

March 10, 2004

Dr. William Hogarth  
NOAA Fisheries  
1315 East-West Highway  
Silver Spring, MD 20910



P.O. Box 30167  
Seattle, WA 98103

Dear Dr. Hogarth:

I received a copy of your memorandum to Terry H. Lee (Office of General Council) dated November 13, 2003 as well as a letter to you from the North Pacific Fishery Management Council (NPFMC) dated February 11, 2004 as part of an information packet provided to the NPFMC Observer Advisory Committee (OAC) for its upcoming meeting in March. I have several comments and questions regarding both of these documents before the APO will be able to formally support the new policy on observer wages.

Regarding the technician-level status of observers we are concerned that this work experience may no longer be applicable when applying for professional level positions. As you know, many observers go on to work for NOAA Fisheries as fisheries, marine or research biologists. In the past, observing experience could be used as relevant employment experience when applying for professional level positions. It has come to our attention that if the observer position is classified as 'technician-level', this experience may no longer apply as relevant work experience when applying for professional-level positions. We request the agency provide clarification. The APO will be unable to support a reclassification if the ability of observers to advance their careers is eliminated by legal technicalities in the terminology.

The memorandum to Terry Lee has stirred up many ill-feelings toward observers in the North Pacific as evidenced by comments at the February North Pacific Fisheries Management Council meeting. Confusion and frustration by industry towards the Agency is being projected onto observers. We believe that much of the confusion, perhaps even over-reaction, could be mitigated if the agency would provide the following additional information:

- Detailed explanation of how the wage determination and FLSA provisions will be applied to observer salaries? Include examples of how the wage determinations have been interpreted in all other federal observer programs past (e.g., Tuna-Porpoise Observer Program) and present (e.g., in the Hawaii longline observer program or any others that have had a long-standing wage determination)?
- How is the FLSA applied to similar workers such as those on oil platforms or North Slope workers?

- Can the wage determinations and/or FLSA provisions be applied differently for ‘waiting’ or stand-by time and ‘working’ time?

- How does the agency anticipate tracking work hours? Is the expectation that a reasonable number of hours will be applied or will observers be expected to fill out detailed time-sheets?
- What, if any, are the implications of having a negotiated labor agreement in place? The NPFMC has summarized parts of the law for a March 2004 discussion paper titled, “Expansion of a Fishery Management Plan Amendment to Establish a New Program for Observer Procurement and Deployment in the North Pacific”, but we would like an official interpretation from the Office of General Council and/or the Department of Labor (DOL).

If the policy remains in place, the APO strongly recommends against having to record detailed working times as this adds a huge administrative burden on the observer and the agency. A few years ago the North Pacific Groundfish Observer Program conducted a special project where observers tracked their work time by job duty. This proved to be not only a burden on the observer but a distraction from higher priority duties as well.

By design, observers have little to no control over their vessel assignments. Some fisheries require more hours of actual work than others. If a base wage is not guaranteed this results in an unacceptable level of uncertainty regarding wages and will encourage an even higher attrition rate of observers. This unintended consequence flies in the face of a national effort to increase retention of experienced observers within federal observer programs.

The APO believes that the wage determination would be reasonably applied if it accounted for a 12 hour work day, 7 days per week which would be 40 hours of regular time plus 44 hours of overtime.

A discrepancy was noted while reading the letter from the NPFMC. The letter refers to section 13(b)(4) exemption of 29 CFR 784.101.

*“Section 13(b)(4) (relating to employees in the canning, processing, marketing, freezing, curing, storing, packing for shipment, or distributing of any kind of fish, shellfish, or other aquatic forms of animal or vegetable life, or any byproduct thereof)”*

The DOL website states this section was repealed, effective May 1, 1976, by section 11 of the Fair Labor Standards Amendments of 1974. If this is the case the APO questions the validity of this argument and its use to repeal the policy.

In closing the APO requests the following questions be answered.

- Is work performed at a technician level, applicable as relevant work experience when applying for a professional level position with the federal government?
- How will the wage determination and FLSA provisions will be applied to observer salaries?
- Can the wage determinations and/or FLSA provisions be applied differently for 'waiting' or stand-by time and 'working' time?

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- What are the implications of having a negotiated labor agreement in place?
- Will observers be expected to start filling out detailed time-sheets?
- Do the newly passed amendments to the FLSA (set to go into effect in 2004) change the applicability of the Act to fisheries observers?

Thank you for your time and prompt response.

Sincerely,

Kimberly S. Dietrich  
Association for Professional Observers

Cc: Chris Oliver/ Nicole Kimball, North Pacific Fishery Management Council (via email)  
Dr. Jim Balsiger, Alaska Region (via email)  
Sue Salveson, Alaska Region (via email)  
Dr. Bill Karp, North Pacific Groundfish Observer Program (via email)  
Vicki Cornish, National Observer Program (via email)  
Lisa Lindeman (via email)  
Terry Lee, Office of General Counsel  
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