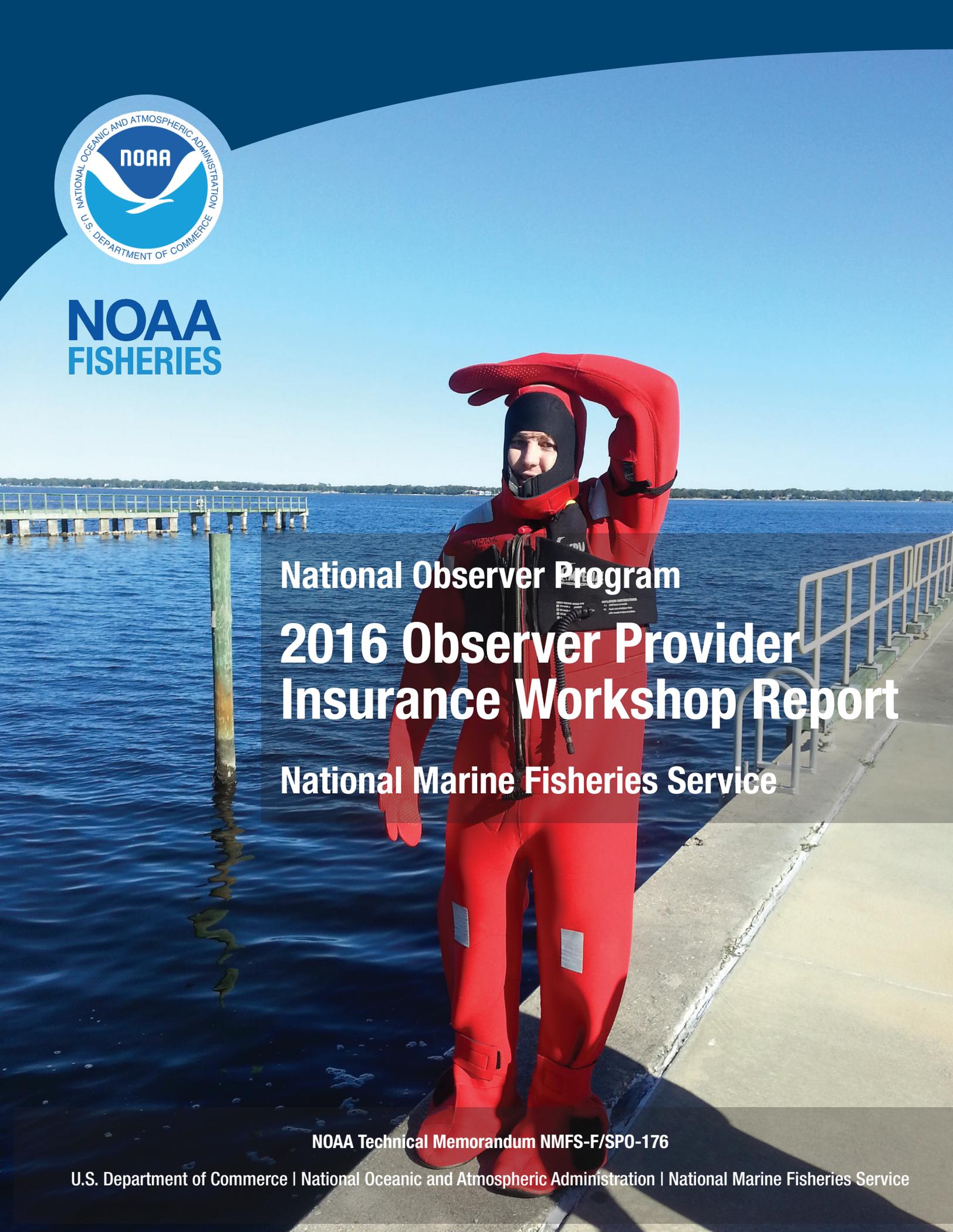




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A person wearing a full-body red wetsuit and a black hood is standing on a concrete pier. They are holding a red buoy or piece of equipment above their head with both hands. The background shows a large body of blue water under a clear blue sky. A wooden pier extends into the water on the left, and a metal railing is on the right.

**National Observer Program  
2016 Observer Provider  
Insurance Workshop Report  
National Marine Fisheries Service**

**NOAA Technical Memorandum NMFS-F/SPO-176**

**U.S. Department of Commerce | National Oceanic and Atmospheric Administration | National Marine Fisheries Service**



# National Observer Program 2016 Observer Provider Insurance Workshop Report

James Patterson, Alex Perry, Alicia Miller, and Jane DiCosimo

**NOAA Technical Memorandum NMFS-F/SPO-176  
November 2017**



U.S. Department of Commerce  
Wilbur L. Ross, Jr., Secretary

National Oceanic and Atmospheric Administration  
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National Marine Fisheries Service  
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<http://spo.nmfs.noaa.gov/tech-memos>

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# Acronyms

Acronym	Title
AFSC	Alaska Fisheries Science Center
AKRO	Alaska Regional Office
AOI	Alaskan Observers, Incorporated
CFR	Code of Federal Regulations
CGL	Commercial General Liability
DOC	Department of Commerce
DOL	Department of Labor
FECA	Federal Employees' Compensation Act
FOCA	Fisheries Observers' Compensation Act
GL	General Litigation
GML	General Maritime Law
LHWCA	Longshore and Harbor Workers' Compensation Act
MEL	Maritime Employers' Liability
MGL	Marine General Liability
MMPA	Marine Mammal Protection Act
MRSA	Methicillin-resistant Staphylococcus aureus
MSA	Magnuson-Stevens Fishery Conservation and Management Act
NCCI	National Council on Compensation Insurance
NEFSC	Northeast Fisheries Science Center
NOAA	National Oceanic and Atmospheric Administration
NOP	National Observer Program
NOPAT	National Observer Program Advisory Team
NPFMC	North Pacific Fishery Management Council
NWFSC	Northwest Fisheries Science Center
OGC	Office of General Counsel
OWCP	Office of Workers' Compensation Programs
PIRO	Pacific Islands Regional Office
P&I	Protection and Indemnity insurance
SEFSC	Southeast Fisheries Science Center
ST	Office of Science and Technology (National Marine Fisheries Service)
USL&H	U.S. Longshore & Harbor Workers' insurance

## Executive Summary

Adequately insuring U.S. fishery observers authorized under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), Marine Mammal Protection Act (MMPA), and Endangered Species Act (ESA) for injury claims during deployment both on land and at sea—and addressing associated lost wages—has been a concern of NOAA Fisheries since the inception of observer programs in U.S. waters in the 1970s. Correspondence between an observer provider company, the North Pacific Fishery Management Council (Council), and NOAA Fisheries during 2014-2015 identified that certain regulatory requirements could be rescinded by the Council and NOAA Fisheries through an amendment to federal regulations, since the agency determined that some requirements were redundant, costly, or inapplicable. However, the correspondence did not identify insurance coverage(s) that could be added as requirements to replace insurance coverages that would be rescinded from regulations, nor did it identify minimum coverage amounts for applicable requirements. Therefore, NOAA Fisheries' National Observer Program (NOP) hosted an Observer Provider Insurance Workshop<sup>1</sup> in Washington, D.C., November 8–9, 2016. The purpose of the workshop was twofold:

1. To review federal regulations that specify observer provider insurance requirements and receive comments on whether they are appropriate.
2. To identify a) whether there are any gaps in observer provider insurance requirements to ensure that U.S. fishery observers<sup>2</sup> are adequately covered for compensation due to injury and/or illness while performing all aspects of their jobs, whether on land or at sea; and b) minimum dollar amounts for those insurance requirements.

Specific objectives of the 2016 Observer Provider Insurance Workshop were to:

- Discuss coverage for observers under State Workers' Compensation and the Federal Employees' Compensation Act (FECA).
- Discuss gaps in coverage and examine options to cover those gaps.

- Discuss actions to ensure that observer providers carry appropriate and sufficient insurance to cover claims by observers who are injured or fall ill while on duty.
- Consider regional and/or national approaches regarding types of insurance coverage requirements, including minimum coverage amounts.

This report summarizes the topics discussed during the workshop, comments submitted during a follow-up May 2017 webinar that summarized the workshop discussions, and preliminary recommendations from an Observer Safety Program Review.

## Background

Since the 1970s, when scientific observers began deploying on commercial fishing vessels to monitor fisheries, it has been difficult to define their role and function to ensure they receive proper care and wage compensation should they become ill or injured while performing the required duties of the job. Observers have many land- and sea-based duties, each of which presents unique challenges and dangers to observers in vastly different and changing working environments. At sea, observers monitor fisheries landings on a variety of vessel types and sizes deploying various gear types, targeting numerous species, and landing a multitude of non-targeted (bycatch) species. Observers also monitor fisheries in both at-sea and shoreside processing facilities. Observers carry sometimes heavy and burdensome equipment on and off vessels, and even across vessels tied together at the dock.

In spite of the Department of Labor (DOL)'s specific job classification that defines the duties and responsibilities of an observer, which may serve as a single point of reference for data for developing adequate and comprehensive health insurance coverage for observers, this has yet to be undertaken. *The resultant national problem is a lack of uniform regulations and/or insurance coverage requirements in U.S. federal fisheries.* Furthermore, in regions where insurance coverage requirements do exist in the regional regulations (regional Codes of Federal Regulations, or CFRs)<sup>3</sup>, the regulations and requirements may be redundant, overly costly, or inapplicable for observers, as was documented in a 2016 letter from NOAA Fisheries to the Council.

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<sup>1</sup> The workshop was conducted as a non-Federal Advisory Committee Act meeting for informational purposes only. Attendees and participants discussed issues but did not reach consensus on recommendations.

<sup>2</sup> For the purposes of this workshop, "observers" includes domestic at-sea monitors in U.S. waters, but excludes international at-sea monitors and observers, platform observers, and EM technicians. However, the results of the workshop may have relevant implications for those groups as well.

<sup>3</sup> Code of Federal Regulations <https://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR>

Observers work in two types of programs: 1) industry-funded programs (North Pacific (Alaska) groundfish and Pacific halibut<sup>4</sup>, West Coast groundfish trawl rationalization, Northeast groundfish sector, and Atlantic sea scallops individual fishing quota fisheries) in which the fishing industry pays for the at-sea deployment of observers, and 2) NOAA Fisheries-contracted programs (all other domestic observer programs) wherein federal funds are utilized to deploy contracted observers. In all cases, NOAA Fisheries funds all infrastructure costs supporting observer programs.

The existence of two funding sources for at-sea deployment of observers has resulted in questions regarding the employment status of observers, further complicating the provision of insurance coverage. The 1996 amendment to the MSA deemed that all fishery observers were to be considered federal employees for the purposes of compensation *while at sea*, and were thereafter eligible for benefits under the Federal Employees' Compensation Act (FECA). This amendment has alleviated some of the difficulties in properly insuring observers; however, FECA still leaves substantial gaps in the coverage provided. FECA provides for insurance coverage of observers only while at sea; it remains necessary for observer providers to purchase or pay into additional insurance policies (e.g., state workers' compensation and Longshore and Harbor Workers Compensation Act (LHWCA)) for the land-based duties regularly performed by observers in support of their at-sea duties. However, the coverage properties and minimum thresholds of these added policies may vary from state to state and between fisheries, resulting in further ambiguities and gaps in coverage. Additionally, overtime pay, which is a substantial portion of an observer's wages, is not considered for compensation under FECA. In short, although FECA in many ways improves protection for observers, there still remains substantial concern regarding adequacy of coverage.

In 2001, the first Observer Insurance Workshop (see [Appendix A3](#)) was conducted to address the inadequacies of existing observer insurance coverage. The 2001 workshop demonstrated gaps in coverage, highlighted multiple redundant and duplicative insurance policies observer providers were required to carry, and defined the inapplicable nature of some of the policies and acts in regard to scientific observers. The discussions and conclusions of

that workshop also demonstrated that, at that time, there were no established minimums for the types of insurance that must be provided by law to protect observers, and many of the protections in place did not appear to have the health and wellbeing of the observer as the top priority. Additional steps were still necessary to ensure the health and safety of the observers.

In 2003, a final report was prepared with four main objectives to address the shortcomings found as a result of the 2001 Observer Insurance Workshop. The objectives were to:

1. Devise coverage options to insure observers regardless of their location (at sea, on land, traveling for work, etc.);
2. Reduce the risk to vessel owners from liability due to an injury of an observer;
3. Address government liability relating to the training, debriefing, and deployment of observers; and
4. Develop methods to monitor and manage the potential future changes in the legal and financial risks associated with observer programs.

In analyzing the above four aspects of observer programs, the report suggested that new legislation specifically applicable to observers would achieve optimal benefits for protecting observers through insurance. This could be achieved by using the LHWCA as a model, with the modification of certain aspects of the language, to bring a bill to Congress for consideration. This drafted bill was termed the Marine Fisheries Observers' Compensation Act or FOCA (see [Appendices A4-A6](#)). It would close the gaps and potentially eliminate redundancies and overlaps found in current coverages. FOCA was designed as a cost-effective all-inclusive plan for observer providers to carry full insurance coverage for observers while prohibiting negligence claims/liability suits by observers (with exception of cases of willful injury or death). This would concurrently provide protection for the government, observer providers, and vessel owners. However, because this legislation was not enacted, the insurance coverage gaps and coverage discrepancies for the protection of observers, observer providers, vessel owners, and vessels remain.

On March 25, 2014, Alaskan Observers Incorporated (AOI) submitted a letter ([Appendix A7](#)) to the North Pacific

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<sup>4</sup> The Alaska Observer Program has two types of industry-funded observer programs. Vessels and processing plants in the full coverage category pay permitted observer providers directly for observer coverage on their vessel or at processing plants. Observer coverage in the partial observer coverage category is funded by revenue generated from an ex-vessel value-based fee. NOAA Fisheries assesses a fee of 1.25% on the ex-vessel value of the landed groundfish and halibut in the partial observer coverage category. NOAA Fisheries uses fee proceeds to contract with an observer provider company (AIS Inc.) which provides observers to vessels and processing plants that have been selected for observer coverage.

<sup>5</sup> National Oceanic and Atmospheric Administration [http://www.nmfs.noaa.gov/sfa/laws\\_policies/msa/](http://www.nmfs.noaa.gov/sfa/laws_policies/msa/)

<sup>6</sup> United States Department of Labor [https://www.dol.gov/owcp/regs/compliance/ca\\_feca.htm](https://www.dol.gov/owcp/regs/compliance/ca_feca.htm)

<sup>7</sup> United States Department of Labor <https://www.dol.gov/owcp/dlhwc/lhwca.htm>

Council that recommended amendments to the observer provider coverage requirements in federal regulations in order to reduce the cost of insuring observers by eliminating these unnecessary and redundant coverage requirements, and providing either national insurance requirements or standards for regional adoption. The AOI letter stipulated: 1) uniform and/or national standards for observer insurance coverage are lacking; 2) only three of the eight regional fishery management councils (North Pacific, Pacific, and New England) have implemented any type of fisheries observer insurance regulatory requirements; and 3) of those three Councils, only the North Pacific Council required the provision of the Merchant Marine Act (Jones Act)<sup>8</sup>, and both the North Pacific Council and the Pacific Council required the provision of LHWCA coverage and Commercial General Liability (CGL).<sup>9</sup> The New England Council did not require the provision of any of these coverages, but did mandate a minimum coverage dollar value of both of Maritime Employers' Liability (MEL)<sup>10</sup> and state workers' compensation coverage in the amount of \$5 million. The AOI letter opined that the Jones Act, CGL, and LHWCA were inapplicable regarding observers, and therefore coverage under these acts should not be required under federal regulations and proposed that MEL, state workers' compensation, and Marine General Liability (MGL) coverages did apply to observers and should be required, with a minimum insurance coverage of \$2 million.

In response to the AOI letter, the Council requested NOAA Fisheries guidance ([Appendix A8](#)) on AOI's recommendations. In a May 2015 letter ([Appendix A9](#)), the NOAA Fisheries Assistant Administrator agreed that the Jones Act, CGL, and LHWCA coverages were indeed redundant and unnecessary requirements for observer providers, and noted that the Council could consider a regulatory amendment to remove some coverages from regulatory requirements and potentially implement more appropriate options. At that time NOAA Fisheries did not have a recommendation on the appropriate minimum coverage requirements for the MGL, MEL, and state workers' compensation coverage, and stated that this element in the regulations could be reassessed in a Council analysis. The ongoing discussion of the applicability and appropriate coverage amounts of the various observer insurance coverages led the NOP to coordinate the 2016 Observer Provider Insurance Workshop in order to identify a pathway to finally resolve this issue.<sup>11</sup>

## The Workshop

The workshop, which was attended by NOAA Fisheries representatives of all U.S. regional observer programs, sought input from as many sources as possible, including union representatives, observer provider company representatives, and insurance experts (consultants, providers, brokers, agents, and underwriters). An additional panel of Department of Labor (DOL) staff with expertise in observer claims provided an opportunity to exchange information on how to expedite the claims process. The workshop was attended by a total of 61 people for all or part of the workshop: 29 participants on site, 12 participants via webinar and phone, and approximately 20 participants via phone only. Webinar and phone participants were in listen-only mode, but could submit questions and/or comments via the webinar, which were addressed when possible during the workshop.

The workshop included four subject matter expert panels that are described below. The first day was organized into two parts. The first session included two NOP staff presentations: 1) background information and 2) discussions of types and coverage amounts of observer provider insurance. For the background session, NOP staff summarized the first workshop in 2001, recent correspondence on this issue, and potential next steps. The second presentation summarized aggregated, anonymous insurance cost data contributed by the observer provider companies. Two panel discussions comprised the second part: 1) observer provider company experts and 2) insurance provider experts.

The second day consisted of three sessions that addressed insurance claims processes. The first session consisted of prepared materials by an observer union representative (as no current observers were present at the workshop) and general discussion by those in attendance and on the phone. The DOL staffed the second session, with presentations and discussions led by subject matter experts on observer insurance claims under FECA and state workers' compensation. The third session included a combined insurance expert and observer provider discussion, with contributions from all prior panels and workshop participants. The meeting concluded with closing remarks and a workshop summary by NOP staff.

<sup>8</sup> Merchant Marine Act of 1920 [http://huelladigital.univisionnoticias.com/cruceros-vacaciones-en-aguas-de-nadie/wp-content/uploads/2016/06/Jones\\_Act\\_1920.pdf](http://huelladigital.univisionnoticias.com/cruceros-vacaciones-en-aguas-de-nadie/wp-content/uploads/2016/06/Jones_Act_1920.pdf)

<sup>9</sup> The Hartford <https://www.thehartford.com/general-liability-insurance>

<sup>10</sup> International Special Risks <http://www.isr-insurance.com>

<sup>11</sup> The information discussed above is intended to provide background to this document, and is not all inclusive. For a timeline of relevant actions on this topic, please refer to [Appendix A1–A9](#).

## Session One: Introduction and Insurance Costs Summary

### The National Observer Program (NOP) Panel

Panelists: Jane DiCosimo, Alex Perry

NOP staff opened the workshop by identifying the objectives of the workshop and presenting the relevant historical information for hosting the workshop (as substantially detailed in the background portion of this document). Staff next summarized the results of a questionnaire posed to observer provider companies prior to the workshop, conducted with the goal of providing cost information to insurance providers. Aggregated insurance costs estimates were intended to determine the feasibility of utilizing a single, national insurance contract. The data were aggregated to protect sensitive and private business information. Despite this, many observer provider companies elected not to answer questions regarding their insurance costs. Additionally, there were varying interpretations regarding the data that was being requested, so true cost and rate comparisons were difficult to make. The data ultimately yielded inconclusive results and the approach was abandoned. After these presentations, the floor was opened up for general discussion by the workshop participants.

Participants were interested in the development of guidance or regulations on national minimum standards to alleviate some of the concerns regarding adequate insurance coverage of observers. This would also eliminate some of the redundancies and unnecessary costs associated with carrying coverages such as the Jones Act or GML, as observers are unlikely to recover under these authorities. However, workshop participants strongly supported flexibility, recognizing that requiring minimum dollar amounts for coverage levels could prove to be problematic due to regional variability. The number of vessels, vessel sizes and various gear configurations, types of fisheries and targeted species, different rates that observers are required to monitor the individual fisheries, and the size of the observer provider companies are only some of the variables that contribute to the determination of the type(s) of coverage and plan minimum coverage amounts that are necessary to provide adequate protection. Due to these and many other factors, workshop participants did not support establishing a single nationwide insurance provider. However, allowing for regional/localized insurance markets (which would adhere to a national set of guidelines or regulations to develop workable coverage schemes) were identified to likely achieve the goal of adequate observer insurance coverage.

By the end of the first session, participants suggested that the NOP should gather more information related to the issues discussed at the workshop and how to improve access to the existing benefits available to injured observers. Participants suggested that the NOP could conduct two separate surveys to gather further information from both the insurance providers and observers regarding insurance costs and observers' perspectives on the claims process. These surveys could be done using an anonymous online survey format such as Survey Monkey.<sup>12</sup> The survey directed to the insurance industry could focus on the costs associated with providing insurance coverage to observer providers based on the number of at-sea days that observers were deployed. Normalizing the data based on the total number of sea days across the observer provider companies could better facilitate comparative rate analyses. The NOP could request that the insurance industry (brokers, underwriters, and providers) assist NOAA Fisheries to craft the language of the survey to compile useful information regarding cost and rate data.

The second survey could gather information from observers who have experience with the injury claims process to gain insight on the challenges or potential barriers in the claims process. The observer survey could be useful to understand the differences for wage compensation under the various coverages (e.g., FECA, USL&H, and state workers' compensation), and the medical benefits and compensation process following an injury. The information from this survey could be useful in developing guidance or training for how to improve access to and understanding of the claim filing process, timeliness of benefits, and the respective roles and responsibilities of the observer, observer provider and insurance claims office under each of the coverages. To improve access to benefits for injured observers and communication under the existing coverages, meeting participants suggested NOAA Fisheries facilitate a workshop involving the Department of Labor office in charge of handling observer claims and observer provider companies and observers. The workshop would be an opportunity to improve communication between the claims processing office and those filing claims for benefits to expedite and promote smoother claims processes (for example, by identifying common claims errors that could be readily corrected).

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<sup>12</sup> Survey Monkey "How it Works" <https://www.surveymonkey.com/mp/take-a-tour/>

## Session Two: Types and Amounts of Observer Provider Insurance

### Observer Provider Expert Panel

**Panelists: Bryan Belay, Michael Lake, Troy Quinlan, Ward McIntyre, Stacey Hansen, Sonja Valle**

Observer provider companies carry insurance for their observers, even if the observers are considered contractors rather than employees. Contract employees could be required to self-insure, but since this could make the observer providers non-competitive, this strategy has not been employed. Through insurance, observer providers are covering their companies from liability claims from the employees (or contractors) and covering the care and compensation of observers in the event of an injury and/or death. The panelists highly recommended that the observer providers voluntarily educate and train their observers and office staff on the processes of claims filing, and that the providers are directly involved in the claims process from inception to conclusion to ensure the proper procedures are followed, forms are completed correctly, and that all requested claims information is submitted in a timely fashion. Due to the nature of the observers' deployments, a deadline could be missed as the observer may be offshore, out of state, or in a remote location and lacking communication capability. Therefore, it would be beneficial for observer providers to take the lead throughout the entire claims process to ensure that observers receive the care and compensation they need in the most efficient manner possible.

Workshop participants suggested that the Jones Act does not apply to observers, as they do not qualify as "seamen"<sup>13</sup> while aboard the vessel, and that federal regulations would need to be amended to remove requirements for carrying that specific policy. However, participants had a variety of different experiences with claims under the U.S. Longshore & Harbor Workers' (USL&H)<sup>14</sup> insurance (implemented under the LHWCA), implying this coverage may be applicable in some specific circumstances. Due to the language in the MSA that defines observers as carrying out their duties "on a vessel," the MSA appears to exclude land-based duties observers are required to perform. Some workshop participants reported that observers who have been injured while performing shoreside duties (e.g., catch monitors/processing plant observers) have successfully recovered under the USL&H. Therefore, given that USL&H insurance has been successfully applied to observers who

perform shoreside duties, regulations that require observer providers to purchase this insurance could be clarified rather than removed.

The panel also revisited the previously discussed topic of minimum insurance coverage dollar amounts. The discussion emphasized that the application of minimum dollar amounts with any carried insurance was potentially problematic due to the differences in regard to several variables, including rate of coverage, the number of employed observers in the provider companies, and costs to billable rate ratio.

Workshop participants noted that state workers' compensation insurance may apply to the land-based component of the observer's duties that were not covered under LHWCA, and in some cases followed the observers offshore depending on the state in which the policy was held and where the incident occurred. Some state workers' compensation insurance(s) continued to cover the observer as long as the vessel remained within state waters. This was thought to be duplicative, however, as FECA coverage of the observer commences once on board the vessel, and FECA is mutually exclusive from state workers' compensation and other insurance coverages. To reiterate, many participants believed it possible to utilize state workers' compensation and/or MEL insurance as a supplement to FECA to compensate for the overtime pay of the observer, since FECA does not recognize overtime when calculating for compensation (which typically constitutes a substantial component of observer wages); this possibility warranted further investigation and discussion.

### Insurance Expert Panel

**Panelists: Ian Greenway, Ivan Kolva, Paul McGreenery, Kevin Rocha**

Although observing is deemed a potentially hazardous occupation, some maritime professions may incur greater risks in the performance of duties than that of an observer, which would require greater cost for coverage. It is important therefore to distinguish observing from other risky maritime occupations in order to properly calculate the cost of adequate coverage. This could be achieved by using the unique job code created specifically for observers by NOP and DOL. The National Council on Compensation Insurance (NCCI)<sup>15</sup> has utilized a marine scientist code for observers, which has produced better insurance rates for providers by combining observers with a lower risk pool.

<sup>13</sup> To qualify as a seaman per the Jones Act an individual must 1) have been permanently assigned to a vessel or perform a substantial amount of his or her work onboard said vessel, 2) perform duties that contribute to the function of the vessel including navigation, operation, and maintenance, and 3) perform duties that are essential for the completion of the mission of the vessel.

<sup>14</sup> Accessible Marine Insurance <http://ami-ins.com/uslh/>

<sup>15</sup> National Council on Compensation Insurance <https://www.ncci.com/pages/default.aspx>

In most cases, the participants agreed on the importance of identifying observers as a separate and distinct profession given the dynamic nature of the job, duties performed, and changing locations of those duties. Discussion on this matter indicated that it would be best if NCCI utilized existing observer job classification codes to develop a risk pool specifically for observers on a national scale. This would provide entities such as NCCI a source from which to gather data regarding observers as a singular group, which may ultimately result in driving the coverage rates down. With an observer profession clearly defined and categorized for insurance purposes, participants agreed that regardless of an observer's job status with the provider (either an employee of the provider company or an independent contractor/1099 employee), the liability coverage for the provider would be essentially the same. However, it was stated that it may also be possible that the use of 1099 employees could limit the insurance provider pool, as insurance companies may be reluctant to offer coverage to independent contractors.

The insurance panel expressed that there appeared to be a misunderstanding within the observer provider industry that there are minimum dollar limits and/or maximum dollar limits on state workers' compensation and USL&H coverages. Although there are no limits on the dollar amounts of coverage at either extreme, there is state-to-state variability in both of these insurances (in some states USL&H and state workers' compensation policies are mutually exclusive; in other states they may be used in conjunction to supplement one another). Panelists identified a need for more clarification concerning the application of LHWCA coverage, as it does not specifically exclude observers in the statutory language, and therefore has been used with high levels of success nationwide to cover claims, particularly claims regarding shoreside injuries. Although LHWCA appears to be the gold standard of coverage regarding wage compensation and health coverage, it does not apply to injuries that occur at sea (mutually exclusive from FECA), and it contains an exemption for workers at aquaculture facilities. Therefore, LHWCA may not apply to observers working in processing facilities. This last issue may warrant further examination.

The panel suggested that umbrella policies can be purchased by observer providers to close some of the gaps in coverage that exist if a provider only complies with the insurance coverages required in regulation, while meeting any established requirements of minimum coverage for the observers. The insurance experts suggested that wording regulatory language in a specific manner could allow for

some flexibility in meeting the requirements among the different regions, which could allay some of the concerns that result from the disparate laws and regulations from state to state. For example, the use of language such as "adequate insurance coverage" could be beneficial in that it would allow regional flexibility to meet the required minimums, while empowering NOAA Fisheries to define the minimum standards. Utilizing this type of language in insurance coverage regulations could standardize observer provider insurance requirements.

## Session Three: Claims Process

### Observer Panel<sup>16</sup>

This panel opened the discussion by stating that the FECA claims process is not only time-consuming, but also cumbersome and complicated. Workshop participants reported that many observers have reported delays due to filing errors and lost faxes or other communications, and most felt disconnected from the process in general. The inability of the observer to participate in the claims process may result in observers feeling a loss of control over the claims process and its resolution. Additionally, workshop participants aired a concern that FECA customer service can be difficult to work with during the claims process. The need for repeated calls, long hold times, "lost or not received" claims information via fax, and the inability to get through to an agent on the phone have all been reported by observers. It was reiterated that the observer providers should properly train observers specifically on the procedures for dealing with injuries that may occur at work or, better yet, provide that service themselves. When seeking medical attention for a work-related injury, it is very important for observers to inform the medical facility that the injury occurred at work and should be treated as a worker's compensation claim. If an observer presents his or her own personal medical insurance for a work-related injury, the claims process can become greatly complicated. Once claims have been filed, it is very difficult for a provider to facilitate a reversal of payments from one insurance company to another. Additionally, participants conveyed that the gaps in coverage concerning illness need to be addressed. Observers that fall ill while at work are required to prove that the illness was "proximately caused by employment", which has been shown to be very difficult. For example, if the observer contracts and requires treatment for Methicillin-resistant *Staphylococcus aureus* (MRSA)<sup>17</sup>, but not everyone on the vessel is showing symptoms, the claim may be denied.

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<sup>16</sup> No observers were present at this workshop. They were represented by written material from their union representative, Tracey Mayhew with United Industrial Workers Seafarer's Union, who attended via webinar, and general discussion by workshop participants.

<sup>17</sup> Centers for Disease Control and Prevention <https://www.cdc.gov/mrsa/>

Several observer providers have developed internal processes for handling the various types of workplace injury claims. Some providers generate an in-house claim identifier for observers immediately following the injury report to track the claim throughout the entire process. The Alaska Region requires that all injuries and illnesses that prevent the completion of duties be reported to NOAA Fisheries. Such reporting may assist in following the claim through the claims process regardless of region, and was suggested to be considered for adoption at a national level.

Several other providers have employed a much more proactive method for dealing with claims, and more importantly, for getting the observers healthy and back to work as soon as possible. These providers pay for the medical services and lost wages (if applicable) of the injured observer out of pocket and/or through liability insurance such as MEL. Following the initial treatment of the injured observer, they help to guide the observer through the claims process, and the providers are subsequently reimbursed through FECA, USL&H, and/or state workers' compensation. However, there is no guarantee of payment by the insurance company, which puts the observer provider company at significant financial responsibility and potential financial burden and risk while waiting for the claim to be paid. This method of dealing with claims, though quite efficient in procuring treatment and compensation for the observer, simply may not be possible for smaller observer provider companies due to the required initial cost, and would not be made part of national NOAA Fisheries policy guidance.

### **Government Subject Matter Expert Panel**

**Panelists: Tara Jones, Derek Tukenmez, Mohammad Sheikh, Keith Hagg, Megan Heller**

Two representatives from the FECA Office of Workers' Compensation Programs (OWCP) gave a presentation to explain FECA claims, requirements, timelines, and processes. To file a FECA claim, the claimant must meet five requirements: 1) file the claim within three years of the incident; 2) be a civilian (non-military) employee; 3) provide Fact of Injury information (injury must have occurred as stated with provision of medical evidence of said injury); 4) sustain the injury during the performance of duty; and 5) demonstrate a causal relationship between the injury, the condition of the injured, and the treatment required to alleviate the injury. FECA also stipulates exclusions for claims reimbursements, which include willful misconduct,

intoxication (drugs and/or alcohol), intentional injury, and injury while not in the performance of duty. Once a claim is filed, FECA generally waits 30 days to decide whether to process or reject a claim. The 30-day period was established to allow FECA to receive any and all claims information and materials from the claimant in an attempt to avoid delays due to missing documents. However, this process can and will be expedited if the injury is catastrophic, and/or the observer or observer provider contacts the claims processor to inform them that all claims information has been submitted, and requests that the process proceed without further delay. FECA offers online training for supervisors, which could potentially be utilized by the observer providers to ensure that all forms are completed correctly to minimize delays.

Typically, when claims are accepted and paid by FECA, the Department of Labor will pay the claim up front and will then seek reimbursement from NOAA Fisheries. To pay the claims of compensation for lost work time, FECA calculates the pay rate based on one year of employment of the observer. This calculation can be problematic for observers, as their work is often difficult to justify as full-time or may be considered seasonal depending upon the fishery, and because there is no compensation for the overtime pay that is integral to observer wages. As a remedy to some of these issues, FECA can expand the calculation for compensation, comparing it to other employees with more hours worked within the same period of time the claimant was injured and unable to work. Furthermore, FECA will reimburse out-of-pocket expenses paid to medical facilities by the claimant on the condition that the medical facility is registered with FECA as an approved provider, with registration possible on a per-case basis.

At the conclusion of this panel discussion, OWCP representatives offered to express the concerns addressed in this workshop regarding the speed of claims processing to their leadership and General Counsel. Additionally, they expressed a willingness to reach out to the Division of Longshore and Harbor Workers to answer questions posed by observer providers both during the panel discussion and in follow-up discussions. Also, OWCP staff offered to provide outreach and education regarding FECA and the FECA claims process through a meeting at the Cleveland Special Program office, which handles all FECA claims, as well as to provide specific instructions on filing claims to observers and observer providers on their website.

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<sup>18</sup> United States Department of Labor <https://www.dol.gov/owcp/>

## Insurance Expert and Observer Provider Discussion

**Panelists: Ian Greenway, Ivan Kolva, Paul McGreenerly, Kevin Rocha, Bryan Belay, Michael Lake, Troy Quinlan, Ward McIntyre, Stacey Hansen, Sonja Valle**

The insurance expert panel discussion began with a focus on the potential for economic loss on the part of the vessel owners and observer providers in the event of an injured observer. Vessel owners and observer providers alike are not protected from an observer bringing civil action against them while utilizing the current insurance coverages, and are therefore highly encouraged (but cannot be required) by the insurance providers to carry Protection and Indemnity (P&I)<sup>19</sup> insurance to protect themselves and their assets in the event of a civil liability suit. One point of discussion was the MMPA<sup>20</sup>, which expressly bars observers that are injured or killed on the job from bringing civil action against the vessel or vessel owner. The MSA does not include a comparable provision that bars civil suits by observers that are injured on the job. NOAA General Counsel explained that the MMPA bar against observer civil suits would generally not apply because observer coverage is generally required under the MSA, rather than the MMPA. If vessels carry an observer to comply with an MSA requirement, that authority would control whether an observer can bring a civil suit, even if the observer collected information for MMPA purposes. The panels also discussed potential economic loss of a vessel owner that needed to bring an observer back to port for reasons not extreme enough to merit a call for an evacuation, such as sea sickness or minor injury. It was generally agreed that there is no available insurance coverage in which to file a claim to make up for financial losses that occur due to an unscheduled return to shore. These costs can be substantial due to the additional fuel consumption and lost fishing time, especially if the incident occurs at the opening of the season in an Olympic-style fishery.

Both the insurance experts and the observer providers stressed the importance of not filing a FECA claim if the injury did not occur on a vessel, and the importance of informing and training the observers on procedures for properly filing claims. If a claim was improperly filed and paid through FECA when it should have been covered by a different insurance vehicle, FECA has the right to retroactively reclaim those funds from the vessel and/or vessel owner. FECA also has the right to reclaim sums for paid services if it is provided proof of negligence that resulted in the injury. It was suggested that the OWCP, which handles all FECA claims, should compile a list of common problems from past claims and develop both educational

and outreach tools to assist in avoiding these same issues in the future. Another possible method to avoid claim-filing difficulties would be to amend FECA and/or the MSA to include the shoreside duties of the observers. On the whole, it was agreed that this may be a viable option for the future. However, such amendments would be time-consuming endeavor, and more immediate remedies would be necessary to ensure the protection of the observers.

Workshop participants noted that several variables would need to be addressed to pursue the possibility of establishing a national standard or nationwide regulations. Primarily, the regional disparity between the payroll costs to billable rate ratio among the various observer providers is problematic for setting a single (i.e., national) minimum value coverage level. For example, the payroll cost to billable rate is 95 percent for one provider, while it is 60 percent in a different region. This difference in employee overhead affects the daily rates charged for the observers' services on vessels in various fisheries, which in turn determines the rates for the insurance coverage costs. Attempting to set a minimum national standard could then result in one region having less than adequate coverage for observers, while simultaneously being overly burdensome and cost-prohibitive to observer providers in another region. To set the national minimum coverage requirements, it was generally agreed that the providers would need to compile documentation comparing the regional differences and the variability in observer duties, and then share this information with the relevant federal agencies.

## Session Four: Wrap-Up

Throughout the workshop, participants provided information about their various experiences with the observer insurance coverage requirements and claims processes. The main points are summarized below. For a detailed visual representation of the insurance policies that were discussed, please see [Appendix B](#).

- Participants highlighted some significant gaps in the coverage provided by FECA, including that observers are only covered while at sea and there is no compensation for overtime pay.
- FECA is supplemented with other coverage(s) as available or applicable to make up for its wage compensation shortfall and other limitations.
- Observers could benefit if NOAA Fisheries established a cooperative relationship between the Special Claims Program that handles FECA claims and the Division of Longshore and Harbor Workers' Compensation office of

<sup>19</sup> The American Club P&I Insurance <http://www.american-club.com/page/protection-indemnity-insurance>

<sup>20</sup> National Oceanic and Atmospheric Administration <http://www.nmfs.noaa.gov/pr/laws/mmpa/text.htm>

DOL. NOAA Fisheries could assist to distribute information and maintain working knowledge of the claims process and specific contacts.

- Participants had different experiences and variable success with claims filed under the LHWCA. This information could be viewed as inconsistent with NOAA Fisheries' conclusion that LHWCA is not applicable to observers, and with conclusions reached during the 2001 workshop. NOAA Fisheries may wish to clarify its May 2015 letter to the North Pacific Council, which reported that LHWCA does not apply to observers *while at sea*. The letter did not address whether LHWCA applies to observers when they are shoreside.
- A national insurance contract for observers would likely be prohibitively challenging, but national standards and requirements agreed upon by NOAA Fisheries could be provided as policy guidance.
- If national guidance is developed regarding types of insurance coverages and minimum coverage amounts, NOAA Fisheries should allow flexibility for each regional observer program to develop requirements as applicable for the observer deployments in their respective regions.
- Information discussed during the workshop supported NOAA Fisheries' conclusion in the May 2015 letter to the North Pacific Council that General Maritime Law and the Jones Act are inapplicable to observers.
- To reduce costs for observer providers, NOAA Fisheries should revise regulations to remove inapplicable insurance requirements as soon as possible.

To facilitate the development of national guidance or regulations for observer provider insurance requirements or minimum coverage amounts, collecting additional information will be necessary to better understand the unique challenges in each region.

## Follow-Up

### General Counsel

Following the meeting, the NOP conferred with the NOAA Office of General Counsel to discuss three possible approaches to establish national minimum observer provider insurance standards. Each has advantages and disadvantages that need to be considered by the NOP, NOAA Fisheries leadership, the Councils<sup>21</sup>, and each of the regional observer programs, as identified below.

1. The first and most easily attainable option is for NOAA Fisheries to develop national policy guidance on observer provider insurance issues. This course of action would

be the simplest of the three because it would not require notice and comment rulemaking. A disadvantage is that guidance is advisory and not mandatory. Regions therefore could adopt varying approaches.

2. The second option would be to draft standardized language for inclusion in observer provider contracts to capture specific minimum coverage standards. However, this arrangement would only apply to NOAA Fisheries contracts and could not be applied to the industry-funded programs that contract directly between the vessel owners and observer provider companies. This would therefore not result in a national standard unless contractual specifications could legally be applied to all NOAA Fisheries direct service provider contracts. Further research is needed on that question.
3. The third option would implement national regulatory requirements which would be mandatory for all regions in U.S. fisheries, applicable to both the government-funded and industry-funded service models that employ fisheries observers. This would be the most substantial action to create and regulate a national standard in the observer programs, and would require notice and comment rulemaking.

### Industry

Following the 2016 Observer Provider Insurance Workshop, the NOP received four suggestions on minimum observer provider insurance standards from Ian Greenway (LIG Marine Managers) that could be considered by NOAA Fisheries and the Councils, as follows:

1. Marine General Liability with a minimum limit of \$2 million for any one occurrence.
2. Maritime Employers' Liability with a minimum limit of \$2 million for any one occurrence ONLY IF required by statute or regulation.
3. State workers' compensation as required by the state of hire containing statutory limits<sup>22</sup> and including employers' liability with a minimum limit of \$1 million.
4. U.S. Longshore and Harbor Workers' Compensation Act containing statutory limits either included by endorsement in state workers' compensation or provided through a separate policy.

<sup>21</sup> Regional Fishery Management Councils <http://www.nmfs.noaa.gov/sfa/management/councils/>

<sup>22</sup> Policy Limits for Workers' Compensation Insurance <http://smallbusiness.chron.com/policy-limits-workers-comp-insurance-63181.html>

Higher minimum insurance amounts (than those proposed above) may be necessary or desired for companies with larger vessels, or other such special circumstances that may be present in the different regions. Prior to rulemaking, an analysis of proposed minimum insurance standards should attempt to demonstrate the benefits of how proposed minimum observer provider insurance standards would work with one another and FECA to ensure the best possible coverage for observers.

## National Observer Program Advisory Team (NOPAT)

In March 2017 the NOPAT reviewed a draft of this technical memo. The NOPAT recommended that the NOP take the following actions as next steps regarding the publication of this tech memo and providing guidance to the regions on this topic:

- Organize a webinar to present the NOP's conclusions and recommendations based on the information gathered at the November 2016 workshop and solicit additional feedback and clarification from workshop participants prior to finalizing these recommendations.
- Provide a final report from the workshop with recommended actions and next steps as soon as possible.
- Clarify the following points in this technical memo:
  - While the process of amending/removing some of the insurance requirements is taking place, observer providers should utilize the current observer provider insurance coverage practices to the best of their abilities to ensure the best possible coverage for observers in the event of a workplace injury.
  - Specific guidance to each region.
  - Due to regional variability, it seems unlikely that private sector insurance would be translated into federal regulations or contract mandates.

## Webinar

In April 2017, the NOP conducted a webinar to summarize the 2016 Observer Provider Insurance Workshop and to collect feedback from NOAA Fisheries, observer provider companies, observers, and the general public, as per the recommendation of NOPAT. The following comments were received from webinar stakeholders identified at the end of this document, who offered clarifications and concerns on the outstanding issues of adequate insurance coverage for observers:

- Because some observers are considered independent contractors<sup>23</sup> and not employees of an observer provider

company, they may not be covered under state workers' compensation.

- The use of MEL insurance to supplement FECA requires the addition of "Voluntary Compensation Insurance Coverage" into the basic MEL policy, which pays benefits outside of legal liability. Voluntary Compensation Insurance Coverage can be applicable to both on-land and at-sea duties of the observer, depending on the composition of the individual policy. The basic policy form of MEL insurance only insures legal liability.
- To qualify for USL&H insurance coverage, an employee must be engaged in both maritime employment and perform work on or in an area adjoining navigable waters, with an exception in LHWCA for aquaculture workers. Because commercial fishing is considered aquaculture under LHWCA, the majority of observers (including aquaculture and clerical workers) may not meet the qualifications for USL&H coverage, and therefore this coverage should not be relied upon as a single solution for compensation of observers in the event of an injury.
- Although the Workshop discussions indicated that the Jones Act and GML do not apply to observers, it has been suggested that GML does apply to observers when considering the relationship between the vessel operator and the observer. The observer is a guest aboard the vessel and is owed a duty of care from the vessel operator; therefore, the vessel operator can be found legally liable for the compensation of an injury to an observer in the case of negligence.

## Observer Safety Program Review

In 2016, NOAA Fisheries launched an Observer Safety Program Review as part of ongoing efforts to assess and evaluate procedures for keeping U.S. fisheries observers and at-sea monitors safe. The review focused on seven areas related to safety and health, including: safety reporting, communications, practices and policies, training, regulations, equipment, and international observer programs. NOAA anticipates receiving a final report in late 2017, and then will work with national and regional observer programs, as well as observer provider companies, to implement recommendations from the report. Draft recommendations pertaining to observer provider insurance for observers deployed in domestic fisheries include the following:

- Develop specific proposals for suitable harmonized national observer insurance standards that could apply within state, federal, and international waters to

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<sup>23</sup> Is an Independent Contractor Covered by Workers' Comp? <http://www.disabilitysecrets.com/workmans-comp-question-22.html>

compensate observers in the event of work-related illness, injury, disability from a work-related injury, or death.

- Develop suitable policy or regulation (first seeking statutory authority, if deemed necessary) which would require observer providers to provide injury, illness, liability, and accidental death insurance for observers, no matter whether they are classified as employees, or as independent contractors or subcontractors.
- Specify minimum insurance requirements for work-related illness/injury in the contract and add a requirement to provide the Contracting Officer's Representative with a certificate of insurance on an annual basis.

## NOP Recommendations and Future Goals

Based on comments provided during the workshop, the NOP has generated a set of future goals divided into three categories: short-term, mid-term, and long-term. Observer providers must ensure they have adequate coverage to protect themselves and their observers in the event of a work-related injury regardless of the location of the incident, while these solutions are pursued.

### Short-Term Goals

The NOP recommends that it publish: 1) a Request for Information (RFI) to collect additional comments on observer provider insurance coverages and minimum amounts as detailed in this document; 2) an Advanced Notice of Proposed Rulemaking to announce that it will consider, and is seeking public comment on, minimum requirements for observer provider insurance coverage(s) and amounts for fishery observers, as identified in the RFI; and 3) proposed and final rulemaking to define applicable insurance requirements for observers deployed at sea and on land, and define minimum coverage amounts.

### Mid-Term Goals

The NOP recommends continued effort at the national and regional level to identify the specific gaps and deficiencies in current insurance coverages and to further investigate currently existing policies that could cover the gaps in coverages and compensation currently required in regulation. A number of ideas were discussed at the workshop for improvements in communication between observers, observer providers, NOAA Fisheries, and insurance claims specialists that could improve access to compensation under existing coverages.

## Long-Term Goals

In the long term, the NOP recommends reinitiating efforts to develop legislation for an amendment to the MSA to implement the Fisheries Observer Compensation Act (FOCA). Within that effort, the Department of Labor job-specific codes assigned as wage descriptions for observers could be utilized to identify their classification on FOCA claims. FOCA could be specifically tailored to the tasks and environments that observers are exposed to daily, and provide health and compensation coverage regardless of the location of the incident. Enactment of FOCA would provide the observers, the observer providers, the government, and vessel owners with a single approach that offers comprehensive coverage and compensation.

There continue to be challenges with observer insurance requirements because existing insurance policies and plans were designed with other professions in mind and adapted to cover observers, a unique class of workers who do not squarely fit under any of the existing coverages. Amending the MSA to implement FOCA would create a definition of the observing profession and provide a comprehensive insurance approach that implements the intended coverages for all parties involved.

Amendments to FECA could also be investigated (as an alternate solution to enacting FOCA) to include shoreside injuries and to address the overtime wage compensation shortcoming. However, enacting FOCA could ultimately provide observers with similar levels of comprehensive insurance protection and coverage that are provided to shoreside maritime workers under the LHWCA.

## Conclusion

Regardless of which avenue is selected, NOAA Fisheries must first establish a rationale for the types of insurance that must be utilized, the minimum standards and/or dollar amounts for these policies, and why they are required and/or recommended. It will be necessary to explain the purpose of each and every type of insurance policy that is to be purchased and how they will benefit the observers and the observer providers. Prior to taking action of any sort, NOAA Fisheries must be willing and able to show why such steps are necessary, and how these actions will ultimately ensure the best possible coverage and compensation for observers in the event of a work-related injury.

# Acknowledgments

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## On-Site Participants

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## Webinar Participants (as identified)

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Elizabeth Mitchell, Association for Professional Observers  
Jenna Rockwell, Fathom Research  
Shawn Sutherland, Riverside Technology, Inc.  
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# Appendix A: Timeline and Reference Materials

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



# Appendix B: Observer Provider Insurance Coverages Based on 2016 Workshop Discussions

	Acts and Laws			Federal and State Coverage		Observer Provider Coverage		
	Jones Act	GML	LHWCA	FECA	State Workers' Compensation	CGL	MGL	MEL
Observers Located On Land*	Not Applicable	Not Applicable	Applicable Needs further investigation	Not Applicable	Applicable Needs further investigation	Not Applicable	Applicable	Not Applicable
Observers Located At Sea*	Not Applicable	Not Applicable	Not Applicable	Applicable No overtime compensation	Applicable Needs further investigation	Not Applicable	Applicable	Applicable May supplement FECA

\*Represents both industry- funded and NOAA Fisheries- contracted observers

