they carried an observer during the entire 48-hour period. This is because a vessel cannot receive credit for an observer coverage day by carrying an observer on the 'edges' of the fishing day. In effect, a vessel cannot fish just before noon on Day 1 or just after noon on Day 3 and receive additional coverage days, as the fishery is not open during that time period. By contrast, under the midnight to midnight definition of a fishing day, a vessel could receive three observer coverage days during the same 48-hour opener. Figure 6, below, attempts to illustrate this example.

Figure 6 Example showing number of observer coverage days potentially obtained in a 48-hour fishing period (Alternative 2 versus Alternative 2, Option 1)



Another way to understand the issue is to consider that under Option 1, a vessel could start fishing with an observer when the fishery opens at noon on Day 1, stop fishing just after noon on Day 2, and as long as no other fishing was conducted without an observer for the rest of that 24-hour period, they would receive two days of observer coverage credit for just over 24 hours of fishing. Under the current midnight to midnight definition (Alternative 1 or Alternative 2, without Option 1), a vessel could start fishing just before midnight on Day 1, stop fishing just after midnight on Day 3, and as long as no other fishing was conducted without an observer for the rest of that 24-hour period, they would receive three days of observer coverage for just over 24 hours of fishing. The reason this isn't possible under Option 1 is because the fishery opening corresponds with the 'fishing day' definition for the purposes of observer coverage. Figure 7 illustrates this example.

Figure 7 Example showing number of observer coverage days potentially obtained in just over a 24-hour fishing period (Alternative 2 versus Alternative 2, Option 1)



To the extent Option 1 changes participants' behavior, it could result in more observed fishing effort/trips that more accurately reflect legitimate fishing effort, thus reducing the effects of "observer tows/sets" on the overall dataset. However, it is not clear that there is a sufficient economic disincentive to prevent operators from making "observer tows" before and/or after noon solely to meet coverage requirements under Option 1. Shifting the observer day to noon to noon may slightly reduce the incentive, but the potential impact on fleet behavior cannot be quantified. As stated above, there may be a benefit to changing the fishing day definition to correspond to the same timeframe as fishing openings and closures. In sum, the primary benefit would likely result from the implementation of Alternative 2 and would be further enhanced by the addition of Option 1. NMFS has not identified any major impediments to implementing Option 1.

Note also that there may be other ways to revise Federal regulations than the changes proposed under Alternative 2, Option 1 that would result in the same outcome. One way would be to change the definition of fishing day, as proposed under Option 1 in 50 CFR 679.2, but add the new requirement (i.e., an observer must be onboard for all gear retrievals during the fishing day in order for that day to count as a day of observer coverage) in the portion of the regulations that governs the 30 percent fleet (50 CFR 679.50(c)(1)(v)). This would limit putting important regulatory instructions related to observer coverage in the definition portion of the regulations. In effect, the Council's preferred alternative of Alternative 2, Option 1, could also be implemented in Federal regulations as follows:

50 CFR 679.2:

Fishing day means ~~to~~ (for purposes of subpart E) a 24-hour period, from ~~0001~~ **1201** hours A.l.t. through ~~2400~~ **1200** hours A.l.t., in which fishing gear is retrieved and groundfish are retained. Days during which a vessel only delivers unsorted codends to a processor are not fishing days.

50 CFR 679.50(c)(1)(v):

A catcher/processor or catcher vessel equal to or greater than 60 ft (18.3 m) LOA, but less than 125 ft (38.1 m) LOA, that participates for more than 3 fishing days (**as defined at §679.2**) in a directed fishery for groundfish in a calendar quarter must carry an observer during at least 30 percent of its fishing days in that calendar quarter and at all times during at least one fishing trip in that calendar quarter for each of the groundfish categories defined under paragraph (c)(2) of this section in which the vessel participates. **An observer must be on board for all gear retrievals during the fishing day in order for that day to count as a day of observer coverage**

Alternative 3

Alternative 3. Establish regulations under 50 CFR 679.7 prohibiting activities that result in non-representative fishing behavior from counting toward an observer coverage day.

Alternative 3 proposes another regulatory solution to the issues identified under the status quo, which would prohibit the activities that NMFS is trying to prevent. NMFS' intent for Alternative 3 was to

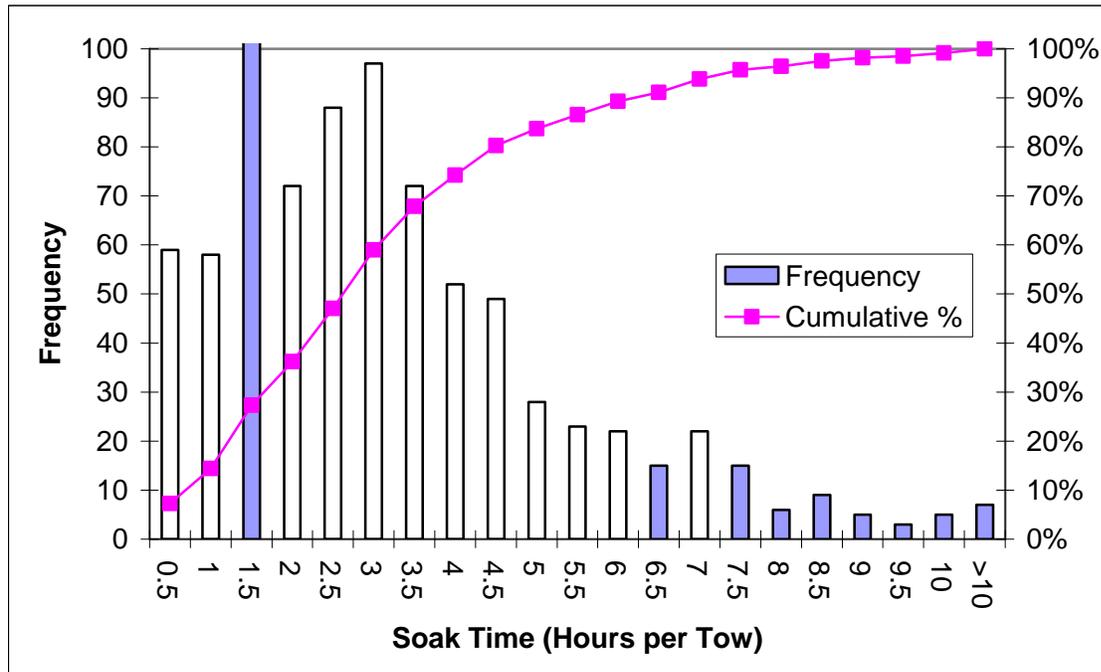
identify through analysis activities or behaviors that are specific to vessels exhibiting strategic behavior only to obtain observer coverage, and prohibit those activities. NOAA OLE could review activities on a case-by-case basis and prosecute cases, as necessary. The challenge is to identify and eliminate specific activities and behaviors that result in fishing solely for “observer coverage” (strategic behavior), but not affect normal fishing operations. Additionally, proposed regulations must be enforceable, and not exacerbate the current problem by allowing vessels to modify their behavior further to continue to avoid meeting the intent of coverage regulations. This alternative initially was recommended for inclusion in the analysis, by the OAC.

Observer Program, Sustainable Fisheries, and OLE staff met to discuss the enforceability of identifying and prohibiting certain activities that result in non-representative fishing behavior, and whether this would reduce these behaviors. During these discussions, staff identified several candidate behaviors that could be prohibited in regulation, as outlined under Alternative 1. However, two problems with this methodology were identified. First, as noted above, it is difficult to differentiate between strategic behavior and the same activity resulting from normal fishing behavior. Of the candidate fishing behaviors that could be used to regulate strategic behavior, all could be explained by typical fishing operations. For example, short tows or brief sets may be a result of: (1) a vessel fishing only long enough to obtain necessary observer coverage, (2) prospecting for fishable concentrations, (3) poor fishing, (4) mechanical failure or human safety issues, or (5) inclement conditions.

NMFS staff analyzed data for the last several years to identify “observer tow/set” behavior. Two important potential elements of this behavior were explored in the analysis: (1) trawl vessels would likely minimize soak time; and (2) some vessel operators would attempt to maximize observer coverage days, while minimizing their time at sea (and associated costs). To explore these behaviors, the analysis examines tow duration, number of tows on a trip, catch, and the timing of tows for trawl catcher vessels with 30 percent coverage that operated in the Central GOA (statistical Area 630) in 2006. Trawl catcher vessels with a trip target of pollock were excluded from the analysis, since the pollock fisheries in this area often have opening periods of less than a full day and would, thus, not create the same set of incentives as other fisheries that are open for longer periods and may have higher bycatch levels.

As noted above, only data for trawl catcher vessels operating in the Central GOA were analyzed for this exercise, which attempted to identify whether this particular behavior (i.e., gear soak time) could be used to effectively determine whether operators were conducting unrepresentative fishing (and thus, potentially be used as a candidate behavior to be prohibited in regulation under Alternative 3). Fixed gear fisheries are therefore not included in this example. Trawl behavior was used as the example in this case because NMFS had previously identified a behavioral pattern that was suspected of being characteristic of “observer tows” that could be compared within the broader context of the Kodiak trawl fishery. This pattern was not as easily identifiable for hook-and-line vessels.

Figure 8 Soak time, measured in hours, as distributed across catcher vessels in statistical GOA Area 630 in 2006



Note: Soak time bins are delineated into half-hour increments, with the frequency of soak times and cumulative frequency provided for each bin. The maximum value for each bin is indicated on the x-axis.

The analysis explored the distribution of vessels that demonstrated soak periods that were not considered “ordinary” behavior. As a fleet, catcher vessels typically fish two or more days and have soak times, for each tow, that are typically less than 5 hours in length, with most occurring between 1.5 to 3 hours in duration (Figure 8). Tows of less than 1 hour (first two bins in Figure 8) were examined based on the assumption that “observer tows” would likely occur at shorter tow durations. Tows of 1 hour or less comprise about 14 percent of the total tows. For comparison, information about tows of between 1 and 2.5 hours, is provided in Table 11. A reduction in the amount of catch and number of tows was observed. While this behavior might be attributed to “observer tows” being made, the reduction in catch may also be a result of less fishing effort (and, thus, less catch) and other variables such as gear failure or weather conditions, which would change durations and catch amounts. For these reasons, the analysts could not identify an “observer tow” by only looking at soak time and catch amounts.

Table 11 Soak periods compared to various catch statistics

	Number of vessels	Number of trips	Average number of tows per trip	Average catch per trip	Average catch per tow	Average soak period per trip	Average soak period per tow
Tows with soak periods less than or equal to 2.5 hours and greater than 1.0 hours	34	121	2.3	21.3 mt	9.4 mt	4.0 hours	1.8 hours
Tow with soak periods less than or equal to 1 hour	31	84	1.5	6.7 mt	4.5 mt	0.84 hour	0.56 hours

Note: Individual vessels can appear in multiple categories.

The analysis also explores the effect of trip duration on the count of tows, catch, and soak periods. These results are summarized in Table 12. Generally, more tows were made on multi-day trips; however, catch rates per tow were comparable for multi-day and single day trips. Vessels on a multi day trips that only made two tows per trip showed a substantial drop in catch per tow when compared with a single day trip, which had an average of 2.1 tows per trip and an average catch of 8.3 mt. The reasons for this drop in catch despite the increase in soak period per tow are unknown, but could be caused by a number of factors, including gear problems, target fishery, “observer tows” being made, weather, etc.

A total of five vessels, making 6 trips, were identified as *potentially* making “observer tows.” These vessels all made two hauls across two days, within 4 hours of midnight; behavior referred to as “paired tows around midnight” in Table 12. Generally, the tow duration for these vessels was short; however, the short tow duration was not unique to these vessels. The average tow duration was 0.81 hours, which corresponds to approximately 14 percent of all tows made by vessels (see Table 12). Thus, short soak durations may not just be a characteristic of observer tow behavior. In addition, there is not a large difference in catch amounts between multi-day vessels that made 2 tows and those that made paired tows around midnight, due to the amount of catch variation for each category.

Table 12 Trip length and midnight straddling behavior compared to various catch statistics

Trip Category	Number of vessels	Number of trips	Average number of tows per trip	Average catch per trip	Average catch per tow	Average soak period per trip	Average soak period per tow
Multi-day trips	33	129	5.7	55.2 mt	9.8 mt	18.0 hours	3.2 hours
Single day trips	26	40	2.1	17.2 mt	8.3 mt	4.1 hours	2.0 hours
Multi-day trips with 2 tows per trip	9	13	NA	5.4 mt	2.7 mt	4.8 hours	2.4 hours
Paired tows around midnight	5	6	NA	3.9 mt	2.0 mt	1.65 hours	0.81 hours

Note: “Paired tows around midnight” refers to a vessel with two tows on a trip that are within 8 hours of midnight, but straddling two days. For example one haul at 22:30 and another at 1:20. Individual vessels can appear in multiple categories.

Analysts were unable to determine from these data which hauls were from vessels only exhibiting strategic behavior, and those that were conducting normal fishing operations. This is because there is a large amount of variability in the data that may obscure behavior patterns that characterize an “observer tow.” This variability is a result of fishery characteristics that make identification of covariates difficult, if not impossible. In other words, prohibiting behavior based on this analysis of these data is unlikely to result in completely eliminating a vessel’s ability to conduct “observer tows”, and may reduce a vessel’s ability to conduct normal fishing operations.

Second, for each candidate behavior that could be prohibited, staff determined that the regulatory fix could be circumvented, and potentially even exacerbate the identified problem. For example, if analysis determined that a large percentage of strategic behavior resulted in hauls of less than 300 kg, regulations could be promulgated that prohibited counting hauls of less than 300 kg as applying towards coverage requirements. In addition to the fact that vessels sometimes take small hauls to determine fishing quality, or that equipment may break early in a tow, requiring early haul backs, vessel captains could circumvent this prohibition by ensuring catch amounts exceeded 300 kg. Vessels interested in only fishing to obtain

required observer coverage would only need to exceed 300 kg by a very small amount, which would not meet the intent of the coverage requirements to obtain data from representative fishing behavior.

Analysis was not conducted to identify the impacts of “observer tows” on the outputs of NMFS catch accounting system. However, NMFS did consider different ways to analyze these impacts. For example, NMFS considered and discussed initiating a project to extract the specific tows that were definitively identified as ‘observer tows’ from the data, and analyze the impacts to the catch accounting system. However, NMFS is concerned about doing this work on the production system, as it would alter existing records and reports. To conduct this work, NMFS would need to construct a test database that mirrors the production system, and then conduct any analytical work on that test system. A test system does not currently exist, and resources are currently fully allocated, in both the AFSC and Regional offices, to ensuring our production data systems are ready for the 2008 fishing year. NMFS also considered examining a smaller subset of the data, which could be used as an example. This approach, however, would not result in a comprehensive analysis, and would also require development of a test system which mirrors the production data system.

The above analyses would identify the magnitude of impact from the ‘observer tows’ identified above. However, it is important to recognize that the analysts have not identified a viable regulatory solution to this problem. NMFS has recommended that any additional analytical work on this issue only be considered, should the Council proceed with broad restructuring of the Observer Program.¹⁷

For the reasons described above, staff has determined that regulatory options available under Alternative 3 would not be enforceable, and would not reduce instances of vessels fishing only to obtain required observer coverage (i.e., would fail to achieve the objectives of the action).

2.5.5 Issue 5: Observer program cost information

Currently, NMFS lacks precise information on the total costs, and components of those costs, for the industry-funded portion of the groundfish observer program. Thus, NMFS is not able to assess the various cost components of the existing groundfish observer program, using information required in the current regulations.

Federal regulations (50 CFR 679.50(i)(2)(x)(G)) require observer providers to submit a completed and unaltered copy of each type of signed and valid contract between the observer provider and those entities requiring observer services. Signed and valid contracts include the contracts an observer provider has with vessels and shoreside or stationary floating processors required to have observer coverage, as well as the contracts the observer provider has with observers. Upon request by NMFS, observer providers must also provide a complete and unaltered copy of the most recent contract between the provider and a particular vessel or processor or a specific observer. These contracts submitted to NMFS provide only a daily rate for observer services and observer contracts that are submitted contain only pay and per diem rates for observers.

The action alternatives under Issue 5 propose requiring specific types of cost information from observer providers to address common analytical questions regarding the baseline costs of the existing groundfish

¹⁷The December 2007 SSC minutes note the following: “Issue 4, which revises the definition of a fishing day, addresses but does not fix the issue of non-representative fishing behavior (and perhaps location) when an observer is on board. This issue has long been a concern of the SSC. In March 2003, the SSC suggested an experimental approach may be of value in evaluating the potential bias that may occur in observer data....Rather than waiting for the entire observer program to be restructured, the SSC suggests that NMFS seek additional funds to conduct something like the experimental approach outlined above.” See the December 2007 SSC minutes for an explanation of the experimental approach suggested by the SSC.

observer program. Each action alternative involves revisions to existing regulations that would establish new requirements for mandatory cost reporting by observer providers. This approach to gathering more complete cost information was discussed at the Council's OAC meeting in May 2007. The outcome of the OAC meeting provided the Council with two alternatives to collect cost information from observer providers. Alternative 2, originally proposed by NMFS, would require observer providers to report annual costs broken out by various fishery subgroups, using business expense categories of: labor, overhead, transportation, housing, food, and insurance. Alternative 3 was recommended by the OAC. It also proposed an annual cost report by fishery subgroups, but did not require observer providers to break down their costs by business expense categories. This second alternative also included options to limit mandatory cost reporting to three years, and to prohibit any person/entity receiving this cost information on behalf of NMFS, from becoming a permitted observer provider in the North Pacific.

As staff began preliminary analysis, it became evident that some clarification was needed to allow a clear comparison among the alternatives. In addition, to reflect some of the ideas discussed in the OAC meeting and in order to more fully complete the analysis, staff recommended the Council consider a fourth alternative, at its February 2008 meeting. This fourth alternative was raised during the OAC meeting and was identified in follow-up discussions with observer providers as a potential option. Alternative 4 involves submission of actual invoices for observer services to NMFS. By combining the information contained in these invoices with observer-collected information, NMFS would be able to calculate costs by fishery subcategories as needed. Alternative 4 builds on the original concept of using billing information from invoices to calculate observer costs, thus preserving the OAC and Council's intent to utilize invoices and reduce the reporting burden on observer providers.

In sum, at its February 2008 meeting, the Council approved the four alternatives and options that were evaluated under Issue 5:

Alternative 1. No action. Observer providers would not be required to report various subcategories of costs to NMFS.

Alternative 2. Require observer providers to report annual costs to NMFS according to the following subcategories: labor, overhead, transportation, housing, food, and insurance. This information would be reported on an annual basis, broken out by BSAI versus GOA fisheries, and by shoreside, 30 percent, 100 percent, and 200 percent covered vessel/processor categories and gear type.

Option 1: Limit the mandatory economic data collection program to three years.

Option 2: Prohibit a person/entity that receives this confidential information on behalf of NMFS from being certified as an observer provider in the North Pacific.

Alternative 3. Require observer providers to report annual costs to NMFS by GOA and BSAI subareas; shoreside, 30%, 100% and 200% covered vessel/processor categories; and gear type.

Option 1: Limit the mandatory economic data collection program to three years.

Option 2: Prohibit a person/entity that receives this confidential information on behalf of NMFS from being certified as an observer provider in the North Pacific.

Alternative 4. Require observer providers to submit copies of actual invoices to NMFS on a monthly basis. Invoices must contain the following information:

1. Name of each individual vessel or shore plant
2. Name of observer who worked aboard each vessel or at each shore plant
3. Dates of service for each observer on each vessel or at each shore plant (include and identify dates billed that are not coverage days)
4. Rate charged per day for observer services
5. Total observer services charge (number of days multiplied by daily rate)
6. Specified transportation costs (i.e. airline, taxi, bus, etc.)
7. Any specified “other” costs not included above (i.e. excess baggage, lodging, etc.)

Option 1: Limit the mandatory economic data collection program to three years.

Option 2: Prohibit a person/entity that receives this confidential information on behalf of NMFS from being certified as an observer provider in the North Pacific.

Authority for collecting economic data

Under Section 402(a) of the Magnuson-Stevens Act (MSA), the Secretary is authorized to develop an information collection program, if the Secretary determines that additional information is beneficial for developing, implementing, or revising a fishery management plan, or for determining whether a fishery is in need of management. This program may also be initiated by a regional Council request to the Secretary. Fishery management plans must, according to Sec. 303(a)(5), specify pertinent economic data necessary to meet the Act’s requirements. Sec. 303(a)(9) adds support for economic data collection: in addition to specifying necessary economic data, fishery management plans must also be accompanied by impact statements that describe the economic and social impacts of the action. National standards also support economic data collection from observer providers. Sec. 301(a)(2) provides that FMPs be developed with the best scientific information; a data collection program would provide economic data about observer costs and contribute the best scientific information to FMP revision or development.

Section 402(a) is provided below, as amended by the Magnuson-Stevens Reauthorization Act of 2006.

SEC. 402. INFORMATION COLLECTION⁷ 16 U.S.C. 1881a

(a) COLLECTION PROGRAMS. –

- (1) COUNCIL REQUESTS. – If a Council determines that additional information would be beneficial for developing, implementing, or revising a fishery management plan or for determining whether a fishery is in need of management, the Council may request that the Secretary implement an information collection program for the fishery which would provide the types of information specified by the Council. The Secretary shall undertake such an information collection program if he determines that the need is justified, and shall promulgate regulations to implement the program within 60 days after such determination is made. If the Secretary determines that the need for an information collection program is not justified, the Secretary shall inform the Council of the reasons for such determination in writing. The determinations of the Secretary under this paragraph regarding a Council request shall be made within a reasonable period of time after receipt of that request.
- (2) SECRETARIAL INITIATION. – If the Secretary determines that additional information is necessary for developing, implementing, revising, or monitoring a fishery management plan, or for determining whether a fishery is in need of management, the Secretary may, by regulation, implement an information collection or observer program requiring submission of such additional information for the fishery.

Confidentiality of economic data

Alternatives 2, 3, and 4 propose mandatory reporting of detailed cost information by the (currently five) entities operating as observer providers in Alaskan fisheries. All mandatory cost information submitted by observer providers would be considered confidential information. These data would meet the definition of confidential information under a number of Federal statutes, as summarized in NOAA Administrative Order (NAO) 216-100. This NAO provides the principal administrative guidance on protection of confidential data, including definitions, policies, operational responsibilities and procedures, penalties, and statutory authorities. The NAO specifies conditions for authorization for access to confidential data by Federal, Council, and state employees and contractors. With respect to FOIA applicability, the NAO directs NMFS to withhold data under applicable FOIA exemptions. The NAO also directs NMFS to consider all other laws that protect data confidentiality, such as the Privacy Act and Trade Secrets Act. Any individual who receives access to confidential data must sign an agreement of nondisclosure, violation of which is punishable by dismissal, fines, and imprisonment. Note that the NAO is not the exclusive guidance for administrators handling confidential fisheries data. Federal regulations at 50 CFR 600.405, et seq, also address how to handle confidential fisheries data.

Collection, maintenance, and protection of confidential data are routinely conducted by NMFS, and procedures for preventing disclosure are well-established. For example, to prevent the release of confidential data in public documents, there are rules for aggregating data. Given that there are only five observer providers serving the North Pacific groundfish fisheries currently, it is assumed that all cost data provided would need to be highly aggregated for release to the public. Note that there are ongoing concerns raised by the Council and industry with regard to the nature of the financial data intended to be collected under the comprehensive socioeconomic data collection program currently being developed for vessels and processors by the AFSC.

In addition, at the December 2006 meeting, the Council requested that staff develop protocols for Council review to address rules for aggregation to maintain data confidentiality, and assess the quality of the data to ensure accuracy of data collected in the crab economic data reporting system. AFSC staff noted at the April 2007 Council meeting that, because the comprehensive data collection program is similar in nature to the crab economic data reporting program, it is expected that the data handling protocols developed for the crab data could also apply to these new data.¹⁸ The Council will have an opportunity to review these protocols as they are developed, and the first update on the progress of development of confidentiality and data quality protocols was received at the October 2007 Council meeting. It is expected that confidential financial information from observer providers collected under Alternative 2, 3, or 4 would also be subject to protocols consistent with those developed for crab and the comprehensive socioeconomic data collection program.

Section 402(b) of the Magnuson-Stevens Act, as recently amended by the Magnuson Stevens Reauthorization Act of 2006 (MSRA), pertains to confidentiality of information. Section 402(b) provides that any information submitted to the Secretary in compliance with any requirement under the Act is considered confidential. The amendments to Section 402(b) included: 1) a few additional disclosures for information that is considered confidential under the MSA, and 2) stricter standards by which the government can disclose information to entities that are authorized to receive this information. This section is provided as Appendix 3 to this document.

The MSRA strengthened data protection in a number of ways, primarily by articulating standards for disclosing to persons authorized to work with confidential fisheries information and by establishing a

¹⁸Comprehensive Socioeconomic Data Collection for Alaskan Fisheries: A Discussion and Suggestions, AFSC, Seattle WA, pp. 17- 18.

categorical protection for observer information. Observer information is defined in the MSRA and it captures a wide variety of information. Because the MSRA established a variety of new and additional data confidentiality provisions, NAO 216-100 is scheduled for revision in the next year. A NMFS workshop to develop NAO revision recommendations is scheduled to be held January 15 -17, in Seattle, Washington. Additional information on the effects of the MSRA on observer data confidentiality will be provided in subsequent versions of this analysis.

Note that in May 2007, the observer providers present at the OAC meeting appeared to have fewer concerns with providing proprietary information to NMFS than with the potential implementation of the confidentiality provisions provided in the MSA. Several members expressed a lack of confidence in the confidentiality aspects of the proposed action alternatives. The confidentiality issue in this case is exacerbated by the fact that there are only five observer providers, three of which provide the majority of observer days. In addition, some providers also service small specific markets. Thus, there is concern that even aggregation rules may not prevent the public from being able to discern confidential cost information relative to a specific provider. NMFS would still be able to analyze and understand cost differences, but great care would need to be exercised in public disclosures to ensure confidential information was not made public. In some cases, certain disclosures could not be made without releases of confidentiality from the observer providers.

Alternative 1

Alternative 1. No action. Observer providers would not be required to report various subcategories of costs to NMFS.

As stated above, existing Federal regulations require observer providers to submit a completed and unaltered copy of each type of signed and valid contract between the observer provider and those entities requiring observer services and observers. The cost information in observer providers' current contracts with industry and observers includes the following:

1. Daily fees charged to industry. These vary by observer provider and vessel/plant coverage requirement levels.
2. Daily rates of pay for observers. These vary by experience level and activity (i.e. time spent working, waiting, traveling, briefing, training, debriefing, etc.)
3. Meal and lodging (per diem) reimbursement for observers. This varies by location.

In addition, some contracts identify other particular components of cost, specific to individual contractors. Those cost components are not identified in this analysis, in order to protect confidentiality.

NMFS has collected a limited amount of other cost information, voluntarily, from observer providers. Cooperation on the part of observer providers has varied, and verification for accuracy is not possible. The type of cost information collected voluntarily has included:

1. Airline costs
2. Reimbursement costs for ground transportation while deployed (i.e. taxi fares)
3. Reimbursement costs for excess baggage fees charged by airlines

NMFS has used this information, as well as estimates of airfare costs and per diem rates, in past analyses, to develop a roughly estimated cost per day of \$355¹⁹. However, this figure is currently out-dated and the

¹⁹ Based on an estimated daily cost of \$355/day for 2000-2003 which includes estimated travel costs of \$25/day and meal costs of \$15/day

use of this information is relatively limited. For instance, the information cannot be used to compare costs between sectors of the industry, except in the crudest of manners (e.g., Sector A incurred X percent of observer costs, based on days of coverage, of Sector B).

The need for more detailed cost information has been highlighted by recent requirements for vessels and processors participating in the BSAI crab rationalization program and the cooperative structure proposed under BSAI Amendment 80 for the non-AFA trawl catcher processor fleet. Only in these recent programs has socioeconomic data collection been mandated, in order to conduct sufficient economic analyses to determine whether and how these programs are working.

In addition, NMFS staff in the Economic and Social Sciences Research Program at the Alaska Fisheries Science Center, are currently working with the Council and State agencies to develop a mandatory data collection program for vessels and processing plants participating in Alaskan fisheries. The intent is to develop a comprehensive program for collecting revenue, ownership, employment, cost, and expenditure data from each vessel and processor. Prior to implementation, Federal fisheries management actions must first undergo sufficient economic analysis as required by the MSA, NEPA, Executive Order 12866, and other applicable Federal laws. At present, analysts can rarely calculate the net benefits generated by Alaska's fisheries and, thus, frequently cannot quantitatively account for all impacts accruing to parties affected by proposed fisheries management decisions.

The comprehensive mandatory economic data collection program is, thus, intended to capture a core set of data that is currently unavailable, yet necessary, to answer many of the analytical questions raised when evaluating past and future management decisions and conducting regulatory analyses. The primary goal is to better inform decision-makers and improve decision-making capability by improving 1) the ability to account for the relevant entities whose economic welfare is affected by Alaskan fisheries; and 2) the knowledge of the elements that comprise each entity's net economic performance.²⁰ In terms of relevant entities, the Council has expressed a need to consider not only the harvesting sector, but also the shoreside processors, motherships, crewmembers, and communities involved in Alaska's fisheries.²¹

Under the status quo, NMFS currently lacks sufficiently detailed information on the costs incurred by observer providers in order to inform analyses as to the costs of the portion of the groundfish observer program funded by vessels and processors required to meet specified observer coverage levels. Recent analyses have provided an estimation of about \$16 million, annually, to implement the program, with about \$12 million funded by industry.²² The average cost of the program funded by industry in both the BSAI and GOA combined, during 2000 through 2003, represented about 1.66% of groundfish ex-vessel values. These estimates are based on a daily observer cost of \$355/day (based on information collected in 2000 through 2003), which includes estimated travel costs of \$25/day and meal costs of \$15/day, based on information provided by observer providers, and a salary range for observers that approximates the 2003 unionized salary rate.

Additionally, cost information is necessary to analyze costs under a restructured observer program. If NMFS and the Council reconsider observer program restructuring, which includes a maximum fee level to cover the cost of observer services, it is necessary to know how much observer coverage is afforded

²⁰Comprehensive Socioeconomic Data Collection for Alaskan Fisheries: A Discussion and Suggestions, AFSC, Seattle WA. Presented at the April 2007 Council meeting.

²¹See the October 2006 Council motion on this issue.

²²NMFS groundfish observer program data provided in the Public Review Draft EA/RIR/IRFA for BSAI Amendment 86/GOA Amendment 76: Extension or modification of the program for observer procurement and deployment in the North Pacific (May 2006). Note that the NMFS cost for the groundfish observer program was \$4.8 million in 2007.

under that maximum. A comprehensive cost collection program would allow analysts to better understand the costs that would likely occur under a service delivery model where NMFS contracts directly with observer providers.

The standard observer cost of \$355/day is typically used in analyses supporting a proposed fisheries management action, although these costs vary on a case by case basis, depending on the fishery, duration of observer coverage, and logistics. Specifically, in some smaller scale short duration fisheries that operate out of remote ports, observer costs may greatly exceed \$355/day. Some of the factors that tend to increase observer coverage costs for certain vessels, shoreside processors, and fisheries under the status quo include:

- *Operation out of remote ports with high transportation costs.* Observer costs generally factor in airfare to major fishing ports, such as Kodiak and Dutch Harbor that receive regular air service from Anchorage. When vessel operators or shoreside processors wish to obtain coverage in more remote ports or rural locations that require chartered air service, transportation costs can greatly increase.
- *Short-term “pulse” fisheries.* When vessel operators wish to obtain coverage for short-term fisheries, the costs of coverage may increase, because observer providers do not have the time to rotate observers through a pool of 30% covered vessels. In these instances, a vessel operator may be forced to pay the entire transportation cost for the observer, when those costs cannot be shared with a pool of other vessels operating in the same fishery, due to the short duration of the opening. In addition, shoreside processors processing multiple, but low volume, species may be required to pay the entire cost of an observer, in anticipation of a higher volume fishery that does not materialize.
- *Small-scale fisheries with few participants.* The fewer the number of participants in a particular fishery, the more difficult it will be for observer providers to develop cost-effective methods of rotating observers among vessels. At the extreme, a single vessel fishing alone, out of a remote port, will realize the highest coverage costs, because there are no other vessels across which transportation and logistical costs of making an observer available can be distributed.
- *Fishery disruptions, changing plans, and lack of advance planning.* Observer providers are often able to contain costs to industry by carefully managing the number of observers they have deployed at any given moment, to minimize the number of observers who are on salary in Alaska, but not deployed. This requires careful coordination between observer providers and the fishing industry, such that observer providers can anticipate when and where observers will be needed. However, the nature of the fishing industry is such that vessel operators and shoreside processors cannot always anticipate when and where they will need future coverage. Adverse weather, breakdowns, changing markets, and unexpected fishery closures can force fishermen to change plans at the last minute. Fishermen who unexpectedly require observer coverage, whether due to external circumstances or poor planning, often find that the cost of last-minute coverage can greatly exceed the average daily rates, primarily because an available, qualified observer must be located and often transported from another remote location.

Anecdotal information from observer providers has suggested that when the above circumstances occur, it is not uncommon for observer coverage costs to exceed \$500 per day, and potentially be as high as double the \$355 per day rate used in most current analyses.²³ These disproportionately high daily costs are typically borne by small-scale GOA fishermen who operate in short-term openings and out of remote

²³Public review draft of BSAI FMP Amendment 86/GOA FMP Amendment 76; May 12, 2006, p. 138.

fishing ports. Observer providers servicing larger fleets that operate in longer-term fisheries and generally out of the major ports of the BSAI, such as Dutch Harbor, are typically better able to avoid the logistical and travel costs that increase costs in smaller, more remote fisheries. Note that to a large extent, these examples of disproportionately high coverage costs are inherently part of the current service delivery model, in which individual vessels with coverage requirements are required to obtain coverage for specified periods of time. The current system does not provide flexibility to observer providers and NMFS to shift coverage around in a more efficient manner, in order to achieve the greatest level of fleet-wide coverage for the “partially observed fleet”, rather than to meet specific coverage level requirements for each individual vessel.

Thus, observer costs differ greatly by sector, fishery, coverage-level, and year, as do the cost components that factor into the daily rate. Under Alternative 1, it is expected that NMFS would continue to use an estimated daily rate, multiplied by the number of observer days incurred by vessels and processors, in order to assess the baseline component of any proposed regulatory change to the observer program on the various fishery sectors. NMFS and the Council would continue to make use of the best available data in the development of FMP and regulatory analyses, recognizing the data limitations under the status quo.

Alternative 2

Alternative 2. Require observer providers to report annual costs to NMFS, according to the following subcategories: labor, overhead, transportation, housing, food, and insurance. This information would be reported on an annual basis, broken out by BSAI versus GOA fisheries, and by shoreside, 30 percent, 100 percent, and 200 percent covered vessel/processor categories and gear type.

Option 1: Limit the mandatory economic data collection program to three years.

Option 2: Prohibit a person/entity that receives this confidential information on behalf of NMFS from being permitted as an observer provider in the North Pacific.

A primary issue to consider when designing a data collection program is whether to collect information from all fishery participants or only specific sectors of the fishery. The preferred general approach by NMFS, as indicated under Alternatives 2, 3, and 4, is to collect observer cost information from the observer companies that provide observer services in the North Pacific groundfish fisheries. This approach is preferable to collecting observer cost information from individual vessels and processors, in part, because only observer companies can provide actual cost information relevant to some of the identified categories (e.g., overhead). In addition, the information would be submitted by a small number of observer providers and aggregated consistently by category, compared to receiving information from a large number of vessels and processors. Given that there are currently only five observer providers, data would be collected from all five companies, as opposed to sampling a subset.

Alternative 2 would require observer providers to report costs to NMFS by a specified date, according to various subcategories. The impetus for the proposed action is that more accurate estimates are necessary to adequately assess the baseline component of proposed regulatory changes to the observer program on the various fishery sectors, and mandatory cost reporting is one approach to meet this goal.

Two terms from the alternative could be defined. First, the term “labor” could be defined as the cost of observer salaries, and could differentiate between observer salaries while deployed (actively working), waiting on shore for an assignment, debriefing, and during briefing or training (assuming these distinctions are exhaustive and appropriate). Second, the term “overhead” could be defined to include gross revenues, non-observer staff salaries, the cost of maintaining an office (i.e., utilities, rent, etc.), the

cost of maintaining permanent observer housing (i.e., rent/mortgage, utilities, maintenance and upkeep, etc.), and anything else that is incorporated into billable costs to the industry, but not reflected in one of the other five expense categories.

Additionally, several observer providers conduct business other than providing observers in the North Pacific, such as providing observer services for other observer programs. While “aggregate” total gross receipts for each company, from all sources, including affiliates, worldwide, is needed for purposes of meeting RFA analytical obligations, detailed cost data associated with these other operations, would not be requested or compiled by NMFS. Only those costs directly attributable to providing observer services in the North Pacific groundfish fishery are relevant to this action.

NMFS is not able to assess the various cost components of the existing groundfish observer program with the information currently required through Federal regulations. All of the observer provider contracts with fishing industry clients that are currently submitted to NMFS provide only the daily rate for observer services. In Alternative 2, the proposed cost categories identify specific types of information that could be collected to address common questions regarding the baseline costs of the existing program. Collecting information on variable costs would allow analysts to evaluate the differences in costs by vessel/processor type, gear type, coverage level, and region, as well as the fraction of the total cost associated with observer remuneration, versus travel/overhead (logistical and fixed costs). This information is necessary, to analyze the cost of the status quo, as well as costs under a restructured observer program.

The primary benefit of this alternative is that this information would allow for a more accurate assessment of costs and benefits under potential management program changes, which may benefit the groundfish observer program and the fisheries dependent upon observer data for management. Current cost reporting may under or over estimate actual observer costs, and decision makers may not have an accurate understanding of the effects of a particular program. If program cost information were accurately collected under this alternative, analysts would be better positioned to compare the costs and benefits of a particular management program, or as changes to monitoring programs are needed, to ensure quality data collections. The Council, NMFS, and public would benefit, because they would better understand the effects of a proposed management action, and more informed decisions could be made.

A disadvantage of this type of approach for Alternative 2 (and Alternative 3) is that NMFS would rely on self reported data, and these data are not independently verifiable by NMFS. Observer providers may have incentives to misreport costs, and biased data could mischaracterize costs. As noted elsewhere, inaccurate reported costs could create funding issues for a restructured observer program, if the actual costs of observer coverage are underreported, thus reducing the benefits of this alternative. In general, NMFS prefers to rely on verifiable information. While intentional misreporting by observer providers could be subject to enforcement action, NMFS does not have the authority to audit observer providers and may not be able to create enforceable actions against misreporting activities. However, it is not likely that all five existing providers would collude on reported data and operators/owners who pay observer costs would not voice objections to misreported costs.

Another consideration with Alternatives 2 and 3 is the fact that NMFS will be receiving one annual report of costs, with no accompanying raw data or explanation of how cost figures within the report were calculated. Therefore, NMFS will not be able to verify cost information and cost calculation methodology, and will have to accept the reports at face value. If individual cost figures are questioned by the industry, Council, or others, NMFS will not have the information necessary to check computations and validate the cost figures given by the observer providers.

The primary cost of this alternative would be the administrative costs incurred by the observer providers. These administrative costs would be for the staff time and resources necessary to organize, maintain, and compile the requisite cost information on an annual basis. To assess the potential administrative cost, NMFS conducted an informal survey of all five observer providers in July 2007. Observer providers were asked to identify the kind of information on their current industry invoices and the general feasibility of providing the information required under both Alternatives 2 and 3. All invoices used by the observer providers contained a minimal amount of information consisting of some or all of the following:

1. Vessel, shore plant, or fishing company name
2. Observer name
3. Dates of service (sometimes includes days other than coverage days)
4. Daily rate
5. Total observer services charge (number of days multiplied by daily rate)
6. Transportation costs (usually airline and ground transportation costs)
7. Other costs (i.e. excess baggage, food, lodging, etc.)

Responses as to the feasibility of providing the information required under Alternatives 2 and 3 ranged from “none of the subcategories of information can be calculated” to “all information can be provided.” All five observer providers said calculating the information required under either action alternative would represent an additional workload to their current bookkeeping. Based on survey responses, the estimated amount of additional work varied from “significant” to “not too much.”

In addition, observer providers would need to assess how best to allocate overhead to the groundfish program. This issue could be complex for providers who conduct business outside of the groundfish program. Several observer providers also provide observers to the State of Alaska crab observer program. Some providers may also have other unrelated business interests which utilize shared staff and space. NMFS could define a method of overhead allocation, or leave it to the providers to provide their best estimate. Leaving it to the providers may result in differences between them in this calculation and uncertainty about the resulting number. In contrast, a NMFS formulation, albeit consistent, may not be the best method for any given provider. However, since these are gross annual estimates, and not transaction-by-transaction accounting, a standardized formula could, if adhered to, yield estimates that provide sufficiently accurate information to allow for its intended uses.

Alternative 3

Alternative 3. Require observer providers to report annual costs to NMFS by GOA and BSAI subareas; shoreside, 30%, 100% and 200% covered vessel/processor categories; and gear type.

Option 1: Limit the mandatory economic data collection program to three years.

Option 2: Prohibit a person/entity that receives this confidential information on behalf of NMFS from being permitted as an observer provider in the North Pacific.

Alternative 3 would require observer providers to submit annual cost information, broken out by BSAI and GOA areas, and by 30 percent, 100 percent, and 200 percent covered vessel/processor categories, and gear type. Both Alternatives 2 and 3 require costs to be tabulated by the same fishery subgroups, but Alternative 2 requires further division of costs into expense categories (i.e. labor, insurance, overhead, etc.). Thus, Alternative 3 would require observer providers to submit less detailed cost information than Alternative 2. Because of this, it would likely be easier and less costly for observer providers to comply with Alternative 3 as compared with Alternative 2. On the other hand, in order to “aggregate” individual data observations into categorical totals, they must derive a subtotal for every cost component under the

given category. In this respect, it may actually require one additional bookkeeping step (i.e., summation) to produce the mandated data under Alternative 3, as compared to Alternative 2.

To further demonstrate this point, consider that with two subareas (GOA & BSAI), three coverage categories (30%, 100% , and 200%), five vessel/processor types (mothership, catcher/processor, catcher vessel, shoreside processor, and floating processor) and three gear types (trawl, hook-and-line, and pot), it is possible that an observer provider working, in both the BSAI and GOA and covering all vessel/process/gear/coverage types, would have to divide their yearly costs into approximately 38 fishery subcategories. Adding six expense categories to this level of sub-division, as would be required under Alternative 2, potentially increases the complexity of the task. The same hypothetical observer provider that works in both the BSAI and GOA and covers all vessel/plant/gear/coverage types could be required to divide their yearly costs into approximately 228 fishery/operating expense subcategories under Alternative 2.

This level of complexity may be somewhat more difficult to achieve with a high level of accuracy, although presumably all observer providers employ professional accounting services, which presumably use computers and accounting software that would make these calculations less burdensome and sufficiently precise. After all, they “bill” these same accounts with high levels of accuracy (one presumes). The observer providers would most likely need to hire additional accounting/bookkeeping services to try and divide their annual costs into the many subcategories that would be required under Alternative 2.

As has been stated earlier, the benefits of Alternatives 2 and 3 lie in the ability of analysts to more accurately analyze the comparative observer coverage costs between fishery sectors. This type of cost information would assist NMFS and the Council in making decisions concerning observer coverage requirements. For example, under both Alternatives 2 and 3, if NMFS wanted to know the total cost of placing observers on the 30% trawl fleet in the GOA during 2007, the cost could be calculated. However, if NMFS wanted to know the fixed costs (overhead) for observer provider companies associated with supplying observers to this same fishery sector, only Alternative 2 would provide the answer. Under Alternative 1 (status quo), neither question could be answered.

Alternative 4 (Council preferred alternative)

Alternative 4. Require observer providers to submit copies of actual invoices to NMFS on a monthly basis. Invoices must contain the following information:

1. Name of each individual vessel or shore plant
2. Name of observer who worked aboard each vessel or at each shore plant
3. Dates of service for each observer on each vessel or at each shore plant (include and identify dates billed that are not coverage days)
4. Rate charged per day for observer services
5. Total observer services charge (number of days multiplied by daily rate)
6. Specified transportation costs (e.g., airline, taxi, bus, etc.)
7. Any specified “other” costs, not included above (e.g., excess baggage, lodging, etc.)

Option 1: Limit the mandatory economic data collection program to three years.

Option 2: Prohibit a person/entity that receives this confidential information on behalf of NMFS from being permitted as an observer provider in the North Pacific.

During the May 2007 OAC meeting, some observer providers suggested submitting invoices to NMFS and allowing NMFS to consolidate them into reports, as necessary. This suggestion is represented in this

alternative. The intent of Alternative 4 is to require observer providers to submit to NMFS standardized invoices on a monthly basis, with specified information in each invoice. NMFS could enter the raw data into a confidential data base and compile and provide this information to analysts to support future management actions.

As stated previously, an informal survey of all five observer providers was conducted in July 2007. NMFS collected information about the contents of typical invoices and found that all invoices used by the observer providers contained a minimal amount of information consisting of some or all of the following:

1. Vessel, shore plant, or fishing company name
2. Observer name
3. Dates of service (sometimes includes days other than coverage days)
4. Daily rate
5. Total observer services charge (number of days multiplied by daily rate)
6. Transportation costs (usually airline and ground transportation costs)
7. Other costs (i.e. excess baggage, food, lodging, etc.)

This information was used in developing the required information for invoices under Alternative 4. NMFS believes that the standardized invoice format will not represent a substantial burden for observer providers, because invoice information requirements would be very similar to what observer providers already include on their invoices. In other words, their current invoicing system would not need to change, or would only change minimally, to meet the requirements of Alternative 4. In addition, NMFS would be able to verify if they have received all invoices, because they have an independent accounting of observer deployments.

For the reasons described earlier, NMFS prefers to collect verifiable information whenever possible. Because copies of actual billing invoices would be submitted to NMFS, and each invoice would contain standardized information, opportunities for intentional misreporting under this alternative would be minimized.

Costs for observer providers associated with this alternative could be less than under Alternatives 2 and 3. Rather than collating costs by specified category, and reporting these costs to NMFS on an annual basis, observer providers would provide NMFS with copies of their billing invoices. This process would be much less burdensome for observer providers, and could reduce costs compared to Alternatives 2 and 3. Because NMFS would enter raw data into a database for later analysis, this alternative would increase agency costs substantially, when compared to Alternative 2 or Alternative 3. However, the increased analytical flexibility, and reduced opportunity for intentional and unintentional misreporting may mitigate these costs.

Alternative 4 has two advantages over Alternatives 2 and 3. First, as noted above, observer provider reported information would be verifiable by NMFS. This would increase the data quality for analytical and decision-making purposes. Second, this approach to economic data collection allows increased flexibility in terms of data analysis. Rather than observer providers summarizing their cost information into required subcategories, much of the raw data used to calculate that information would be reported to NMFS, and NMFS could analyze and report the data in various ways and combinations as needed. As an example, one could analyze the total cost of observer coverage for the 72-hour directed pollock fishery in Area 620 in 2007, by using the location and catch detail provided in the observer database, coupled with the cost information provided in the observer provider invoices. Alternative 4 is the only alternative under consideration that could answer such a question of this type.

The main disadvantage of Alternative 4 is that the cost of data preparation and analysis would be incurred exclusively by NMFS. However, NMFS would be able to allocate resources towards cost analysis only as needed, whereas under Alternative 2 or 3, observer providers would be required annually to conduct extensive cost analysis to the same degree of detail to meet reporting requirements. A second disadvantage of Alternative 4 is that raw invoices will not allow NMFS to derive estimates of fixed costs, nor apportionment of overhead when a provider also engages in economic activities unrelated to providing groundfish observers to the industry off Alaska. While, presumably, each invoice will reflect the company's internal calculation of the incremental share of overhead, fixed costs, and normal economic profit each client is levied, precisely how much each of these categories represent of the unit price of observer services, will be completely indeterminate from examining the invoice data.

Options under Alternatives 2, 3, and 4

Alternatives 2, 3 and 4 include the same two options for consideration. Option 1 would limit the mandatory economic data collection program to three years. The intent of this provision is to reduce the administrative cost placed on observer providers. Three years was selected as a reasonable period of time in which to require this type of information to be submitted to NMFS. The benefits of Option 1 are, thus, in the reduced long-term cost to observer providers. As previously stated, the informal survey of the five current observer providers indicated that the amount of effort estimated to provide the information required in Alternatives 2 and 3 ranged from "significant" to "not too much." Since NMFS does not have access to any of the observer providers' business information, it is very difficult to estimate how much of an added financial burden would be placed on the observer providers under Alternatives 2 or 3. However, for the reasons described in the previous section, Alternative 4 would be much less of an added burden for observer providers, when compared to either Alternative 2 or 3.

Option 1 in combination with Alternative 4, would impose a higher cost on NMFS, however. Option 1 would require NMFS to develop a data acquisition program that would (1) systematically receive and secure raw invoices for all groundfish observer services, from each of five observer providers; (2) design data protocols for interpreting raw data from invoices; (3) enter, edit, and verify data; (4) create a data storage and retrieval structure with necessary safeguards against release of confidential data; (5) establish a dataset maintenance protocol; and (6) institute rules of access and a means of monitoring data use. As with any such system, experience accumulated over time will result in the need for enhancements, adjustments, and improvements. A three year collection interval will likely be insufficient to either justify the cost, or allow for full ground-truthing and certification of the data management system.

The disadvantage of Option 1 is the limited term for which these data will be made available for use by analysts. While variable costs, broken out by region, coverage level, and gear type, made available for any time period, would represent an improvement over the data that are currently available, setting a limit on the collection of these data severely limits their usefulness. Regardless of the analytical product for which these data are primarily used, there will continue to be future management needs for which analyses simply cannot be done without access to this information, and many others that would benefit substantially from this type of data. If a comprehensive, long-term economic data collection program is not implemented, the data may only be appropriate to use for a few years, at which point they become outdated, inadequate, and perhaps even misleading.

The December 2007 minutes of the Scientific and Statistical Committee note the following:

"Issue 5, the requirement that observer providers provide detailed economic data, is in line with an increased emphasis by NPFMC and NMFS on the collection of social and economic data. It is an attempt to begin to accumulate the data needed to address the second obstacle to a fundamental restructuring of the observer program. However, the SSC questions the wisdom of the proposed

“sunset provision” in the collection of economic data...There are scientific and analytical justifications for acquiring data on a consistent and systematic basis over time. The SSC recommends that there be no sunset provision on the economic data collection outlined in Issue 5. The SSC also suggests that sub-sampling vessel operators to verify data reported by observer providers would be advisable.” (*SSC minutes, 12/6/07*)

Note that the Council included Option 1 as part of its preferred alternative, with a substantive change. For reasons identified in the SSC minutes above, the Council opted not to provide a sunset date for the observer provider data collection. Instead, the Council recommended that the information be submitted every third year. The SSC did not have an opportunity to provide advice to the Council regarding the policy choice to require the collection of this information every third year instead of annually. This policy decision is also discussed in Section 2.7 on the Council’s preferred alternative.

The policy choice by the Council to collect invoices every third year, instead of annually, was intended to reduce perceived costs to providers, should the invoice information be collected more frequently. The approach taken by the Council results in a data collection program that is not as complete as it could have been under Alternative 4 **without** Option 1 (either in its original or Council-modified form).

The dilemma that Council adoption of Option 1, as-modified, creates for the Agency is treated in Section 2.7. The Council’s decision to modify and adopt this revised Option 1 is fully within its prerogative. The resulting data collection program, however, does not maximize the net benefit to the Nation, as compared to Alternative 4 without Option 1, and is not the “least burdensome alternative considered, with respect to directly regulated small entities, while meeting the purposes of MSA, other applicable law, and the stated purpose of this action.”

Option 2 would prohibit a person/entity that receives confidential economic information on behalf of NMFS from becoming permitted as an observer provider in the North Pacific. This option was recommended by the OAC at its May 2007 meeting, and approved by the Council for consideration. This particular provision stems from current observer providers who are concerned that contractors, hired by NMFS in the future to do analyses involving observer provider economic and business information, could subsequently use this information to start a business and become a new observer provider in the North Pacific. Current observer providers are concerned that business information acquired by a contractor prior to becoming a permitted observer provider could be used advantageously as a competitor in the permitted observer provider marketplace.

As an example, in 2005, a company that in a previous year had been under contract with NMFS to audit the observer program, received information from each existing observer provider, and subsequently applied to become an observer provider. The contractor was permitted to become a competing observer provider for the North Pacific groundfish fisheries. While this concern was made known to NMFS at the time of permit consideration, there were no regulations that prevented the company from becoming legitimately permitted. The provision provided under Option 2 would prevent this situation from recurring. This prohibition would only apply to a person or entity applying to become a permitted observer provider in the groundfish observer program in the North Pacific.

Currently, this option considers permanently removing an entity’s ability to apply to become a permitted North Pacific groundfish observer provider, if it receives financial information from current observer providers. Consideration was given to adding a limit on the number of years this provision would be effective. Over time, the information acquired by the entity would become stale, and the competitive advantage it gained over current observer providers would be diminished. For reasons detailed in Section 2.7, the Council did not include Option 2 as part of its preferred alternative.

Comparison of alternatives

The following list highlights comparisons between the action alternatives (Alternatives 2, 3, and 4).

1. Alternatives 2 and 3 would require observer providers to report costs by the following basic categories:
 - a. Fishing area (BSAI vs. GOA)
 - b. Observer coverage level (30%, 100%, 200%)
 - c. Vessel/processor type (mothership, catcher/processor, catcher vessel, shoreside processor, floating processor)
 - d. Gear type (trawl, hook-and-line, pot)

In addition, Alternative 2 would further require allocation of costs into six expense subcategories for each basic fishery category. These include: labor, overhead, transportation, housing, food, and insurance.

2. With the information contained in the NMFS observer database, combined with the invoices submitted by observer providers under Alternative 4, NMFS would be able to calculate costs by the same basic fishery categories as Alternatives 2 and 3, and observer providers would not be burdened with these calculations. Alternative 4 in combination with the revised Option 1, is incapable of supporting detailed economic analysis in two of three years.
3. Under Alternative 4 NMFS would be able to verify that they had received cost information for each observer coverage day, by comparing observer names, vessel names, and invoice billing dates with logistics information contained in the observer database. The Council's preferred alternative which includes Option 1 as-modified, limits this verification to one in three years.
4. The only alternative that would allow NMFS to gather cost information, broken out by expense categories (e.g., overhead, transportation, housing, etc.) would be Alternative 2. However, NMFS could calculate some of these expense categories, such as airline transportation costs, under Alternative 4, without Option 1. Again, these costs could only be calculated in one out of every three years under the Council's preferred alternative.
5. Of the action alternatives, Alternatives 2 and 3 impose an increased accounting burden on observer providers compared to Alternative 4. In addition, not all observer providers may easily allocate costs by the categories required under each alternative. NMFS may assist by establishing a uniform protocol to be used in making these cost apportionments.

NMFS would not be able to verify the accuracy of the cost information provided by observer providers under Alternatives 2 and 3. While, presumably, submission of falsified information would be a criminal offense, strict verification could only be accomplished by conducting a professional audit of each observer provider's accounts. This would be a costly and invasive process and is not part of any of the proposed regulatory changes described in the alternatives.

Table 13, below, provides another way to compare and contrast the alternatives. For each of the alternatives, the table answers common analytical questions that could be raised in future analyses involving observer program restructuring or in the development of new fishery specific observer coverage requirements. These questions are examples only, and are intended to illustrate the value of economic data collections under each of the alternatives. However, these questions are only representative of the types of analytical questions likely to be asked of a future analysis.

- Question 1: What was the total cost of observer coverage in the most recent fishing year, for the 30% hook-and-line fleet in the GOA?
- Question 2: What was the cost of observer coverage during the first quarter of the most recent fishing year, for the 30% trawl fleet in the BSAI?
- Question 3: What were the transportation costs in the most recent fishing year, for observers on GOA 30% pot vessels?
- Question 4: What were the housing and food costs for observers working at GOA shoreside processors in the most recent fishing year?
- Question 5: What was the total cost of observer coverage for the 72 hour directed pollock fishery in Area 620 in the most recent fishing year?

Table 13 Representative analytical questions that could be answered by each alternative

	Question 1 answered?	Question 2 answered?	Question 3 answered?	Question 4 answered?	Question 5 answered?
Alternative 1 (No action)	No	No	No	No	No
Alternative 2 (Observer contractor provides annual costs, broken out by expense categories and fishing subcategories)	Yes, all years	No (only annual costs provided)	Yes, all years	Yes, all years	Yes, all years
Alternative 3 (Observer contractor provides annual costs broken out by fishing subcategories only.)	Yes, all years	No (only annual costs provided)	No (transportation costs are not provided)	No (housing and food costs are not provided)	No (cost information not provided in adequate temporal and spatial detail)
Alternative 4 (Observer contractor provides invoices and NMFS completes analysis in finer detail as needed, but without expense categories.)	Yes, all years	Yes, all years	Yes, all years	No (housing and food costs are not provided)	Yes, all years
Alternative 4 w/ Option 1 (Observer contractor provides invoices <u>only</u> every third year and NMFS completes analysis in finer detail, as restricted data allow, but without expense categories.)	Yes, but only in one of three years	Yes, but only in one of three years	Yes, but only in one of three years	No (housing and food costs are not provided)	Yes, but only in one of three years

Table 13 indicates that none of the alternatives answers all five questions. Under Alternative 1 (status quo), none of the questions could be answered. Under Alternative 2, four of the five questions could be answered, primarily because Alternative 2 is the only alternative that provided costs in all expense categories. Alternative 3 provided sufficient cost information to answer only one of the questions. Alternative 3 provides the least amount of cost information, except for the status quo (Alternative 1). Alternative 4, without Option 1 as-modified, would be preferable for answering most of the questions; however, because of the limited expense category information contained in the observer provider invoices, question number 4 could not be answered. In fact, question 4 was the only question that could be answered by only one of the alternatives (Alternative 2). Also, Alternative 4 without Option 1 as-modified was the only alternative that could unambiguously answer question 5 in every year. Alternative 2 may be able to answer question 5 to some extent, depending upon the level of detail required in the fishing subcategories. Alternative 4, however, may be the only alternative to provide the temporal and spatial detail necessary to fully answer question 5, although in combination with option 1 that answer could be derived only every third year. Under the Council's preferred alternative (Alternative 4 with Option 1 as-modified) NMFS would have to rely on proxy information from years when data were collected to estimate costs in years when data were not collected to answer questions 1-3 and 5.

2.5.6 Issue 6: Completion of the fishing year

NMFS staff completes quality control checks and editing to finalize all observer data, as soon as possible after the close of each fishing year. Once completed, data users can commence work, using the full annual data set. Completion of the observer data set is dependent on observers returning from sea and completing debriefing for all cruises that have data for a given year. Current regulations allow observer cruises to span two fishing years and cruises may last up to 90 days. Thus, observers deployed late in one fishing year can delay completion of the data set and its availability for analytical work until they return, possibly in the following fishing year. Under this issue, NMFS proposed revising Federal regulations to establish a calendar date cutoff, whereby observers who collect fishing data in one year would be required to return from sea and be available for debriefing.

Note that in July 2007, staff further consulted with the primary internal agency users of observer information to determine if their needs warrant consideration of this action. This is specifically in light of preliminary discussions with both the OAC and the Council that the proposed action (Alternative 2) would potentially increase indirect costs to industry (by shortening trips) with limited direct benefits. Upon review, while there is interest in obtaining a final observer dataset earlier in the year, there are no compelling analytical requirements that warrant a change to the status quo. The change is not considered necessary and any cost increase or imposition upon the industry, observer providers, or observers is not warranted.

Alternative 1 (Council preferred alternative)

Alternative 1. No action. No change would be made to existing Federal regulations allowing observer deployments to span two different fishing years and last for up to 90 days.

Currently, data users depend upon completion of the full data set for a given year, before they can begin their analyses. Completion of the observer data set is dependent on observers returning from sea and completing debriefing for all cruises for which they have collected data for a given year. An observer cruise is a unique employment period up to 90 days in which an observer may be on up to four different vessels/plants. The debriefing process is thorough, but time consuming. The complete debriefing process is summarized below:

1. *Completion of an electronic survey.* The survey is completed for each vessel or processor, and is the most detailed and accurate description of the cruise. Information documented in the survey includes, among other things, sampling methodologies, difficulties encountered during the cruise, potential violations that were witnessed, protected species interactions during the cruise, etc. Data collected by the survey are used by debriefers, future observers, fishery managers, the United States Coast Guard, NMFS enforcement, and other NMFS staff. The survey is built in multiple question format, and requires detailed explanations for some answers. Survey completion typically takes a day, but can be extended depending on the number of vessels.
2. *Data submission.* Upon completion of the vessel survey, the observer submits his or her data, printed vessel surveys, and logbook to NMFS staff. Data which has not been keypunched into the electronic database is done so at this point. Biological samples must be prepared, including scanning otolith information into a database, and mounting salmon scales for the debriefer to examine.
3. *Data and survey review.* Prior to the debriefing interview, the debriefer reviews the observer's data by visually reviewing the paper forms for obvious errors and formatting problems. The debriefer will read the survey, noting where questions should be asked during the interview. The database conducts a series of data checks designed to flag potential errors. The debriefer will review these errors. The debriefer will ensure that all data was keypunched correctly by comparing the paper forms with the electronic database. Finally, the debriefer will ensure biological samples are in order, and properly labeled. Scales from any salmon collected during the cruise are read to ensure proper species identification by the observer. This process could take anywhere from a few hours to an entire day, depending on the completeness of the vessel survey, the amount of data, and the number of vessels the observer was deployed on.
4. *Debriefing interview.* Debriefing interviews are scheduled as soon as a debriefer is available. During certain times of the year, observers may not be scheduled immediately for a debriefing due to large numbers of observers coming back at the same time. During the interview, the debriefer will ask the observer to clarify or elaborate on any issues not fully addressed in the survey. The goals are to ensure a complete record of the cruise, and to ensure the data was collected according to approved protocols. The debriefer and observer will resolve all errors flagged by the database. In some circumstances, this part of the process is the most time consuming. Some errors may never be resolved, and that data must be removed from the database.
5. *Evaluation.* An observer's work and performance are evaluated at the completion of each cruise. The evaluation serves two purposes. First, it provides a summary of the work performed, the observer's effort, and the quality of the data. Second, it serves as a tool for future deployments by giving recommendations, suggestions, and identifying areas of needed improvement.
6. *Gear Return.* An observer's gear must be cleaned by the observer and an appointment is made for gear check-in. At the time of gear return, each item is accounted for and any lost or damaged items of high value are documented. The observer's contractor is informed of the high value gear loss and they are held responsible for the replacement of this gear.

Existing Federal regulations allow observer cruises to span two fishing years, and cruises may last up to 90 days (see 50 CFR 679.50(i)(2)(vii)(B)). Thus, observers deployed late in one fishing year can delay completion of the final data set, and its availability for analytical work, for more than three months into the following year. Alternative 1 would continue to allow for a delayed completion of the annual observer data set until all observers returned and debriefed. This means that the completed data would not be

available to end users working on a variety of analytical documents until all observers that were deployed over the change in the calendar year have returned.

Table 14 Number of observer cruises which spanned two fishing years and the number of cruises on which fishing continued into March, 2002 - 2007

Fishing years	Number of cruises spanning the fishing year	Number of spanned cruises on which fishing continued into March
2002 – 2003	7	3
2003 – 2004	11	5
2004 – 2005	10	3
2005 – 2006	17	3
2006 – 2007	17	7

Source: NMFS, observer database, 2002 – 2007.

Note: The data only include cruises in which the observer collected fishing data in the first fishing year. Cruises where only noon positions were collected are not included and are not affected by the proposed action under Issue 6.

Since 2002, the number of observers whose deployments spanned two fishing years ranged from 7 to 17 out of a total 3,744 deployments during those six years (see Table 14). Fewer than half of those cruises continued beyond February 28 each year. Note that the proposed action only applies to cruises during which the observer collected fishing data in the first fishing year. Cruises where only noon positions were collected in the first fishing year are not included in the data presented and are not affected under this issue.

Table 15 below provides more detailed information on the observer cruises that are provided in Table 14. This table shows that in 2002 – 2003, the latest two cruises ended on March 13. In 2003 – 2004, the latest cruise ended on March 24, and in 2004 – 2005, the latest cruise ended March 10. In 2005 – 2006, three cruises extended into March, the latest of which also ended March 10. Finally, in 2006, 7 of the 17 cruises that spanned the two years extended into March, the latest of which ended March 24.

The observer cruises that start late in December and extend into the following fishing year are typically hook-and-line catcher processors fishing BSAI Pacific cod. This is because the BSAI Pacific cod season can potentially remain open until December 31 of one year, and it starts again January 1 of the following year.

Alternative 1 does not have any direct impacts on NMFS, the fishing industry, observer providers, or observers. Alternative 1 does have a potential indirect negative impact on NMFS and the fishing industry, in that it allows for the continued delay of the final data set and prevents agency analyses from being completed earlier in the year.

For reasons outlined in the beginning of this section, the Council selected Alternative 1 as its preferred alternative. Upon review, while there is interest in obtaining a final observer dataset earlier in the year, the Council found no compelling analytical requirements that warrant a change to the status quo. Discussion of the Council's preferred alternative under each issue is summarized in Section 2.7.

Table 15 List of cruises which had catch data spanning two calendar years, 2002 - 2007**2002 - 2003**

8047 11/2/02 – 1/17/03
 8064 12/17/02 – 2/24/03
 8066 12/20/02 – 1/27/03
 8074 12/31/02 – 3/8/03
 8079 12/30/02 – 3/13/03
 8080 12/28/02 – 3/13/03
 8087 12/30/02 – 1/31/03

2003 - 2004

8735 11/23/03 – 1/10/04
 8738 11/24/03 – 2/13/04
 8745 12/1/03 – 2/16/04
 8751 12/19/03 – 1/20/04
 8764 12/3/03 – 2/16/04
 8767 12/29/03 – 2/29/04
 8768 12/31/03 – 3/4/04
 8772 12/31/03 – 3/20/04
 8774 12/31/03 – 3/13/04
 8780 12/27/03 – 3/13/04
 8785 12/29/03 – 3/13/04

2004 - 2005

9471 11/29/04 – 2/13/05
 9472 11/24/04 – 2/12/05
 9495 12/30/04 – 2/15/05
 9496 12/29/04 – 2/22/05
 9498 12/30/04 – 3/10/05
 9500 12/31/04 – 2/25/05
 9503 12/31/04 – 1/13/05
 9504 12/31/04 – 3/5/05
 9510 12/31/04 – 3/6/05
 9515 12/31/04 – 2/22/05

2005 - 2006

10169 11/6/05 – 1/25/06
 10172 11/13/05 – 2/3/06
 10174 11/16/05 – 2/5/06
 10178 12/3/05 – 1/25/06
 10179 12/30/05 – 1/27/06
 10193 12/29/05 – 3/5/06
 10196 12/31/05 – 2/18/06
 10202 12/30/05 – 3/1/06
 10203 12/30/05 – 3/10/06
 10204 12/28/05 – 2/25/06
 10211 12/31/05 – 2/18/06
 10212 12/28/05 – 2/18/06
 10213 12/31/05 – 2/19/06
 10216 12/31/05 – 2/21/06
 10217 12/30/05 – 2/19/06
 10221 12/30/05 – 2/18/06
 10233 12/29/05 – 1/15/06

2006 - 2007

10897 12/31/06 – 3/1/07
 10899 12/31/06 – 2/11/07
 10902 12/31/06 – 2/12/07
 10904 12/30/06 – 3/17/07
 10908 12/30/06 – 2/18/07
 10909 12/30/06 – 2/12/07
 10918 12/29/06 – 3/14/07
 10920 12/31/06 – 3/9/07
 10921 12/29/06 – 2/10/07
 10923 12/29/06 – 2/26/07
 10925 12/29/06 – 2/14/07
 10927 12/30/06 – 3/8/07
 10931 12/30/06 – 3/24/07
 10934 12/29/06 – 2/10/07
 10943 12/29/06 – 1/24/07
 10946 12/29/06 – 3/14/07
 10959 12/30/06 – 2/9/07

Alternative 2

Alternative 2. Revise Federal regulations to require that observers who collect fishing data in one fishing year during a deployment that extends into a second fishing year return from sea and be available for debriefing by February 28 of the second fishing year.

Alternative 2 would establish a cutoff date, whereby observers who collected fishing data spanning two consecutive years would be required to return from sea and be available for debriefing. NMFS has proposed February 28 as the cut-off date. This would allow the final data set to be compiled up to a maximum of one month earlier than under the status quo (Alternative 1). Note that the general discussion of impacts which follows is based on the February 28 date and may change if a different date is established.

Alternative 2 could increase observer provider costs, because the efficiency of each deployment that spans two different years would be reduced. Using the last fishing day as the cut-off (Feb. 28), between 3 and 7 observer deployments would have been truncated had this regulation been implemented, over the period 2002 through 2007, a period during which 3,744 total observer deployments were made. As the observer providers do not control the deployments, they would have to increase planning and communication with vessels such that they would not deploy an observer on a trip if the trip involved harvesting groundfish, under observer coverage, both before and after January 1, and had the potential to extend beyond February 28.

Observers would also be affected by Alternative 2, although the level of impact is difficult to predict, given that it depends on the composition of the providers' clients and the duration of the trips they take in any given year. For example, a provider could optimize the observer's deployment if they had some clients who took short, predictable trips.

Recall that the impact of this action is limited to those observers whose cruises span two different fishing years and the cruise extends beyond February 28. As documented in Table 14, a low of 7 observers (2002 – 2003) and a high of 17 observers (2005 – 2006 and 2006 – 2007) had cruises which spanned two fishing years in the recent past. As shown in Table 15, a range of 3 to 7 of those continued fishing into March. Thus, had Alternative 2 been in place, the effect would have been to shorten the duration of 3 to 7 observer cruises, out of a total number of observer deployments of 3,744 during this time period. As an example, during 2006 – 2007, one cruise extended to March 24 and would have been shortened by 24 days under Alternative 2. The average beginning daily pay rate for all five observer providers in 2006 was \$130. An individual observer could forgo \$3,120 in gross wages in this example. This amount could be higher if the observer was more experienced and earned a higher daily wage. However, this observer could be reassigned, reducing the estimate of forgone wages. Furthermore, knowing that a February 28 cutoff date was mandated, the provider could take steps, prior to deployment, to minimize the economic and logistical impacts on all parties.

Fishing industry costs could also increase under Alternative 2 to the extent observer provider costs are incorporated into billable costs. The industry would benefit from Alternative 2 to the extent they are dependent on receiving finalized observer information or completion of analyses using observer data generated from recent years to manage the fisheries. A quantitative assessment of these costs and benefits is not feasible, *a priori*.

The proposed change under Alternative 2 would likely benefit NMFS and the various clients it serves with observer information. It would provide a date certain whereby observers would need to return from sea for debriefing, allowing consistency in the completion of the year's final data set. The data set would be available to end users earlier in the year, allowing work on a range of analyses which use the recent

years' data (e.g., total catch estimates, bycatch mortality, Stock Assessment and Fishery Evaluation (SAFE) and Economic SAFE analyses).

An additional benefit is that these observers would debrief earlier than other observers deployed in the new year, potentially reducing the number of observers who need to debrief at the same time. Although this represents an indirect benefit of the proposed action, the backlog in the debriefing process has been of increasing concern to NMFS, the fishing industry, observer providers, and observers in recent years. Alternative 2 could slightly increase efficiencies in the debriefing process, potentially benefiting these entities.

As stated previously, even though some potential benefits could be expected under Alternative 2, staff further consulted with the primary internal agency users of observer information to determine if their needs warrant consideration of this action. While there is interest in obtaining a final observer dataset earlier in the year, there are no compelling analytical requirements that warrant a change to the status quo. The change is not considered necessary and any cost increase or imposition upon the industry, observer providers, or observers is not warranted.

2.5.7 Issue 7: Miscellaneous modifications

Several minor changes are necessary in order to correct inaccuracies or make clarifications in existing Federal regulations that govern observer program operational issues. These are simple changes, primarily housekeeping issues, which have negligible impacts and do not warrant extensive analysis.

Alternative 1

Alternative 1. No action. Do not revise existing Federal regulations to address inaccuracies or housekeeping issues.

Alternative 1 would not make any changes to existing Federal regulations, including those necessary to correct or clarify existing regulations. Specifically, regulations at 50 CFR 679.50(c)(5)(i)(A) incorrectly reference a workload restriction at (c)(5)(iii). The Observer Program has identified that the correct reference is (c)(5)(ii). While there are no direct and significant impacts to any sector under Alternative 1, maintaining an incorrect regulation may confuse the public. Similarly, the NMFS Alaska Fisheries Science Center, Fisheries Monitoring and Analysis Division website address is referenced in 50 CFR 679.50. Specifically, the website is cited in a provision that requires observer providers to provide to observer candidates copies of NMFS-provided pamphlets and other literature describing observer duties.²⁴ The NMFS website address has changed and Federal regulations have not yet updated this information.²⁵ Alternative 1 would maintain the old website address, serving only to confuse the public should they desire to contact the Fisheries Monitoring and Analysis Division of NMFS or find the observer job pamphlets mentioned above.

In addition, Federal regulations at 50 CFR 679.50(i)(2)(x)(G) currently require observer providers to submit to NMFS a completed and unaltered copy of each type of contract they have entered into with observers or industry. The regulations do not currently include a deadline for submission of this particular information, although most observer providers currently operate as if there is an annual deadline for all required information. In addition, current regulations require that each observer provider submit copies of "certificates of insurance" by February 1 of each year. Alternative 1 would not change

²⁴See 50 CFR 679.50(i)(2)(i)(B)(1) and (2).

²⁵The current website is: <http://www.afsc.noaa.gov/FMA/default.htm>

Federal regulations; thus, there would be no established deadline associated with the requirement for observer providers to submit a copy of each type of contract they have entered into with observers or industry. While the impact of Alternative 1 is minimal, it does not provide consistency for submittal of information, nor does it make clear Federal requirements for observer providers.

Alternative 2 (Council preferred alternative)

Alternative 2. Revise existing Federal regulations related to observer program operational issues as follows:

- a. Regulations at § 679.50(c)(5)(i)(A) incorrectly reference a workload restriction at (c)(5)(iii). Replace (c)(5)(iii) with the correct reference at (c)(5)(ii).
- b. Regulations at § 679.50 currently require observer providers to submit to NMFS each type of contract they have entered into with observers or industry. There is no deadline for submission of this information, although most providers currently operate as if there is an annual deadline for all submitted information. Establish a February 1 deadline for annual submissions of this information, which is consistent with the deadline for copies of ‘certificates of insurance.’
- c. Update the NMFS Alaska Fisheries Science Center, Fisheries Monitoring and Analysis Division website address throughout 50 CFR 679.50.

Alternative 2 includes three separate actions, none of which result in significant impacts. The proposed changes are housekeeping in nature and are intended to correct technical inaccuracies or provide necessary clarifications in the current regulations.

Alternative 2a would correct regulations at 50 CFR 679.50(c)(5)(i)(A) which incorrectly reference a workload restriction at (c)(5)(iii). Alternative 2a would correct this reference to (c)(5)(ii). While there are no direct and significant impacts to any sector under Alternative 2, correcting the reference will serve to clarify regulations for the public. In addition, this regulatory amendment package is an appropriate vehicle by which to make these types of housekeeping changes.

Alternative 2b proposes to establish a deadline of February 1 for observer providers to submit contract information that they are currently required to provide under Federal regulations at 50 CFR 679.50(i)(2)(x)(G). Currently, each observer provider must submit to NMFS a completed and unaltered copy of each type of contract they have entered into with observers or industry, but there is no deadline for submission. Most observer providers currently operate as if there is an annual deadline for all required information. Alternative 2b would establish a deadline of February 1, which mirrors the deadline in existing regulations for observer providers to submit other types of information, specifically, their certificates of insurance. Alternative 2b would provide consistency in the submittal of observer provider information, as well as make clear the requirements for the five observer providers. As most observer providers submit contract information at the beginning of the calendar year under the status quo, Alternative 2b is not expected to have any substantial effects.

Alternative 2c would update the NMFS Alaska Fisheries Science Center, Fisheries Monitoring and Analysis Division website address as referenced in 50 CFR 679.50 to the correct address: <http://www.afsc.noaa.gov/FMA/default.htm>. Currently, the website is cited in a provision that requires observer providers to provide to observer candidates copies of NMFS-provided pamphlets and other literature describing observer duties. The NMFS website address has changed and Federal regulations have not yet updated this information. Alternative 2 would update Federal regulations with the new

website address. While the impact is likely minimal, Alternative 2 would serve to clarify contact information for the public should they desire to contact the Fisheries Monitoring and Analysis Division of the Alaska Fisheries Science Center or find the observer job pamphlets mentioned in regulations.

2.6 Implementation and enforcement issues

The following describes the implementation and enforcement issues associated with each of the action alternatives. For each issue, Alternative 1 is the no action alternative, and would present no implementation or enforcement issues aside from enforcement issues resulting from the status quo. Where possible, agency costs are quantitatively described. In most cases, quantitative information associated with these costs is unavailable, and costs are described qualitatively.

Issue 1 – Observer certification and observer provider permitting appeals processes. Alternative 2 would remove the appeals process associated with initial denial of an observer certification and observer provider permit. These actions would better reflect the discretionary decisions of the agency. Because appeals of certification or permit denials can draw significant staff resources, removing the appeals process would reduce the burden associated with the time required to prepare, submit, and defend an appeal. This burden is primarily borne by Observer Program and NOAA GC staffs. These resources could be reallocated, and used to provide better or additional services to observers, industry, and NMFS clients. Therefore, more efficient allocation of limited agency resources, yielding improved service flows, is expected to result from this alternative. There are no enforcement issues identified with Alternative 2.

Issue 2 – Observer conduct. Alternative 2 would remove regulations governing observer behavior, but require observer providers to submit a drug and alcohol policy to NMFS. In effect, the burden of enforcing observer behavior is removed from NMFS, and placed on observer providers. Because agency staff would not be conducting investigations and potential de-certifications based on observer behavioral issues, this alternative would reduce the overall burden for the Observer Program, NOAA GC, and NMFS Enforcement. However, an option to require reporting of any breach of a drug and alcohol policy would require NMFS to continue to track these occurrences. To the extent that continued observer conduct issues result in decreased observer performance, NMFS may be able to de-certify an observer. Although Alternative 2 would result in significant time savings, relative to de-certifications and appeals, these resources could be reallocated, and used to provide better or additional services to observers, industry, and NMFS clients. Therefore, more efficient allocation of limited agency resources, yielding improved service flows, is expected to result from this alternative.

Issue 3 – Observer providers’ conflict of interest limitations regarding research and experimental permits. Alternative 2 would revise regulations to clarify that observer providers may provide scientific data collectors to aid in research activities. To the extent that NMFS Enforcement would investigate whether an observer provider is in violation of current (status quo) conflict of interest regulations, clarifying regulations under Alternative 2 would reduce this burden. However, because these practices are currently not investigated as violations, there would be no effect relative to the status quo. No additional costs would be associated with this alternative.

Issue 4 – Fishing day definition. Alternative 2 would revise the current definition of “fishing day” relative to observer coverage, such that all hauls within a 24-hour period must have an observer present to count towards a coverage day. Alternative 2, Option 1 would further revise the definition of a fishing day from the current 24-hour period of midnight to midnight, to noon to noon. Because these revisions would only result in a change in the accounting period for purposes of law enforcement investigations, there would likely be no additional implementation or enforcement issues under this alternative. No additional costs have been identified as associated with this alternative.

Alternative 3 would prohibit certain fishing behaviors that result in non-representative fishing. In addition to investigating whether vessels obtained minimum observer coverage levels, NMFS Enforcement would also be investigating whether vessels engaged in prohibited behaviors. For this reason, Alternative 3 would represent a potential increase in the burden to NMFS Enforcement. However, as noted previously, NMFS considers this alternative to be unenforceable.

Issue 5 – Observer program cost information. Alternative 2 would require observer providers to report annual costs to NMFS. NMFS would develop a cost reporting system and database to store this information electronically. Therefore, this alternative would result in an initial and ongoing burden associated with development and maintenance of this system. It is expected that development and maintenance of this system would not be cost prohibitive.

Alternative 3 would require similar cost information from observer providers. While Alternative 3 is intended to reduce the reporting burden for observer providers, the resources and costs necessary to develop and maintain a reporting system and database under this alternative would be the same as under Alternative 2. An option to limit mandatory cost reporting would reduce this burden after 3 years, as the database would likely still require ongoing maintenance.

Alternative 4 would require observer providers to submit to NMFS standardized invoices with certain information in each invoice. Invoices would be submitted to NMFS on a monthly basis. NMFS could enter the raw data into a confidential database and provide this information to analysts to support future management actions. This alternative would shift the burden of collecting and entering cost information from observer providers to NMFS. The Observer Program would dedicate one half-time ZP-II staff member to these tasks, at a total cost of approximately \$31,250 in salary and fringe benefits per year. There would also be costs associated with the initial design, development, and ground-truthing of the new system and protocols. These, while not readily quantifiable, would largely be “one-time” expenditures by the agency.

Issue 6 – Completion of the fishing year. Alternative 2 would require observers whose cruises span two years to be available for debriefing by February 28 of the second year. The intent of this alternative is to make complete annual fisheries data available to end users sooner. However, Alternative 2 would not result in any implementation or enforcement issues. No additional costs would be associated with this alternative.

Issue 7 – Miscellaneous modifications. Alternative 2 would clarify regulations, implement an observer provider reporting deadline, and revise a website address in regulation. NMFS Enforcement burden could be increased if an observer provider did not meet the reporting deadline. However, all observer providers are currently reporting this information in a manner that would not result in enforcement action. Therefore, Alternative 2 is not expected to result in any implementation or enforcement issues. No additional costs would be associated with this alternative.

2.6.1 Summary of implementation and enforcement issues

In summary, the following enforcement and monitoring issues were specifically considered:

- Removing the appeals process associated with initial observer certification and observer provider permitting could result in significant resource reallocations towards necessary program functions (Issue 1, Alternative 2)

- Placing the burden associated with regulating observer conduct on observer providers, rather than NMFS, could result in significant agency resource reallocations towards necessary program functions (Issue 2, Alternative 2).
- Prohibiting non-representative fishing behavior would likely result in additional NMFS enforcement costs, but would help prevent strategic behavior used to evade catch monitoring (Issue 4, Alternative 3).
- Requiring observer providers to report cost information would necessitate development and maintenance of a reporting and database system (Issue 5, Alternatives 2, 3, and 4).
- Issue 3 (Alternative 2), Issue 4 (Alternative 2), Issue 6 (Alternative 2), and Issue 7 (Alternative 2) would not result in any implementation issues, and cost would be minimal. To the extent that there could be non-compliance with reporting regulations, enforcement burdens could be increased.

2.7 Council preferred alternatives

This section summarizes the Council's preferred alternative under each Issue 1 through 7, as selected at its April 2008 meeting. The Council motion is provided as Appendix 5.

Under Issue 1, the Council recommended Alternative 2 as its preferred alternative. Essentially, the Council recommends removing Federal regulations that provide an appeals process to an observer candidate in the case that NMFS denies an observer candidate initial certification and the opportunity to pursue further NMFS observer training. This alternative would also remove Federal regulations that provide an appeals process to an observer provide applicant in the case that NMFS denies an applicant an initial permit to become an observer provider in the North Pacific.

The anticipated effects of Alternative 2 (the Council's preferred alternative) are described in Section 2.5.1. The Council selected this alternative primarily on the basis of NOAA GC guidance that recommends that these regulations be removed in order to reflect the discretionary nature of these agency actions. There is no statutory or other requirement that an initial observer candidate or potential observer provider be provided an appeals process at this stage of the process, and removing these regulations will increase NMFS' control over applying limited staff resources to the process of granting or denying certifications and permits. The Council also noted that the preferred alternative does not affect the ability of observers or observer providers to appeal any decision to revoke or sanction an observer certification or observer provider permit that is already issued; this action is limited to new observer certifications and new observer provider permits. In effect, the preferred alternative would establish final agency action as the point at which the observer program official issues a notice stating that the observer provider permit application is denied or that the observer candidate will not be permitted to re-enter the initial groundfish training course. Because final agency action would occur at this stage, existing regulations that allow for an appeal to OAA would be unnecessary.

Under Issue 2, the Council recommended Alternative 2, Option 1 as its preferred alternative. The preferred alternative would remove current Federal regulations at 50 CFR 679.50(j)(2)(ii)(D) that were intended to control observer behavior related to activities involving drugs, alcohol, and physical sexual contact with personnel of the vessel or processing plant to which the observer is assigned. Regulations would be revised to require that each observer provider have a policy addressing observer conduct, and these activities in particular, and current copies of each provider's policy would be required to be submitted to NMFS.

The anticipated effects of the recommended alternative are described in Section 2.5.2. Essentially, the NMFS Observer Program drug, alcohol, and physical sexual conduct policies would be eliminated, and

the obligation and responsibility would be that of the observer providers, in their role as observer employers. The Council's rationale for this proposed action is based on NOAA GC guidance that the current Federal regulations addressing this issue are largely unenforceable and outside of NMFS' authority. NMFS has the statutory authority to regulate the collection of reliable fisheries data, and it has proven very difficult to make a direct connection between the sanctioned behaviors and data collection. In addition, the Council recognized that Alternative 2 would serve to clarify the responsibilities between NMFS and observer providers, which may result in less confusion overall when observer conduct issues arise.

The Council also recommended Option 1 under Alternative 2, which would require that observer providers submit information to NMFS concerning reports regarding a breach of the observer provider's policy on observer conduct within 72 hours after the provider becomes aware of the information. The Council recommended Option 1 primarily to allow NMFS to continue to be aware of behavioral problems, due to the potential link between these behaviors and the quality and integrity of observer data. While NMFS has stated that establishing such a link is difficult, a notification requirement would continue to allow NMFS to consider such behaviors as mitigating factors in the decertification process of an observer. Observer providers are currently required to notify NMFS within 24 hours after the observer provider becomes aware of information regarding observer harassment, safety, and other issues listed at 50 CFR 679.50(i)(2)(x)(1). However, the Council's preferred alternative under Issue 2 would allow for notification of behaviors specifically related to alcohol, drugs, and physical sexual contact within 72 hours. The longer time period was recommended by the OAC and supported by observer providers who contend that a slightly longer time period is beneficial in order to submit complete information.

Under Issue 3, the Council recommended Alternative 2 as its preferred alternative. The proposed action would revise Federal regulations to clarify that observer providers may provide observers or scientific data collectors for purposes of NMFS approved activities as defined in 50 CFR 600.10: scientific research activities; exempted educational activities; or exempted or experimental fisheries. Alternative 2 would mirror current practice to allow these activities, but would serve to clarify the regulations such that there is no misunderstanding or potential for enforcement action against observer providers that undertake these actions.

The anticipated effects of the preferred alternative are described in Section 2.5.3. The Council recognized that, while the preferred alternative would not encompass every possible situation in which an observer provider may want to provide an observer or scientific data collector, it does address the most common situations to-date. In addition, the preferred alternative would not compromise the intent of the existing regulations, which were intended to limit observer providers from other business relationships with industry that could be perceived as compromising objectivity in the Observer Program. The preferred alternative allows providers to supply observers or scientific data collectors for NMFS approved activities, as specified.

Under Issue 4, the Council recommended Alternative 2, Option 1 as its preferred alternative. The preferred alternative would require that an observer be onboard for all gear retrievals during the 24-hour period, in order to count as a day of observer coverage. And, Option 1 would change the definition of 'fishing day' in Federal regulations at 50 CFR 679.2 to a noon to noon 24-hour period, as opposed to the current midnight to midnight 24-hour period.

The Council was very concerned with the implications of and issues surrounding Issue 4, the anticipated effects of which are described in Section 2.5.4. The primary concern was to find a way to reduce the ability of vessels required to have 30% observer coverage from conducting unrepresentative fishing specifically for the purposes of obtaining observer coverage. In essence, many vessels in the 30% fleet may be meeting the letter of the regulation, but not the intent, as they intentionally alter their fishing

behavior specifically to meet observer coverage requirements. A common example is a vessel picking up an observer just before midnight and making one tow/set, then making another just after midnight, after which the observer is returned to shore, thus, the operator receiving two days of observer coverage credit without having undertaken any real fishing. This is possible because current regulations are interpreted such that an observer must be onboard a vessel *at any point* during the 24-hour period when fishing occurs, in order for it to count as a fishing day and credited as a day of observer coverage. Analysis of observer debriefing surveys shows that this behavior occurs in both the hook-and-line and trawl vessel fisheries, subject to the 30% coverage requirements, most frequently in the trawl catcher vessel sector (see Section 2.5.4). It is also reported practice among 30% observer coverage pot operations, but because this sector operates under different coverage rules and definitions, pot operators are not party to this action.

The Council's preferred alternative is intended to close this 'regulatory loophole' to some degree, understanding there is not likely a comprehensive regulatory solution. However, the combination of Alternative 2 and Option 1 may mitigate some of the problem behavior, as well as prevent a vessel from receiving three days of observer coverage during a period that slightly exceeds 24 hours. It is possible that fishery participants would be less likely to use the time period around noon to take observer tows because the daylight hours correlate with better fishing. The analysis suggests that participants would be less likely to attempt to manipulate the system during daylight hours at the risk of key fishing time. In addition, there is a benefit to changing the fishing day definition to correspond to the same timeframe as fishing openings and closures. To the extent the preferred alternative changes participants' behavior, it could result in more observed fishing effort/trips that more accurately reflect legitimate fishing effort, thus reducing the effects of observer tows on the overall dataset. However, it is not clear that there is a sufficient economic disincentive to prevent operators from making observer tows before and/or after noon solely to meet coverage requirements. Shifting the observer day to noon to noon may reduce the incentive, but the potential impact on fleet behavior cannot be quantified. The primary benefit would likely result with the implementation of Alternative 2 overall, which requires that an observer be onboard during the entire 24-hour fishing period in order to count it as a day of observer coverage.

Costs may increase for vessels under the preferred alternative, as vessels who undertake this type of behavior will need to carry an observer longer than they would have otherwise, in order to receive the same number of observer coverage days. However, both the OAC and the Council determined that the preferred alternative is superior to the status quo, in terms of the overall potential benefit of increased observer data quality.

Note that Alternative 2, Option 1 proposes to revise the definition of 'fishing day' in Federal regulations at 50 CFR 679.2 in order to meet the described intent; however, there may be other ways to implement the same substantive change as the preferred alternative. One way would be to change the definition of fishing day as proposed under Option 1 in 50 CFR 679.2, but add a new requirement that an observer must be onboard for all gear retrievals during the fishing day in order for that day to count as a day of observer coverage, in the portion of the regulations that governs the 30 percent fleet (50 CFR 679.50(c)(1)(v)). This would limit putting important regulatory instructions related to observer coverage in the definition portion of the regulations. In effect, the Council's preferred alternative of Alternative 2, Option 1 could also be implemented in Federal regulations as follows:

50 CFR 679.2:

Fishing day means ~~to~~ (for purposes of subpart E) a 24-hour period, from ~~0001~~ **1201** hours A.l.t. through ~~2400~~ **1200** hours A.l.t., in which fishing gear is retrieved and groundfish are retained. Days during which a vessel only delivers unsorted codends to a processor are not fishing days.

50 CFR 679.50(c)(1)(v):

A catcher/processor or catcher vessel equal to or greater than 60 ft (18.3 m) LOA, but less than 125 ft (38.1 m) LOA, that participates for more than 3 fishing days (**as defined at §679.2**) in a directed fishery for groundfish in a calendar quarter must carry an observer during at least 30 percent of its fishing days in that calendar quarter and at all times during at least one fishing trip in that calendar quarter for each of the groundfish categories defined under paragraph (c)(2) of this section in which the vessel participates. **An observer must be on board for all gear retrievals during the fishing day in order for that day to count as a day of observer coverage**

Under Issue 5, the Council recommended Alternative 4, Option 1 as its preferred alternative. Alternative 4 would require observer providers to submit copies of actual invoices to NMFS, on a monthly basis. Invoices must contain the following standard information: 1) name of each individual vessel or shore plant; 2) name of observer who worked aboard each vessel or at each shore plant; 3) dates of service for each observer on each vessel or at each shore plant (include and identify dates billed that are not coverage days); 4) rate charged per day for observer services; 5) total observer services charge (number of days multiplied by daily rate); 6) specified transportation costs (e.g., airline, taxi, bus, etc.); 7) any specified “other” costs not included above (e.g., excess baggage, lodging, etc.). Note that #7 was originally included in the list under Alternative 4, because it reflected information that is typical of most observer provider invoices. However, if this list is implemented in regulation, it does not make sense to include “any specified ‘other’ costs not included above” as a mandatory element of a submitted invoice. Thus, this element does not need to be included in order to implement the Council’s intent under Alternative 4. Moreover, it is not necessary for the invoices to contain #2, the name of the observer who work aboard each vessel or at each shore plant, as NMFS is able determine the observer’s name by matching up fields from the invoice with the observer database. At least one observer provider would have to significantly modify their accounting practices to include this information on their invoices, thus, NMFS will not require invoices to include observer name since NMFS can determine this information independently.

The anticipated effects of the preferred alternative are described in Section 2.5.5. The Council recognized that the authority to collect economic data from observer providers is in Section 402(a) of the MSA, and that these data would be confidential under Federal law. Collecting these types of cost data would help NMFS and the Council assess the various cost components of the industry-funded portion of the existing groundfish observer program, as well as help inform potential cost estimates that may be associated with a new service delivery model for observer services. Similar to the rest of the industry, the need to require cost data from observer providers stems from the need to estimate net benefits and understand the effects of various management actions. Under the status quo, NMFS and the Council lack detailed, quantitative information on the costs incurred by observer providers in order to inform analyses as to the costs of the industry-funded portion of the groundfish observer program.

Three action alternatives were considered under Issue 5. The Council selected Alternative 4, in part, because it is likely to be the least burdensome to observer providers in that only copies of actual invoices would be submitted, thus negating the need for observer providers to collate costs by a newly specified category. In addition, Alternative 4 provides information that is easily verifiable, and allows for increased flexibility in terms of data analysis. This is because the raw data are provided to NMFS, and NMFS can analyze and summarize the data in various ways as needed. The data provided under Alternative 4 would potentially answer more analytical questions than that provided under any other alternative (refer to

Table 13). As noted in that table, most of the potential of Alternative 4 to address these questions annually is forgone when combined with Option 1.

The Council nonetheless included Option 1, with two revisions to the original language. The original language of Option 1 would limit the mandatory economic data collection program to three years. Given the SSC recommendations and the need to collect these data for future analyses, the Council did not find sufficient justification for setting a limit on the term for which these data should be made available. However, the OAC supported, and the Council then subsequently recommended, that the economic data be submitted only every third year, as opposed to every year. In effect, the preferred alternative would require that observer providers submit copies of actual invoices to NMFS on a monthly basis, once every three years. For example, if the program was implemented in 2010, providers would first be required to submit copies of actual invoices on a monthly basis during 2010. Then 2013 invoices would be submitted on a monthly basis during 2013, then 2016 invoices would be submitted on a monthly basis in 2016, etc.

In its review of the original proposed action, the SSC supported systematic collection of these data. The SSC reviewed the original language of Option 1 and explicitly opposed the three-year sunset provision. Subsequent to SSC review and comment, the proposed alternatives for this systematic annual collection of data, were substantially modified. The March, 2008 minutes of the OAC mention relaxing the requirement to submit data on an annual basis and recommend revising Option 1 to require that the data only be submitted every third year. To find the middle ground between the SSC's recommendation to not limit the time period over which data would be collected and the OAC's motivation to reduce the burden on observer providers, the Council opted for a preferred alternative that provided for a systematic collection of Observer Provider economic data, but with submittal required only once every third year. The SSC did not have an opportunity to review and comment on the "once every three year" data collection cycle, prior to final action by the Council.

The analysis reports that the primary non-agency cost of this alternative would be the administrative costs incurred by the observer providers. These administrative costs would be for the staff time and resources necessary to organize, maintain, and compile the requisite cost information on an annual basis. The analysis also notes that an informal survey of all five observer providers was undertaken in July 2007, in order to assess their perspectives on the potential administrative cost. Observer providers were asked to identify the kind of information on their current industry invoices and the general feasibility of providing the information required under both Alternatives 2 and 3. All five observer providers said calculating the information required under either action alternative would represent an additional workload for their current bookkeeping resources. Based on survey responses, the estimated amount of additional work varied from "significant" to "not too much." Although the estimate of the cost burden varied substantially among observer providers, this was the primary argument in objection to requiring observer provider companies to compile and submit data on an annual basis to NMFS. As explained in Section 2.5.5, this would require each company to re-structure and re-package their unique business and financial records into a "uniform" report format, specified by NMFS. Depending upon their filing and accounting systems, and the form adopted by NMFS, there could be recurring transposition and recording costs associated with such tasks.

In response to these objections and concerns, NMFS and the Council added another alternative (Alternative 4), which requires observer providers to submit only copies of actual invoices for observer services rendered, to NMFS, on a monthly basis. The Council selected this as its preferred alternative, which removes virtually all compliance burdens that may be imposed upon observer companies. Furthermore, the preferred alternative, were it to be fully implemented without Option 1 as-modified, has the potential to yield the timely, complete, and consistent economic data, as identified in the objective for the action, requested by the NMFS Observer Program, recommended by the SSC, and authorized by the MSA.

As stated previously, after hearing public testimony from observer providers and upon recommendations from the OAC at two separate meetings, the Council also selected an option, which was not explicitly proposed for consideration when the SSC reviewed the package, that would limit the required submission of monthly invoices to once every three years. Thus, the preferred alternative would require that observer providers submit copies of their actual invoices related to north Pacific groundfish observers, on a monthly basis for an entire year, once every three years. This alternative is expected to provide NMFS and the Council with at least some minimal baseline information on the industry cost of meeting Federally mandated observer coverage requirements. The three year data collection cycle would delay NMFS and the Council's ability to detect trends in observer coverage costs and would limit the precision in evaluating the temporal variability of these costs. Despite these limitations, the data collection effort represents an improvement over the status quo. After the first year of data collection, NMFS would have the ability to analyze the industry cost of the observer program and to compare the relative costs of observer coverage among sectors and fisheries. Though two years would elapse before additional information is made available, NMFS would possess more accurate information on observer costs than it has had under the status quo alternative, although far poorer economic information that offered by Alternative 4 without Option 1.

Notwithstanding the limitation imposed by collecting cost data only once every three years, it is anticipated that this information would yield an improved understanding of the actual observer expenses borne by the various sectors of the groundfish fleet, which to date, NMFS has only been able to roughly estimate. The once every three year data collection cycle would likely provide NMFS an opportunity to input, verify, and analyze the invoice data without having to add new personnel.

The Council's preferred alternative would not allow for a complete, continuous overview of the industry's observer program costs due to the three year lapse between data collection cycles; however, it would provide some information which NMFS currently needs, and which it lacks under the status quo. The Council could revisit this issue in the future should NMFS and the Council determine that data are needed from observer providers on an increased frequency.

Note that the Council did not select Option 2 as part of its preferred alternative, which would have prohibited a person/entity that receives this confidential information on behalf of NMFS from being certified as an observer provider in the North Pacific. The background and rationale for considering this option is provided in Section 2.5.5 and in the OAC minutes in Appendix 4. At its March 2008 meeting, the OAC recommended that this option be included in order to prevent government contractors who may receive this information on behalf of NMFS (e.g., to develop an analysis or report) from subsequently using the information to assist them in becoming permitted, competitive observer providers in the North Pacific. However, at the April 2008 Council meeting, the Council was informed that NOAA GC contends that NMFS and the Council may not be able to develop a regulation that prevents government contractors from competing to become an observer provider. If this avenue was to be pursued, the new regulations could not conflict with existing contractor/consultant regulations (i.e., Federal Acquisitions regulations).

In sum, in order to avoid the legal concerns conveyed by NOAA GC, the Council opted to revise Option 1 to include a provision that limits access to these confidential data to agency staff. Thus, there is expected to be a commitment by NMFS, whether by internal policy or Federal regulation, to only allow NMFS staff to receive and use the data. The intent was to mitigate the issue with Federal contractors receiving the data and potentially using it to become permitted observer providers in the future.

Under Issue 6, the Council recommended Alternative 1 (no action) as its preferred alternative. In effect, no change would be made to existing regulations allowing observer deployments to span two different fishing years and last for up to 90 days. The anticipated effects of this alternative are discussed

in Section 2.5.6. Ultimately, the Council agreed with NMFS' recommendation not to adopt Alternative 2, which proposed a date by which observers who collect fishing data and whose deployment spans two different years would be required to return from sea and be available for debriefing prior to the existing 90 day limit.²⁶ While there is interest in receiving the final observer data set earlier in the year for use in analytical documents, NMFS concluded that there are no compelling analytical requirements that warrant a change to the status quo. The OAC related concerns with Alternative 2, primarily its potential to increase indirect costs to industry by shortening trips, thereby possibly increasing the total number of observed fishing trips. Each observed trip has associated fixed costs, thus, increasing the number of trips results in an increase in total costs. Given these concerns and NMFS' recommendation, the Council selected Alternative 1.

Under Issue 7, the Council recommended Alternative 2 as its preferred alternative. Alternative 2 would make some very simple changes to Federal regulations in order to correct inaccuracies, provide updates, and clarify existing regulations. The effects of the preferred alternative are discussed in Section 2.5.7. No concerns with Alternative 2 arose from the OAC, NMFS, or public testimony.

²⁶Letter from Dr. James Balsiger, Administrator, NMFS Alaska Region, to Eric Olson, Chairman, NPFMC, January 16, 2008. This letter is provided as Appendix 6.

Table 16 provides a summary of the Council's preferred alternative.

Table 16 Summary of the Council's Preferred Alternatives

ISSUE	ALTERNATIVES and OPTIONS
ISSUE 1: Observer certification and observer provider permitting appeals processes	Alternative 2. Remove the appeals processes for observer candidates that have failed training and observer provider applicants denied an initial permit.
ISSUE 2: Observer conduct	Alternative 2. Remove Federal regulations that govern observer behavior related to drugs, alcohol, and physical sexual contact. Require that each observer provider have such policies and submit them to NMFS. Option 1: Require observer providers to notify NMFS of a breach of the above policies within 72 hours after becoming aware of a breach.
ISSUE 3: Research and experimental permits	Alternative 2. Clarify in Federal regulations that observer providers may provide observers or scientific data collectors for research associated with exempted fishing permits, scientific research permits, or other research activities.
ISSUE 4: Fishing day definition	Alternative 2. Revise the fishing day definition in Federal regs to require that an observer be onboard for all gear retrievals in which groundfish are retained during the 24 hr period in order to count as an observed day. Option 1: Change the 24 hr period from midnight to midnight to noon to noon.
ISSUE 5: Economic data collection	Alternative 4. Require observer providers to submit copies of actual invoices to NMFS on a monthly basis. Invoices must contain specified information. Option 1: Limit the submittal of economic data to every third year and limit access to these data to agency staff.
ISSUE 6: Completion of the fishing year	Alternative 1. No action.
ISSUE 7: Miscellaneous reg modifications	Alternative 2. Revise Federal regulations to correct inaccuracies and establish a deadline (Feb. 1) for observer providers to submit to NMFS copies of each type of contract they have with observers or industry.

Note: This table provides a general summary outline of the Council's preferred alternatives under Issues 1 – 7. See Appendix 5 for the precise wording of the alternatives and options in the Council motion.

3.0 INITIAL REGULATORY FLEXIBILITY ANALYSIS

3.1 Introduction

This Initial Regulatory Flexibility Analysis (IRFA) addresses the statutory requirements of the Regulatory Flexibility Act (RFA) of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C. 601-612). This IRFA evaluates the potential adverse economic impacts on small entities directly regulated by the proposed actions.

The proposed actions are organized under seven issues. The specific need for action associated with each issue is described in Section 2.5 under the expected effects of the alternatives. Generally, however, these actions are proposed to remove Federal regulations that are either unnecessary, unenforceable, or outside the authority of NMFS (Issues 1 and 2); or to clarify existing regulations with regard to allowing observer providers to provide observers for exempted fishing permits and scientific research permits/activities (Issue 3). Other issues included in this action would establish new regulations to: prohibit activities that result in non-representative fishing behavior from counting toward an observer coverage day (Issue 4); and require observer providers to report more detailed annual billing information to NMFS (Issue 5). No action is proposed on Issue 6; the action alternative considered would have specified a date by which observers who have collected data in the previous fishing year would be required to be available for debriefing. Finally, the action would implement some minor housekeeping changes to improve the accuracy and clarity of current regulations (Issue 7). In sum, the proposed actions are intended to improve the operational efficiency of the Observer Program, as well as improve the catch, bycatch, and biological data provided by observers for conservation and management of the North Pacific groundfish fisheries, including that provided through scientific research activities, compared to the status quo.

3.1.1 The purpose of an IRFA

The RFA, first enacted in 1980, was designed to place the burden on the government to review all regulations to ensure that, while accomplishing their intended purposes, they do not unduly inhibit the ability of small entities to compete. The RFA recognizes that the size of a business, unit of government, or nonprofit organization frequently has a bearing on its ability to comply with a Federal regulation. Major goals of the RFA are: (1) to increase agency awareness and understanding of the impact of their regulations on small business, (2) to require that agencies communicate and explain their findings to the public, and (3) to encourage agencies to use flexibility and to provide regulatory relief to small entities. The RFA emphasizes predicting impacts on small entities as a group distinct from other entities, and on the consideration of alternatives that may minimize adverse economic impacts, while still achieving the stated objective of the action.

On March 29, 1996, President Clinton signed the SBREFA. Among other things, the new law amended the RFA to allow judicial review of an agency's compliance with the RFA. The 1996 amendments also updated the requirements for a final regulatory flexibility analysis, including a description of the steps an agency must take to minimize the significant economic impact on small entities. Finally, the 1996 amendments expanded the authority of the Chief Counsel for Advocacy of the Small Business Administration (SBA) to file *amicus* briefs in court proceedings involving an agency's alleged violation of the RFA.

In determining the scope, or 'universe', of the entities to be considered in an IRFA, NMFS generally includes only those entities that can reasonably be expected to be directly regulated by the proposed action. If the effects of the rule fall primarily on a distinct segment, or portion thereof, of the industry

(e.g., user group, gear type, geographic area), that segment would be considered the universe for the purpose of this analysis.

Since the RFA is applicable to businesses, non-profit organizations, and governments, observers fall outside of the scope of the RFA. Therefore, they will not be discussed in the RFA context. The focus of the RFA section will be the observer provider companies, vessels, and processors that may be directly regulated under one or more of the proposed actions.

Data on cost structure, affiliation, and operational procedures and strategies in the fishing sectors subject to the proposed regulatory action are insufficient, at present, to permit preparation of a ‘factual basis’ upon which to certify that the preferred alternative does not have the potential to result in a ‘significant adverse economic impact on a substantial number of small entities,’ as defined under the RFA. Because, based upon all available information, it is not possible to ‘certify’ this outcome, should the proposed actions be adopted by the Secretary, a formal IRFA, focusing on the complete range of available alternatives (including the Councils’ preferred alternatives), has been prepared and is included in this package for Secretarial review.

3.1.2 IRFA requirements

Under 5 U.S.C., Section 603(b) of the RFA, each IRFA is required to contain:

- A description of the reasons why action by the agency is being considered;
- A succinct statement of the objectives of, and the legal basis for, the proposed rule;
- A description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply (including a profile of the industry divided into industry segments, if appropriate);
- A description of the projected reporting, record keeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
- An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule;
- A description of any significant alternatives to the proposed rule that accomplish the stated objectives of the proposed action, consistent with applicable statutes, and that would minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives, such as:
 1. The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
 2. The clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;
 3. The use of performance rather than design standards;
 4. An exemption from coverage of the rule, or any part thereof, for such small entities.

3.1.3 Definition of a small entity

The RFA recognizes and defines three kinds of small entities: (1) small businesses, (2) small non-profit organizations, and (3) small government jurisdictions.

Small businesses. Section 601(3) of the RFA defines a ‘small business’ as having the same meaning as ‘small business concern’, which is defined under Section 3 of the Small Business Act. ‘Small business’ or ‘small business concern’ includes any firm that is independently owned and operated and not dominant in its field of operation. The SBA has further defined a “small business concern” as one “organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor...A small business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust or cooperative, except that where the firm is a joint venture there can be no more than 49 percent participation by foreign business entities in the joint venture.”

The SBA has established size criteria for all major industry sectors in the United States, including fish harvesting and fish processing businesses. Effective January 5, 2006, a business involved in fish harvesting is a small business if it is independently owned and operated, not dominant in its field of operation (including its affiliates), and if it has combined annual gross receipts not in excess of \$4.0 million for all its affiliated operations worldwide. A seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation, and employs 500 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide. A business involved in both the harvesting and processing of seafood products is a small business if it meets the \$4.0 million criterion for fish harvesting operations. A wholesale business servicing the fishing industry is a small business if it employs 100 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide. For observer provider entities, the analyst consulted the SBA Size Standards database and found the specified threshold for firms engaged in placing technical employees to be \$7.0 million in gross annual receipts, including those of all affiliates, worldwide.

The SBA has established “principles of affiliation” to determine whether a business concern is “independently owned and operated.” In general, business concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party controls or has the power to control both. The SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists. Individuals or firms that have identical or substantially identical business or economic interests, such as family members, persons with common investments, or firms that are economically dependent through contractual or other relationships, are treated as one party with such interests aggregated when measuring the size of the concern in question. The SBA counts the receipts or employees of the concern whose size is at issue and those of all its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit, in determining the concern’s size. However, business concerns owned and controlled by Indian Tribes, Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601), Native Hawaiian Organizations, or Community Development Corporations authorized by 42 U.S.C. 9805 are not considered affiliates of such entities, or with other concerns owned by these entities solely because of their common ownership.

Affiliation may be based on stock ownership when: (1) a person is an affiliate of a concern if the person owns or controls, or has the power to control 50 percent or more of its voting stock, or a block of stock which affords control because it is large compared to other outstanding blocks of stock, or (2) if two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, with minority holdings that are equal or approximately equal in size, but the aggregate of these minority holdings is large as compared with any other stock holding, each such person is presumed to be an affiliate of the concern.

Affiliation may be based on common management or joint venture arrangements. Affiliation arises where one or more officers, directors, or general partners, controls the board of directors and/or the management

of another concern. Parties to a joint venture also may be affiliates. A contractor and subcontractor are treated as joint venturers if the ostensible subcontractor will perform primary and vital requirements of a contract or if the prime contractor is unusually reliant upon the ostensible subcontractor. All requirements of the contract are considered in reviewing such relationship, including contract management, technical responsibilities, and the percentage of subcontracted work.

Small organizations. The RFA defines “small organizations” as any not-for-profit enterprise that is independently owned and operated, and is not dominant in its field.

Small governmental jurisdictions. The RFA defines small governmental jurisdictions as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of fewer than 50,000.

3.2 A description of the reasons this action is being considered

The North Pacific Groundfish Observer Program is the largest observer program in the United States and plays a critical role in the conservation and management of groundfish, other living marine resources, and their habitat. The indispensable nature of this program, and its role in the successful and sustainable management of the living marine resources of the North Pacific and Bering Sea, are treated in detail in the RIR above. Data collected by the Observer Program are used for a wide variety of purposes including: (1) stock assessment; (2) monitoring groundfish quotas; (3) monitoring the bycatch of groundfish and non-groundfish species; (4) assessing the effects of the groundfish fishery on other living marine resources and their habitat; and (5) assessing methods intended to improve the conservation and management of groundfish and other living marine resources.

However, NMFS has identified several technical and operational issues which may be addressed through regulatory amendments, in order to make improvements to the existing Observer Program. The action under consideration includes seven separate issues, all of which are related to the operations of the Observer Program, with alternatives proposed under each issue. Each of the seven issues is described and analyzed separately, and they represent mutually exclusive decision points. The list of issues, alternatives, and options under consideration is provided in Section 2.4. A description of the Council’s preferred alternatives under each issue is provided in Section 2.7 and outlined in Table 16.

Several proposed actions are intended to clarify authority, either of NMFS or the observer provider entities. Under Issue 1, NMFS would clarify its discretionary authority to either grant or deny an initial observer certification or observer provider permit, as there is no statutory entitlement to receive these designations. Because there would be no appeal at this stage of the process, NMFS would have increased control over applying limited staff resources to the process of granting or denying certifications and permits.

The proposed action under Issue 2 would, in general, clarify responsibilities between NMFS and observer provider entities, and focus NMFS’ responsibility on maintaining data quality and integrity without the responsibility of attempting to enforce observer standards of behavior. NOAA GC has advised that such regulations are unenforceable and/or outside the authority of NMFS.

Under Issue 3, the proposed action would clarify regulations to allow observer provider entities to supply an observer for the purpose of research and experimental or scientific permits. This comports with current practice, but serves to codify these practices.

Several other issues are focused primarily on improving the quality and utility of observer data. Issue 4 is proposed in order to close a regulatory loophole that currently allows vessels to alter their fishing

behavior to conduct fishing that is unrepresentative of normal operations, in order to meet observer coverage requirements. The proposed action would tighten regulations to mitigate some of these behaviors; thus, increasing observer data quality for the fishing sectors to which these regulations apply.

Issue 5 is proposed in order to acquire cost data from observer providers that is similar to that identified for the rest of the fishing industry. NMFS currently lacks sufficiently detailed information on the costs incurred by observer provider entities in order to inform FMP and regulatory analyses as to the costs of the portion of the groundfish observer program funded by industry that is required to meet specific coverage levels. Because costs vary substantially across fishery sectors, it is very difficult to estimate the differing effects of both the existing program and changes to the program on various sectors.

No action is proposed under Issue 6.

Finally, the actions proposed under Issue 7 would revise minor inaccuracies in the existing regulations related to observer program operational issues.

3.3 Objective statement of proposed action and its legal basis

Under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the Secretary of Commerce and in the Alaska region, the North Pacific Fishery Management Council, have the responsibility to prepare fishery management plans and associated regulations for the marine resources found to require conservation and management. NMFS is charged with carrying out the Federal mandates of the Department of Commerce, with regard to marine fish, including the publication of Federal regulations. The Alaska Regional Office of NMFS, and Alaska Fisheries Science Center, research, draft, and support the management actions recommended by the Council.

National Standard 2 of the Magnuson-Stevens Act requires that conservation and management measures shall be based upon the best scientific information available. Data collected by observers and an effective and responsive Observer Program are essential for the Council and NMFS to meet this requirement. The overall objective of the proposed actions is to improve the operations of the existing Observer Program and its data collection mechanisms.

3.4 Description and estimate of the number of small entities directly regulated by the proposed action(s)

The following sections describe the entities directly regulated by the proposed action alternatives under each issue. Note that under **Issue 1** (Alternative 2), individuals employed as observers are considered small entities as defined under the RFA. As stated previously, since the RFA is applicable to businesses, non-profit organizations, and governments, observers fall outside of the scope of the RFA. Issue 1, relative to observer provider companies, is discussed below. The actions under **Issue 7(a) and (c)** are limited to correcting citations in the existing regulations; thus, these issues also do not represent actions which directly regulate small entities.

Observer providers

Five observer provider companies are currently permitted and active in the North Pacific, reduced from six in 2000. These entities would be directly regulated by the proposed action under **Issue 2 (Alternative 2, Option 1), Issue 3 (Alternative 2), Issue 5 (Alternative 4, Option 1), and Issue 7(b) (Alternative 2)**. These companies are: Alaskan Observers, Inc. (AOI); NWO, Inc. (NWO); Saltwater, Inc. (SWI); TechSea International (TSI); and MRAG Americas, Inc. (MRAG). Of these, three are based in the Seattle area,

one is based in Anchorage, and one is based in Florida, with a satellite office in Anchorage. On the basis of admittedly incomplete information, it is believed that the principal activity of most of these companies is providing observers for the North Pacific Groundfish Observer Program, and most of them also provide observers for other observer programs within or outside of Alaska, or are involved in other business activities. There are substantial differences among the observer providers in terms of both the proportion of their income generated by providing observers for the groundfish fishery and the proportion of the total groundfish observer deployment days they provide. All of the current observer provider companies are considered small entities under the Regulatory Flexibility Act.

Additionally, firms interested in obtaining a permit to provide observer services in the future, under the Observer Program, would be regulated under the proposed action in **Issue 1 (Alternative 2)**. However, the universe of potential observer provider firms is large, and not possible to define. Therefore, the *potential* number of small observer provider firms cannot be estimated.

Vessels subject to 30% observer coverage requirements

Trawl and hook-and-line catcher vessels and catcher processors subject to 30% observer coverage requirements would be directly regulated by the proposed action in **Issue 4** (the Council's preferred alternative is **Alternative 2, Option 1**). Generally, these include trawl and hook-and-line catcher vessels between 60' and 125' LOA, and hook-and-line catcher processors between 60' and 125' LOA; in the BSAI and GOA, with several exceptions for vessels participating in specific programs. AFA trawl catcher vessels subject to 30% observer coverage requirements are not included in the table, as these are categorized as large entities for the purpose of the RFA under the principles of affiliation, due to their being part of the AFA pollock harvest cooperatives.

Table 17, below, provides data on the number of individual trawl and longline vessels that participated in the GOA and/or BSAI groundfish fisheries, by sector, in 2006 and 2007 (through July). For purposes of this IRFA, the information in Table 17 represents the number of small entities directly regulated under Issue 4.

Table 17 **Number of individual trawl and longline vessels participating in the GOA and/or BSAI groundfish fisheries by 30% sector, 2006 – 2007**

Sector	2006	2007
Trawl CV >60' but ≤125'	39	23
Trawl CP >60' but ≤125'	12	10
H&L CV >60' but ≤125'	97	74
H&L CP >60' but ≤125'	11	11

Source: NMFS catch accounting database, 2006 - July 2007.

Note: Vessel counts among sectors are not unique.

The IRFA likely overestimates the number of directly regulated small entities for three reasons. Some number of the vessels subject to 30% observer coverage requirements do not meet the criteria for a small entity (i.e., fish harvesting is a small business if it is independently owned and operated, not dominant in its field of operation, including its affiliates, and if it has combined annual gross receipts not in excess of \$4.0 million for all its affiliated operations worldwide). The RFA requires a consideration of affiliations between entities, for the purpose of assessing if an entity is small. The estimates in Table 17 do not take account of affiliations between entities, with the exception of the AFA trawl catcher vessel sector. There is not a strict one-to-one correlation between vessels and entities; many persons and firms are known to have ownership interests in more than one vessel, and many of these vessels with different ownership, are otherwise affiliated with each other. Finally, the vessel counts among sectors in Table 17 are not unique, as some vessels may participate in two or more sectors. As previous alluded to, NMFS does not have

access to data on ownership and other forms of affiliation for most segments of the fishing industry operating off Alaska. Absent these data, a more precise characterization of the size composition of the directly regulated entities, impacted by this action, cannot be offered.

The remainder of this section briefly describes the regulated sectors:

Hook-and-line catcher processors <125' LOA, also known as freezer longliners, use hook-and-line gear to harvest groundfish. Most hook-and-line catcher processors are limited to headed and gutted products. Hook-and-line catcher processors <125' operate primarily in the BSAI Pacific cod fishery, and to a lesser extent in the halibut/sablefish IFQ fishery and GOA Pacific cod fisheries. The hook-and-line catcher processor fleet in the BSAI is divided between vessels under and over 125' that currently face 30% and 100% observer coverage requirements, respectively. In 2006 and 2007, 11 hook-and-line catcher processors <125' (and 29 and 26 hook-and-line catcher processors \geq 125', respectively) operated in the BSAI Pacific cod fishery. However, despite the length difference, these two groups of hook-and-line catcher processors generally operate in an identical manner, and often harvest similar volumes of groundfish.

Hook-and-line catcher vessels \geq 60' and <125'. A large majority of the hook-and-line CVs in this class operate solely with hook-and-line fixed gear, focusing on halibut and relatively high-value groundfish, such as sablefish and rockfish. Both fisheries generate high revenue per ton, and these vessels often enter other high-value fisheries, such as the albacore fisheries on the high seas. The reliance of these vessels on groundfish fisheries sets them apart from smaller fixed gear CVs, eligible, by reason of vessel length, to be employed in Alaska salmon fisheries with multiple gear types. Overall, this fleet is quite diverse. Excluding vessels that principally participate in the halibut or salmon fishery, most vessels are between 60' and 80' LOA, with an average length of about 70'. The larger vessels in this class can operate in the Bering Sea during most weather conditions, while smaller vessels can have trouble operating during adverse weather. In 2006 and 2007, 97 and 74 hook-and-line CVs \geq 60' and <125' LOA participated in the BSAI and/or GOA groundfish fisheries.

Non-AFA trawl catcher vessels \geq 60' and <125'. This category includes all CVs greater than or equal to 60' LOA that use trawl gear for the majority of their catch, but are not qualified to fish for pollock under the AFA. They are ineligible to participate in Alaska commercial salmon fisheries with seine gear, because they are longer than 58'. Non-AFA trawl CVs, greater than or equal to 60', also tend to concentrate their efforts on groundfish, obtaining more than 80% of ex-vessel revenue from groundfish harvests. All non-AFA CVs fishing in recent years are <125' LOA, and most concentrate their fishing in the GOA. Only three non-AFA trawl CVs over 60' LOA fish for groundfish in the BSAI on a regular basis. The number of non-AFA trawl catcher vessels \geq 60' and <125' LOA that participated in the BSAI and GOA groundfish fisheries was 39 in 2006, and 23 in 2007 (NMFS catch accounting database).

Vessels that carry an observer whose deployment spans two years

Note that the Council recommended the No Action alternative (Alternative 1), under **Issue 6**, thus, no entities, small or otherwise, would be directly regulated.

Summary

The following table summarizes all of the potentially directly regulated small entities, by sector, under the proposed action. Note again that the IRFA likely overestimates the number of small entities, due to lack of information pertaining to the combined annual gross receipts for each entity by size (including all of its affiliated operations worldwide).

Table 18 Estimate of the number of small entities potentially directly regulated by the proposed action(s)

Sector	2006	2007
Observer Providers	5	5
Trawl CV >60' but ≤125'	39	23
Trawl CP >60' but ≤125'	12	10
H&L CV >60' but ≤125'	97	74
H&L CP >60' but ≤125'	11	11

Source: NMFS catch accounting database, 2006 - July 2007.

Note: Vessel counts are not unique; thus, the number of small entities may be overestimated.

3.4.1 Recordkeeping and reporting requirements

Proposed actions under Issue 2 and Issue 5 would require additional recordkeeping or reporting requirements for the five observer providers, currently supplying services to the North Pacific Groundfish Observer Program. Issue 7(b) would impose a deadline for submission of information that is already required of observer providers under existing regulations.

Issue 2, Alternative 2 is intended to clarify the responsibilities between NMFS and observer providers with regard to observer conduct (e.g. drugs, alcohol, and physical sexual contact). Alternative 2 would revise regulations to clarify that the responsibility for developing standards for observer conduct, and the enforcement of those standards, lies exclusively with the observers' employer (i.e., observer providers). Option 1 under Alternative 2 requires that NMFS continue to be informed of these behaviors, if they occur. This is primarily due to concern that specific negative behaviors have the potential to adversely affect data quality and integrity. Alternative 2 would continue to allow NMFS to consider such behaviors in the de-certification process of an observer. In effect, violation of an observer provider's drug and alcohol policy or physical sexual conduct policy could be a mitigating factor in a future de-certification of the observer involved.

Current regulations at 50 CFR 679.50(i)(2)(x)(I) require observer providers to notify the Observer Program via fax or email, within 24 hours after the observer provider becomes aware of certain behaviors. Issue 2, Alternative 2, Option 1 proposes to revise these regulations to include the requirement that observer providers must also submit information to NMFS concerning a breach of the observer provider's policy on observer conduct, which includes issues related to drugs, alcohol, or sexual physical contact. Under Option 1, the Council selected a notification period of within 72 hours after the provider becomes aware of the alleged violation.

The RIR (Section 2.0) discusses an informal survey of observer providers, conducted in July 2007 by NMFS Observer Program staff, which shows that observer providers do not have difficulty complying with the existing notification regulations. Given that the notification requirement does not appear to be unduly burdensome to observer providers, and because a violation of an observer provider's drug and alcohol policy (or physical sexual conduct policy) could represent a mitigating factor in a future de-certification of an observer, NMFS contends that it is necessary to remain informed of any violations of an observer provider's policy. It is estimated that it may take 20 minutes for an employee of the observer provider company to report this information. However, because one can notify NMFS via fax or email, it may take much less time to comply with this regulation in some cases.

Issue 5, Alternative 4 requires observer providers to submit to NMFS, on a monthly basis, standardized, actual invoices with specific information contained in each invoice. NMFS is not currently able to assess the various cost components of the existing groundfish observer program, based upon the information currently submitted. Most, if not all, of the observer provider/vessel contracts submitted to NMFS

provide only the daily rate for observer services (e.g., \$355/day). Actual invoices identify the specific types of information that could be collected to address questions regarding the baseline costs of the existing program, as mandated under regulation and law.

The primary benefit of this action is that this information would allow for a more accurate assessment of costs and benefits under potential program changes, which may benefit the groundfish observer program and the fisheries dependent upon observer data for management. The primary cost of this action would be the minimal additional administrative costs incurred by the observer providers to copy monthly invoices and send them to NMFS. Even these costs are not incurred annually, as the Council included a provision (Option 1) that would limit the economic data collection program to once every third year.

Option 1 under the Council's preferred alternative would also limit access to these data to agency staff. This provision is intended to prevent a situation in which a contractor to the Federal government could use confidential information submitted by the existing observer providers, to establish a business to compete with current observer providers.

Alternative 4 is intended to reduce the potential administrative burden and costs associated with calculating and reporting the data associated with Alternatives 2 or 3. Under Alternative 4, observer providers would submit their standardized, actual billing invoices to NMFS, and NMFS would enter the raw information into a database for analytical use, when and as needed. In addition to the general benefits described above, which also apply to Alternatives 2 and 3, Alternative 4 has three main advantages. First, observer provider cost information could be verifiable by NMFS, increasing the overall data quality. Second, this approach to economic data collection allows increased flexibility in terms of data analysis. And, third, Alternative 4 shifts literally all of the costs and administrative burden of collection, management, analysis, and securing of these data to the agency. Observer providers need only submit copies of their actual billing invoices, without further modification, interpretation, or calculation, to NMFS. Except for the minor cost of making copies and transmitting same to NMFS on a monthly basis, the entities will incur no costs and require no additional or special professional expertise to comply with this rule.

Issue 7, Alternative 2 requires housekeeping changes to Federal regulations at 50 CFR 679.50(i)(2)(x)(G). These regulations currently require observer providers to submit to NMFS each type of contract they have entered into with observers or industry. There is currently no deadline for submission of this information, although most providers currently operate as if there is an annual deadline for all submitted information. Issue 7, Alternative 2 establishes a February 1 deadline for annual submissions of this information, which is consistent with the current deadline for copies of 'certificates of insurance.' In sum, NMFS is not requiring additional reporting under this alternative; the alternative is limited to formally establishing a due date for information that is already required under existing regulations.

In and of itself, the proposed recordkeeping and reporting requirements would not likely represent a significant economic burden on the five observer providers (small entities) certified in the North Pacific Groundfish Observer Program.

3.4.2 Relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule

No relevant Federal rules have been identified that would duplicate, overlap, or conflict with the proposed actions under Issues 1 through 7.

3.4.3 Description of any significant alternatives to the proposed rule that accomplish the stated objectives of the proposed action

An IRFA also requires a description of any significant alternatives to the proposed action(s) that accomplish the stated objectives, are consistent with applicable statutes, and that would minimize any significant economic impact of the proposed rule on small entities.

Based upon the best available scientific data and information, and consideration of the objectives of this suite of actions, one may draw the following conclusion. As demonstrated in the RIR, the Council examined a wide suite of alternatives and options, seeking to identify the least economically burdensome means of achieving its stated objects for each of these several observer management and procedural actions. These included alternatives that expressly sought to accommodate the limited resources available to small entities for complying with new rules.

In nearly every case, the Council selected the least economically burdensome alternative available, based upon the analyses contained in the RIR and IRFA, including in one case, the 'No Action' alternative. The one alternative selected which is not the least burdensome and cost minimizing alternative, is the Council's preferred alternative under Issue 5. There, the Council selected an action alternative (Alternative 4) with Option 1 which would require that observer provider companies submit detailed cost and operational data once every third year, rather than annually. The selected alternative and option would result in an inferior data set, with higher costs per unit of data obtained than Alternative 4 without Option 1. The Council, nonetheless, adopted their preferred alternative on the basis of advice from their Observer Advisory Committee and public objection to providing economic data, from representatives of the observer provider companies.

4.0 CONSISTENCY WITH OTHER APPLICABLE LAWS

4.1 Consistency with National Standards

Below are the ten National Standards as contained in the Magnuson-Stevens Act (Act), and a brief discussion of the consistency of the proposed alternatives with those National Standards, where applicable.

National Standard 1 - Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery

None of the alternatives under any of the issues, including the preferred alternatives, would result in changes to management of the groundfish fisheries, as they are administrative in nature (with the exception of Alternatives 2 and 3 under Issue 4 which could result in increased data quality). Additionally, groundfish fisheries managed by the Council and NMFS off the coast of Alaska are not in danger of overfishing.

National Standard 2 - Conservation and management measures shall be based upon the best scientific information available.

Information in this analysis represents the most current, comprehensive set of information available to the Council, recognizing that some information is unavailable.

National Standard 3 - To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

The proposed actions would not change the manner in which individual stocks are managed as a unit throughout their range. With the exception of Alternative 2 (Council preferred alternative) and Alternative 3 under Issue 4, both of which could result in increased data quality, all of the alternatives considered are administrative in nature.

National Standard 4 - Conservation and management measures shall not discriminate between residents of different states. If it becomes necessary to allocate or assign fishing privileges among various U.S. fishermen, such allocation shall be (A) fair and equitable to all such fishermen, (B) reasonably calculated to promote conservation, and (C) carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

Observer requirements are based on the specific information and monitoring needs of specific fisheries and vessel types. None of the alternatives consider residency as a criteria for the Council's decision. Residents of various states, including Alaska and the Pacific Northwest, participate in each of the major sectors affected by these allocations. None of the alternatives involve the allocation or assignment of fishing privileges among various U.S. fishermen.

National Standard 5 - Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources, except that no such measure shall have economic allocation as its sole purpose.

National Standard 5 recognizes the importance of various other issues in addition to economic efficiency.

The wording of this standard was changed in 1996, to ‘consider’ rather than ‘promote’ efficiency. Efficiency in the context of this change refers to economic efficiency, and the reason for the change, essentially, is to de-emphasize to some degree the importance of economics relative to other considerations (Senate Report of the Committee on Commerce, Science, and Transportation on S. 39, the Sustainable Fisheries Act, 1996). The analysis presents information relative to these perspectives, but does not highlight any one alternative in terms of this standard. National Standard 5 recognizes the importance of various other issues, in addition to economic efficiency. There are no expected changes to the overall efficiency in the utilization of fishery resources as a result of any of the proposed alternatives.

National Standard 6 - Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.

No changes to the current fishery management regime would be expected as a result of adoption of any of the alternatives considered, including the preferred alternatives.

National Standard 7 - Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

All of the proposed alternatives appear to be consistent with this standard.

National Standard 8 - Conservation and management measures shall, consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.

The management of the groundfish and halibut fisheries would not change under the action alternatives in any material way that would affect fishing communities.

National Standard 9 - Conservation and management measures shall, to the extent practicable, (A) minimize bycatch, and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.

Because the management of the groundfish fishery would not change under any of the action alternatives, this action would not be expected to have any material affect on actual bycatch rates in the groundfish fleet.

National Standard 10 - Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea.

None of the alternatives considered would change how the fishery is prosecuted. Therefore, the alternatives under consideration appear to be consistent with this standard.

4.2 Fisheries Impact Statement (Spillover Impacts)

Section 303(a)(9) of the Magnuson-Stevens Act requires that any management measure submitted by the Council take into account potential impacts on the participants in the fisheries, as well as participants in adjacent fisheries. Impacts to participants in the groundfish fishery are the subject of Section 2.5. Changes to the existing program are largely administrative in nature; thus, no impacts are expected beyond those analyzed in previous documents, including the Final Programmatic SEIS (NMFS 2004) and

EA/RIR/FRFA to extend the program beyond 2007 (NMFS 2007). Potential impacts to fisheries other than the groundfish fishery are not anticipated as a result of this action.

5.0 REFERENCES

- National Marine Fisheries Service (NMFS). 2004. "Alaska Groundfish Fisheries Final Programmatic Supplemental Environmental Impact Statement." U.S. DOC, NOAA, NMFS, Alaska Region, P.O. Box 21668, Juneau, AK 99802-1668.
- NMFS. 2007. "Final Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis for a Regulatory Amendment to Extend the Program for Observer Procurement and Deployment in the North Pacific." U.S. DOC, NOAA, NMFS, Alaska Region, P.O. Box 21668, Juneau, AK 99802-1668.
- North Pacific Fishery Management Council (NPFMC). 2007. Observer Advisory Committee Report, May 21 – 22, 2007.

6.0 LIST OF PREPARERS

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Kathy Robinson (Saltwater Inc.)
Sue Salvesson (NMFS AKR)

APPENDIX 1

Groundfish Observer Letter of Understanding



UNITED STATES DEPARTMENT OF COMMERCE
 National Oceanic and Atmospheric Administration
 Alaska Fisheries Science Center
 Fisheries Monitoring and Analysis Division
 Alaska Groundfish Observer Program
 7600 Sand Point Way N.E.
 Seattle, WA 98115-6349

Groundfish Observer Letter of Understanding

As a certified observer in the NMFS North Pacific Groundfish Observer Program, I have successfully completed an observer certification training course or required briefing. During the course of this training or briefing, I was presented with the North Pacific Groundfish Observer Manual which contains Observer Program guidelines. This statement acknowledges that I fully understand the Observer Program guidelines and agree to abide by the observer duties and responsibilities, groundfish observer standards of conduct, conflict of interest standards and confidentiality standards.

In my acceptance of this position I agree to:

1. perform the assigned duties to the best of my ability,
2. accurately record sampling data and to be honest and forthright when providing information for observer reports and in reporting suspected violations.
3. keep all collected data and observations according to confidentiality guidelines presented in the North Pacific Groundfish Observer Manual
4. refrain from engaging in any illegal actions or activities while under contract as an observer, and
5. refrain from entering into a situation that is contrary to the Observer Program's conflict of interest standards.

I understand that if I do not abide by the standards set forth by the Observer Program, my certification may be revoked. I further understand that as a result of my participation in any illegal activity, including the false reporting of information to the federal government, I may be subject to civil or criminal penalties.

 (Print full name)

 (Signature)

 (Date)



APPENDIX 2 Memo From NOAA OLE to NMFS Alaska Region, January 3, 2005**NOAA FISHERIES OFFICE FOR LAW ENFORCEMENT**

Mail to: P.O. Box 21767
 Location: 709 W. 9th St., Room M09C
 Juneau, Alaska 99802-1767

DATE: January 3, 2005

MEMORANDUM FOR: Jim Balsiger, Regional Administrator

FROM: Jeff Passer, Special Agent-in-Charge 

SUBJECT: Request for Regulation Change - Clarification of definition of "fishing day" for clear and consistent enforcement of vessel observer coverage requirements.

The current definition of "Fishing Day" (for purposes of enforcing observer coverage requirements) does not clearly address situations where a vessel carries an observer for only a portion of the fishing activities occurring on a particular day. This is a frequent practice in the 30% CV fleet.

Regulations at 50 C.F.R. 679.50(c) (1)(v) state:

"(v) A catcher/processor or catcher vessel equal to or greater than 60 ft (18.3 m) LOA, but less than 125 ft (38.1 m) LOA, that participates for more than 3 fishing days in a directed fishery for groundfish in a calendar quarter must carry an observer during at least 30 percent of its fishing days in that calendar quarter and at all times during at least one fishing trip in that calendar quarter for each of the groundfish fishery categories defined under paragraph (c)(2) of this section in which the vessel participates."

Recently, field enforcement staff have been unclear if a less than fully observed day counted as an "observer day". A recent enforcement action brought by GCAK was based upon their interpretation of the regulation as requiring an observer to be onboard for all gear retrievals during a 24-hour period if it is to be counted as an "observer day".

Enforcement fully supports GCAK's position, from the "enforceability" position, and recommends the definition be amended to clearly address current ambiguity regarding this application of the regulation.

Enforcement recommends the following change (strikeout and italics) to the definition of Fishing Day, at 50 CFR 679.2:

Fishing day means ~~to~~ (for purposes of subpart E) a 24-hour period, from 0001 hours ALT, through 2400 hours ALT, in which fishing gear is retrieved and groundfish are retained. *An observer must be on board for all gear retrievals during the 24-hour period in order to count as a day of observer coverage.* Days during which a vessel only delivers unsorted codends to a processor are not fishing days.

While the Observer Program staff is best able to comment on the effects on data quality, it is well documented that a significant component of the 30% fleet is utilizing the existing ambiguity of the regulation to their advantage by fishing for a portion of a day unobserved, then embarking an observer late in the day, then making one small set or haul on the first day, and reversing this process on the last fishing day, thereby accruing two “observer days for very little observed fishing activity or resultant data”.

I would appreciate your consideration of this proposed change.

APPENDIX 3

Section 402(b) of the Magnuson Stevens Act

(b) CONFIDENTIALITY OF INFORMATION.--

- (1) Any information submitted to the Secretary, a State fishery management agency, or a marine fisheries commission by any person in compliance with the requirements of this Act shall be confidential and shall not be disclosed except--
 - (A) to Federal employees and Council employees who are responsible for fishery management plan development, monitoring, or enforcement;
 - (B) to State or Marine Fisheries Commission employees as necessary to further the Department's mission, subject to a confidentiality agreement that prohibits public disclosure of the identity or business of any person;
 - (C) to State employees who are responsible for fishery management plan enforcement, if the States employing those employees have entered into a fishery enforcement agreement with the Secretary and the agreement is in effect;
 - (D) when required by court order;
 - (E) when such information is used by State, Council, or Marine Fisheries Commission employees to verify catch under a limited access program, but only to the extent that such use is consistent with subparagraph (B);
 - (F) when the Secretary has obtained written authorization from the person submitting such information to release such information to persons for reasons not otherwise provided for in this subsection, and such release does not violate other requirements of this Act;
 - (G) when such information is required to be submitted to the Secretary for any determination under a limited access program; or
 - (H) in support of homeland and national security activities; including the Coast Guard's homeland security missions as defined in section 888(a)(2) of the Homeland Security Act of 2002 (6 U.S.C. 468(a)(2)).
- (2) Any observer information shall be confidential and shall not be disclosed, except in accordance with the requirements of subparagraphs (A) through (H) of paragraph (1), or—
 - (A) as authorized by a fishery management plan or regulations under the authority of the North Pacific Council to allow disclosure to the public of weekly summary bycatch information identified by vessel or for haul-specific bycatch information without vessel identification;
 - (B) when such information is necessary in proceedings to adjudicate observer certifications; or

- (C) as authorized by any regulations issued under paragraph (3) allowing the collection of observer information, pursuant to a confidentiality agreement between the observers, observer employers, and the Secretary prohibiting disclosure of the information by the observers or observer employers, in order—
- (i) to allow the sharing of observer information among observers and between observers and observer employers as necessary to train and prepare observers for deployments on specific vessels; or
 - (ii) to validate the accuracy of the observer information collected.
- (3) The Secretary shall, by regulation, prescribe such procedures as may be necessary to preserve the confidentiality of information submitted in compliance with any requirement or regulation under this Act, except that the Secretary may release or make public any such information in any aggregate or summary form which does not directly or indirectly disclose the identity or business of any person who submits such information. Nothing in this subsection shall be interpreted or construed to prevent the use for conservation and management purposes by the Secretary, or with the approval of the Secretary, the Council, of any information submitted in compliance with any requirement or regulation under this Act or the use, release, or publication of bycatch information pursuant to paragraph (2)(A).

APPENDIX 4

Observer Advisory Committee Report, March 2008

Observer Advisory Committee Report
March 17, 2008
Alaska Fisheries Science Center
7600 Sand Point Way, NE, Seattle
Building 4, Room 1055
8:30 am – 4:30 pm

Committee present: Joe Kyle (Chair), Bob Alverson, Christian Asay, Jerry Bongen, Julie Bonney, Kathy Robinson, Paul MacGregor (by phone)

Committee not present: Todd Loomis, Tracey Mayhew, Brent Paine, Pete Risse, Thorn Smith

Staff: NPFMC – Chris Oliver, Nicole Kimball
NMFS/AFSC – Martin Loefflad, Bill Karp, Bob Maier, Jennifer Ferdinand, Allison Barns, Lisa Thompson, Jennifer Calahan, Craig Faunce, Jerry Berger
NMFS AK Region – Sally Bibb, Jennifer Hogan
NOAA GC – Tom Meyer
NOAA Office for Law Enforcement (Alaska Division) – Mike Adams, Nathan Lagerway

Other participants: Jan Jacobs, Michael Lake, Diana Starr, Lori Swanson, Ed Richardson, Stefanie Moreland, Troy Quinlan, Everette Anderson

AGENDA

- I. Review and approve agenda
- II. Review of observer data: 2004 – 2006 total catch, observed catch, and percent observed catch by area, harvest sector, gear type, trip target fishery, and vessel length (Jennifer Hogan, NMFS)
- III. Review analysis and provide recommendations on proposed regulatory changes to North Pacific Groundfish Observer Program
- IV. Scheduling & other issues

SUMMARY OF OAC RECOMMENDATIONS

OAC recommendations on the proposed regulatory changes to the observer program (agenda item III) are as follows. See the relevant sections of the minutes for details.

- Issue 1: Alternative 2
Issue 2: Alternative 2, Option 1 (72 hours)
Issue 3: Alternative 2
Issue 4: Alternative 2, Option 1

Issue 5: Alternative 4. The committee also recommended Option 1 and Option 2 with revisions. Option 1 would be revised to state: "Limit the submittal of economic data to every third year." Option 2 would be revised to state: "Prohibit a person/entity that receives this confidential information on behalf of NMFS from being certified as an observer provider, or working for an existing observer provider, in the North Pacific."

Issue 6: Alternative 1

Issue 7: Alternative 2

The committee also recommended:

- 1) With regard to the observer data request, the committee recommends breaking out the GOA and AI Pacific cod State fisheries from the Federal (including parallel) fisheries data. The committee also recommended showing the Central, Western and Eastern Gulf subtotals in Table 1 on p. 11.
- 2) The committee recommends the Council send another letter to NOAA HQ: 1) urging resolution of the outstanding observer compensation issues with regard to the Fair Labor Standards Act (FLSA) and Service Contract Act, and 2) to re-evaluate its policy determination that North Pacific observers should be classified as technicians rather than professionals under the FLSA.
- 3) The OAC would like to convene in the future to re-evaluate the problem statement and objectives from the June 2006 observer program restructuring analysis, in order to explore whether some of the problems particular to the GOA fisheries can be resolved through regulatory measures as opposed to comprehensive restructuring.

I. Review and approve agenda

The committee approved the agenda with one addition. Julie Bonney proposed adding a discussion about whether the quality of the observer data in the Gulf of Alaska (GOA) is sufficient to use for the type and level of extrapolations currently necessary in the catch accounting system, and whether any changes can be made under the current service delivery model that would improve the status quo. This item was added to the end of the agenda.

II. Review of observer data: 2004 – 2006 total catch, observed catch, and percent observed catch by area, harvest sector, gear type, trip target fishery, and vessel length

The committee received a presentation from Jennifer Hogan (NMFS AKR) on updated data showing the effective annual rate of observer coverage in various target fisheries, areas, and sectors. The data tables presented were in response to a request from the OAC in May 2007. NMFS presented the percent observed catch in the Alaska groundfish fisheries from 2004 – 2006, specifying that the observer data included both sampled and unsampled hauls from when an observer was onboard the vessel. The total catch data was from the NMFS catch accounting database.

Jennifer presented background information on the sources of the data, including the databases used to estimate total catch for each vessel type. If a catcher/processor or mothership was 100% or 200% observed, observer data were used to estimate total catch; if the catcher/processor had 30% coverage requirements, WPR data were used for retained catch and observer data for at-sea discards. For catcher vessels delivering shoreside, ADF&G fish tickets were used for retained catch and observer data were used to estimate at-sea discards; if delivering unsorted catch to motherships, observer data were used. Jennifer also discussed how trip targets are assigned (based on a retained amount of groundfish on a weekly basis for CPs and motherships and a trip basis for CVs delivering shoreside), and how it is possible for trip targets to be mismatched between WPR and observer data. Production data often lags behind observer data, which can affect the derived target.

The committee highlighted the utility of the data as a standalone product. While it does not feed directly into the analysis being considered by the Council in April, it is comprehensive background information that the agency intends to update annually.

The committee clarified that the GOA harvest in the data tables includes State fisheries (e.g., Pacific cod). Including the State water Pacific cod fishery (which does not have observer requirements) within the Federal fishery harvest totals underestimates the effective coverage rate in the Federal fisheries, particularly in the Gulf pot cod fishery. **The committee recommended breaking out the GOA and AI Pacific cod State fisheries from the Federal (including parallel) fisheries data in order to see the effective coverage rate in the Federal fisheries. The committee also recommended adding the Central, Western, and Eastern Gulf subtotals in Table 1 on p. 11.**

It was also noted that there is no observer coverage in the directed halibut fishery. There is an effort by the IPHC and NMFS to look at the use of video in the hook-and-line halibut fleet through an NPRB study this summer.

The committee also discussed examples in Gulf trawl fisheries in which an increasingly large component of the catch is being harvested by <60' vessels, which are not subject to observer coverage requirements. This feeds into the extrapolation issues of concern to members. In the Gulf, the majority of the observer data is generated by the 30% fleet (reference Table 6, p. 14). These data are relatively sensitive and can be greatly influenced by the level of extrapolation that occurs for both the unobserved fleet and unsampled hauls of the observed fleet. The recent example cited was one observed trip that took one tow, resulting in one Chinook salmon caught in a 22 pound groundfish tow. The observer was dropped off and the vessel resumed fishing, which resulted in that one salmon being extrapolated across all pollock targets for an estimate of 21,000 Chinook.

A committee member noted that the above example highlights not only concerns with extrapolations, but that more unrepresentative fishing occurs under the current service delivery model as vessels try to control their observer costs by making 'observer tows' to meet coverage requirements. This behavior would be curtailed under a new service delivery model which would replace the current regulatory framework of observer requirements based on vessel length with a fee system in which NMFS determines when and where an observer would be placed. It was also noted that a relatively small amount of Federal funding could go a long way toward improving data quality in the Gulf, by placing observers on some of the unobserved fleet. However, this effort would not address the disproportionate cost issues that are also of concern in the Gulf.

In sum, the committee noted that on the whole, the data presented show that the fisheries with 30% coverage requirements (which are primarily in the Gulf) are obtaining about 30% coverage rates. Thus, there is relatively consistent compliance with the 30% requirement. What the data do not show is how representative that data is on a temporal or spatial basis, and how sensitive it is. Thus, one must be aware that the macro data masks some underlying issues in specific sectors, including how much of the catch is actually sampled by an observer. The committee discussed two major issues that create data gaps (which exacerbate the extrapolation issues) most notably in the Gulf: 1) the unobserved <60' sector; and 2) 30% coverage may not be representative on a temporal or spatial basis. The committee agreed that the issue of the unobserved sector could be resolved through a regulatory change, but that concern with the 30% sector could likely most effectively be resolved through a change to the service delivery model, under which NMFS would decide where and when to place observers based on a statistical sampling plan.

Martin Loefflad (AFSC, Director of FMA) provided a brief update on a request to HQ for cost analyses to inform the overall cost estimates that may result from a change to a NMFS-contracted observer program. This analysis of existing contracts (awarded contracts and bids that were not awarded) is intended to

provide an overview of what other regions are paying for observer services. Combined with the current Service Contract Act (SCA) wage determinations from the Department of Labor, analysts may be in a better position to estimate costs based on a number of hours per day (e.g., 12, 16, 18 hours/day).

Given the discussions relative to observer restructuring, and the cost estimates necessary to develop an analysis, the committee recommended the Council send another letter to NOAA HQ: 1) urging resolution of the outstanding observer compensation issues with regard to the Fair Labor Standards Act and Service Contract Act, and 2) to re-evaluate its policy determination that North Pacific observers should be classified as technicians rather than professionals under the FLSA.

The OAC also discussed whether some of the current problems identified in the GOA could be mitigated through management measures (regulatory changes), given the previously unsuccessful attempts to change the service delivery model for the entire program. **The OAC would like to convene in the future to re-evaluate the problem statement and objectives from the June 2006 observer program restructuring analysis, in order to explore whether some of the problems particular to the GOA fisheries can be resolved through regulatory measures as opposed to comprehensive restructuring.**

III. Review analysis and provide recommendations on proposed regulatory changes to North Pacific Groundfish Observer Program

The committee received a presentation on the public review draft analysis of proposed regulatory changes to the Observer Program from Nicole Kimball (NPFMC). The following sections represent committee discussion and recommendations on each issue analyzed in the amendment package.

Issue 1: Observer certification and observer provider permitting appeals processes

The committee questioned whether a current contractor that loses their permit and needs to reinitiate the process to receive a new permit would be granted an appeals process if the new permit is denied. Staff responded that the appeals process would be removed from the regulations for all observer providers that are denied a new permit. However, this issue does not affect the appeals process available to existing permitted providers, should their current permit be sanctioned. The committee agreed with the rationale for removing an appeals process that is not required by law. The committee supports Alternative 2.

Issue 2: Observer conduct

This issue was primarily discussed by the three observer providers represented at the meeting (i.e., AOI, Saltwater, and TechSea). The committee agreed that observer conduct relative to drugs, alcohol, and physical sexual contact with vessel or processing facility employees is more appropriately addressed through the employee/employer relationship. In addition, all providers currently have policies addressing such behaviors in their current observer contracts. The OAC generally agreed that NMFS needs to continue to be notified in the case that there is a breach of the providers' policies on drugs, alcohol, and sexual contact, so that the agency is aware of any potential effects on data quality or can use the information as mitigating circumstances in an enforcement case. The providers agreed that a longer notification period is preferred, so there is sufficient time to obtain correct information. It was noted that notification under the proposed regulation would be similar to that under existing regulations for other issues (e.g., harassment, safety issues, etc). Contractors provide the best information they have at the time, and often follow up with clarifying details if necessary. The committee recommends Alternative 2, Option 1 (72 hour notification period).

Issue 3: Observer providers' scope of authority regarding scientific and experimental research permits

The committee agreed that regulatory language that clarifies that observer providers are allowed to supply observers and scientific data collectors for the purpose of exempted fishing permits (EFPs) and scientific research permits (SRPs) is necessary. This would clarify the approach taken to supply these services. The

committee understood there were no changes proposed to the 90-day cruise limit and 4 vessel limit prior to debriefing.

The committee's primary question was whether the language proposed under Alternative 2 was broad enough to encompass other scientific and research activities. The observer providers gave several examples of potential scenarios in which they may receive a request for an observer or scientific data collector for research that is not formally approved by NMFS, but is sponsored by a university, commission, or industry. Providers did not want the language to preclude providing observers for these types of activities.

The committee discussed whether the language used in Alternative 2 that allows observer providers to provide "scientific data collector and observer services to support NMFS approved scientific research or experimental fisheries as defined under 50 CFR 600.10," limits these other activities that are outside of NMFS' purview. There was some discussion about whether a letter from NMFS would suffice to meet the intent of "NMFS approved" research for the types of activities that fall outside of 600.10, understanding that the regulations would then remain unclear about some activities, requiring NMFS to make subjective decisions on a case by case basis.

Staff responded that Alternative 2 was intended simply to clarify an observer provider's ability to provide observers for exempted and scientific research activities as defined in Section 600.10.²⁷ NMFS suggested that the regulatory text proposed under Alternative 2 could be revised to be clear that the activities being added to the list of things that do not present a direct financial interest are only those SRP or exempted activities specifically defined under 600.10 and not any type of scientific or experimental activity. The majority of the activity to date has been under SRPs or EFPs, which is why the alternative was developed to address those specific activities.

The committee agreed Alternative 2 clarifies that these types of activities are allowed, and it is preferable to the status quo, even if some activities may remain in question and require further discussion with NMFS. The committee supports Alternative 2.

Issue 4: Fishing day definition

The committee discussed Issue 4 at length, including exploring other options that may better close the loophole in existing 30% coverage regulations. Most members agreed that the problem has a negative effect on data quality, often at a time high quality data is most needed (e.g., near the end of the fishery). Many 30% vessels take observers at the beginning of the fishery, in order to ensure they meet their coverage requirements before the fishery closes (at a future uncertain date). This means that in the 30% fleet, a relatively substantial amount of observer data are available at the beginning of the fishery, and data taper off toward the end of the fishery. Thus, a relatively small amount of observer data at the end of the fishery can greatly influence both the total catch and PSC estimates, which in turn influences fishery closures. At times these data may also extend a fishery, thus, one may see a peak in observer data at the end of the fishery as vessels suddenly need more coverage due to the unexpectedly longer season.

The committee also agreed that no regulatory option would completely resolve the problem of observer tows/sets within the 30% sector, but that Alternative 2 would serve to mitigate strategic behavior to some extent as vessels would need to carry an observer for the entire fishing day (any fishing time in a 24-hour period) in order for it to count as an observer coverage day.

²⁷NMFS approved activities defined under 50 CFR 600.10 include: scientific research activities; exempted educational activities; and exempted or experimental fisheries.

In addition, Option 1 appears to improve Alternative 2. Option 1 would change the 24-hour period definition of a fishing day to noon to noon (from midnight to midnight). Because most fisheries open and close at noon, changing the definition to noon to noon removes the ability to receive an entire coverage day by carrying an observer on the fringes of short pulse openings. In addition, the best fishing occurs during daylight hours, so there is a greater likelihood that vessels may forego strategic behavior in order to maximize fishing time and revenue. The committee questioned whether the observer providers would revise their fee schedule to match the definition of an observer coverage fishing day under Option 1.

The committee also discussed a suggestion to include a restriction such that one may not receive more than one day's worth of observer coverage in any calendar day under Option 1. While the proposal appeared to have some merit, it was confusing to some members to define a fishing day (noon to noon) differently than you would an observer coverage day (calendar day, midnight to midnight). In addition, some members were concerned with the increase in costs over and above the costs assumed under Alternative 2, Option 1. In general, Option 1 would prevent a vessel from being able to obtain three days of observer coverage in any period slightly exceeding 24 hours. A vessel could obtain a maximum of two days of observer coverage in any period slightly exceeding 24 hours. The committee noted that while data quality could increase, costs will increase for both vessels trying to manipulate the system and those that are not, as vessels must carry an observer longer in order to receive the same number of coverage days they could earn under the status quo.

The committee ultimately agreed that Alternative 2, Option 1 is the preferred alternative. The alternative could serve to modify behavior, as vessels may not risk their ideal fishing time during daylight hours by fishing solely for observer coverage. In addition, a vessel could not obtain more than two days of coverage in a 48-hour period, and an observer would need to be present for all gear retrievals in a 24-hour period in order to receive an observer coverage day. The committee thought that this would result in more full calendar days (and fewer partial days) with an observer onboard, and that observer data could be more temporally representative. The committee noted that while the fleet continues to be responsible for ensuring they meet coverage requirements, the observer providers currently assist vessels in planning to meet those requirements. It may be more difficult for providers to help individual vessels plan under Alternative 2, because providers will not know if vessels return to fishing (without an observer) in the same 24-hour period, thus negating the observer coverage day.

Issue 5: Economic Data Collection

The committee reviewed the suite of four alternatives proposed under Issue 5, recognizing that each action alternative varies in the cost and time required for observer providers to comply with data collection. Alternative 4 is the least burdensome to observer providers, as it only requires providers to submit copies of actual invoices to NMFS. The listed information required in the invoices under Alternative 4 is common to the existing invoices. Alternatives 2 and 3 would require providers to compile, sort, and summarize their cost data differently than they do now, in addition to requiring cost data that some providers do not currently account for separately.

The agency reiterated its desire to collect this information, in order to inform analyses regarding the cost components of the industry-funded portion of the observer program. Past analyses have used \$355/day as an 'average' daily rate, which does not account for the wide variability in the different fishery sectors' observer costs nor does it allow analysts to differentiate between sectors. It was noted that the disadvantage to Alternative 4 is that it would not allow analysts to determine fixed costs versus variable costs, overhead versus travel, etc. But because Alternative 4 allows NMFS to easily verify the data provided are accurate and allows the agency to sort raw data to suit its purposes on a case by case basis, NMFS noted its general support for Alternative 4.

The committee noted that #7 listed under what is required in invoices submitted under Alternative 4 (“any specified ‘other’ costs not included above”) may need to be removed. It was intended as a ‘catch-all’ such that observer providers would not feel they had to remove items from an invoice that were not specifically listed under Alternative 4. Because the introductory language states that invoices *must* contain the following information, staff agreed that #7 spurs confusion and should be removed.

None of the three providers present at the meeting voiced concerns with the ability to submit invoices under Alternative 4. The primary concern was related to the use of the data submitted, and whether it would remain confidential. One observer provider noted that industry invoices are not protected information currently. However, due to concerns with a previous contractor to NMFS with access to the providers’ business information then entering the business as a competitor, the committee endorsed Option 2. Option 2 would disallow a person that received this confidential information as a contractor to NMFS to become a permitted observer provider in the North Pacific. The committee recommended that Option 2 be revised to also disallow an individual to work for an existing observer provider. Staff noted that this would only apply to individuals/companies under contract with the agency or Council, as agency and Council staff have different restrictions.

The committee also discussed relaxing the requirement to submit cost data on an annual basis. Option 1 as currently written would limit the collection of these data to a total of three years. Given the limited utility of collecting only three years’ worth of data, the committee recommended revising Option 1 to require that the data only be submitted every third year. In effect, observer providers would not be required to submit data for each year of operation; they would be required to submit cost data every third year.

Issue 6: Completion of the fishing year

The committee reviewed the analysis and noted that upon further review, the analysts determined that it is not necessary to establish a cutoff date by which observers who collect fishing data that span two years must return for debriefing (Alternative 2). Consultation with the primary internal agency users of the data prompted this conclusion, noting that completion of the annual observer data set will continue to be delayed until all observer data is submitted, which could be as late as the end of March of the following year. The cost tradeoff to industry in artificially shortened fishing trips was sufficient rationale not to support Alternative 2. NMFS is recommending Alternative 1 (no action) under this issue. The committee also supports Alternative 1.

Issue 7: Miscellaneous modifications

The committee did not identify any problems with making the proposed changes that clarify regulations or revise inaccuracies (i.e., housekeeping issues). The committee recommends Alternative 2.

IV. Scheduling & other issues

The committee also addressed the issue added to the agenda: whether the quality of the observer data in the GOA is sufficient to use for the type and level of extrapolations currently necessary in the catch accounting system, and whether any changes can be made under the current service delivery model that would improve the status quo. One member noted that there is a need for a more statistically robust system in the GOA, since it is not nearly as data-rich as the Bering Sea. Given the large unobserved fleet and 30% fleet in the GOA, the data is sparse enough to be very sensitive to only a few observer reports, which can create a relatively variable fishery and reduces the ability of vessels to plan for their coverage.

One of the examples a committee member related was in the WGOA, where there is not a trawl vessel over 60’ participating in a specific target fishery that can carry an observer. In this situation, extrapolating from the CGOA to the WGOA results in a perceived overestimate of halibut PSC. In addition, more of the GOA catch is being harvested by the unobserved <60’ fleet (e.g., trawl cod), many vessels of which

can pack more and are more efficient than much of the >60' – 125' fleet. While the majority of this discussion occurred under agenda item II, the committee further discussed the suggestion of using a different algorithm in the GOA to extrapolate data across fisheries, potentially weighting observer reports at the end of the season less than those at the beginning of the season.

Martin Loefflad related that the Observer Program is currently working with the Alaska region to develop a contract that would evaluate ways to incorporate some statistical estimators into the catch accounting system. The intent is to capture the level of error around the existing point estimates (catch and PSC estimates), which becomes more necessary as we ask NMFS to manage increasingly fine levels of sector allocations and bycatch caps. When completed, this report will be available to the public.

APPENDIX 5

Council motion on North Pacific Groundfish Observer Program April 5, 2008

The Council approved three separate motions. The first motion recommended the following preferred alternatives under the seven issues evaluated in the RIR/IRFA for proposed regulatory changes to the observer program:

Issue 1. Observer certification and observer provider permitting appeals processes

Alternative 2. Remove the Federal regulations that provide an appeals process to an observer candidate in the case that NMFS denies an observer candidate initial certification and the opportunity to pursue further NMFS observer training. Remove the Federal regulations that provide an appeals process to an observer provider applicant in the case that NMFS denies an applicant an initial permit to become an observer provider.

Issue 2. Observer conduct

Alternative 2. Remove current Federal regulations at 50 CFR 679.50(j)(2)(ii)(D) that attempt to control observer behavior related to activities involving drugs, alcohol, and physical sexual contact, and remove references to the Observer Program's drug and alcohol policy in the regulations. Regulations would be revised to require each observer provider to have a policy addressing observer conduct and behavior, and current copies of each provider's policy would be required to be submitted to NMFS.

Option 1: Add a requirement under 679.50(i)(2)(x)(I)(5) to require observer providers to submit information to NMFS concerning reports regarding a breach of the observer provider's policy on observer conduct. Notification of such information is required within 72 hours after the provider becomes aware of the information.

Issue 3. Observer providers' conflict of interest limitation regarding research and experimental permits

Alternative 2. Revise Federal regulations to clarify that observer providers may provide observers or scientific data collectors for purposes of exempted fishing permits, scientific research permits, or other scientific research activities. In this role, NMFS observer program regulations would apply to observers operating under their NMFS certification but would not apply to scientific data collectors.

Issue 4. Fishing day definition

Alternative 2, Option 1. Revise the definition of "fishing day" in Federal regulations as follows:

Fishing day means ~~to~~ (for purposes of subpart E) a 24-hour period, from ~~0001~~ 1201 hours A.l.t. through ~~2400~~ 1200 hours A.l.t., in which fishing gear is retrieved and groundfish are retained. An observer must be on board for all gear retrievals during the 24-hour period in order to count as a day of observer coverage. Days during which a vessel only delivers unsorted codends to a processor are not fishing days.

Issue 5. Observer program cost information

Alternative 4. Require observer providers to submit copies of actual invoices to NMFS on a monthly basis. Invoices must contain the following information:

8. Name of each individual vessel or shore plant
9. Name of observer who worked aboard each vessel or at each shore plant
10. Dates of service for each observer on each vessel or at each shore plant (include and identify dates billed that are not coverage days)
11. Rate charged per day for observer services
12. Total observer services charge (number of days multiplied by daily rate)
13. Specified transportation costs (i.e. airline, taxi, bus, etc.)
14. Any specified "other" costs not included above (i.e. excess baggage, lodging, etc.)

Option 1: Limit the submittal of economic data to every third year and limit access to these data to agency staff.

Issue 6. Completion of the fishing year

Alternative 1. No action. No change would be made to existing Federal regulations allowing observer deployments to span two different fishing years and last for up to 90 days.

Issue 7. Miscellaneous modifications

Alternative 2. Revise existing Federal regulations related to observer program operational issues as follows:

- a. Regulations at § 679.50(c)(5)(i)(A) incorrectly reference a workload restriction at (c)(5)(iii). Replace (c)(5)(iii) with the correct reference at (c)(5)(ii).
- b. Regulations at § 679.50 currently require observer providers to submit to NMFS each type of contract they have entered into with observers or industry. There is no deadline for submission of this information, although most providers currently operate as if there is an annual deadline for all submitted information. Establish a February 1 deadline for annual submissions of this information, which is consistent with the deadline for copies of 'certificates of insurance.'
- d. Update the NMFS Alaska Fisheries Science Center, Fisheries Monitoring and Analysis Division website address throughout 50 CFR 679.50.

In the second motion, the Council recommended three specific actions outside of the regulatory package that were suggested by the Observer Advisory Committee:

- 4) With regard to the May 2007 observer data request, the Council recommends breaking out the GOA and AI Pacific cod State fisheries from the Federal (including parallel) fisheries data. The committee also recommended showing the Central, Western and Eastern Gulf subtotals in Table 1 on p. 11.
- 5) The Council approved sending another letter to NOAA HQ: 1) urging resolution of the outstanding observer compensation issues with regard to the Fair Labor Standards Act (FLSA) and Service Contract Act, and 2) to re-evaluate its policy determination that North Pacific observers should be classified as technicians rather than professionals under the FLSA.

- 6) The Council stated its intent to have the OAC convene in the future to re-evaluate the problem statement and objectives from the June 2006 observer program restructuring analysis, in order to explore whether some of the problems particular to the GOA fisheries can be resolved through regulatory measures as opposed to comprehensive restructuring.

The Council also approved the following (third) motion:

The Council tasks staff to develop a discussion paper to evaluate the problem statement, issues, and alternatives in the observer restructuring analysis last reviewed by the Council in 2006. The discussion paper also will identify any new issues that have arisen in the meantime, including the Magnuson-Stevens Act amendments, the status of cost information, and any relevant changes in the fisheries. Staff will provide recommendations about possible modifications to the problem statement and alternatives. ADF&G and IPHC staff will be asked to participate with Council and NMFS staff in development of this discussion paper. The discussion paper will be provided to the Council for consideration at the December 2008 meeting.

APPENDIX 6

Letter from NMFS AK Region to NPFMC, January 16, 2008

APPENDIX 7

Percent observed catch in the Alaska groundfish fisheries, 2004 - 2007