

SEFSC Questions and Responses

The following are Southeast Fisheries Science Center (SEFSC) responses to complaints filed with the Office of the Inspector General (OIG) by the Association for Professional Observers (APO) and Public Employees for Environmental Responsibility (PEER) on behalf of Jonathan Combs.

It should be emphasized that observer safety is the number one priority of our SEFSC programs. Observers have the final say as to accept or reject a trip without reprisal. Moreover, they are required to assess any potential safety issues prior to deployment acknowledging that it is substantially more difficult to get them off a vessel once they are underway.

The letter to the OIG says that Jonathan Combs sent the same statement to the NMFS National Observer Program (NOP) on Nov 18, 2011 “with more details.”

Response: The statement presented by PEER is not the same that was received by the NOP. The “details” referred to in the OIG letter are confidential data (vessel names). There is a concern that Mr. Combs conveyed this confidential information to persons not authorized to receive confidential data.

In the letter it says, “His statement reflects what other Fisheries Observers have also reported.”

Response: The SEFSC is not aware of any similar written reports or complaints from SEFSC Observers to authorities outside the Center (e.g., NOP, APO, PEER). However, as explained in some of the texts below, other observers have reported violations, refusing vessels over safety concerns, etc., to SEFSC staff.

The letter says “The only reason Mr. Combs is able to go on record is because he was fired without cause by National Marine Fisheries Service (NMFS) for attempting to gain clarification on NMFS protocols that were contrary to the support of Fisheries Observers in the program and/or conflicting with what he knew to be federal law.”

Response: Mr. Combs was not fired by NMFS. He is an employee of IAP and to our knowledge was not fired by IAP but rather reassigned to another fishery. The Pelagic Observer Program (POP) made the decision to no longer deploy Combs because of the difficulty in communicating with him (it often took him 12 hours or more to return the POP’s inquiries regarding his availability to make a trip) and his requests for long periods of time off. POP staff reached a conclusion that meeting program target coverage required an observer who would be more available, and the decision was made to bring on another observer who had previously worked for the POP during the Gulf of Mexico Enhanced Coverage (GOMECE) project(s), and to use this observer in place of Mr. Combs. After leaving the Pelagic Longline Observer Program, he was offered another assignment with the Shark Gillnet Observer Program but to the best of our knowledge he declined that offer.

1. Failure to Report Violations

According to the letter “In contrast with the SEFSC Pelagic Longline Observer Program (POP), the NMFS North Pacific Groundfish Observer Program (NPGOP) outlines for

observers in their field manual their role in regulatory compliance and instructs observers how to legally document violations. Observers in the NPGOP are asked during debriefing if they witnessed any violations. If so, they are instructed to write an affidavit for NMFS Enforcement and the case is then pursued. POP provides no similar guidance to Observers, should they witness a violation”

Response: Different protocols are followed in different SEFSC observer programs. For the Galveston-based observer programs, NMFS Office of Law Enforcement (OLE) attends observer trainings and explains what constitutes egregious violations. These are, in turn, immediately reported to OLE. OLE has attended Galveston observer trainings sporadically prior to 2008. In 2008, it became a standard for all training sessions. The OLE is given an hour time slot for presentations and discussions. OLE does not have a “standard” PowerPoint slide show and the presentation varies depending on the Special Agent conducting the training. OLE does hand out their cards -with a message to call anytime pertaining to safety, or as to what constitutes a violation. For the POP, enforcement matters are handled differently, largely as a result of the design and purpose of the program. There is a difference in the regulatory basis between the POP and the NPGOP. Compliance monitoring is a component in the expressed purpose of the NPGOP as set forth in Federal regulations¹; however no such component is mentioned in the NMFS Highly Migratory Species (HMS) regulations which implement the POP². In fact, in a regulatory compliance guide produced by HMS staff, the function of the observer program is described as to “collect biological information on all HMS species and other fish species caught in the commercial fishery. Observers note information recorded on logbooks such as the gear used, fishing location, and the number of fish caught and discarded, as well as information not reported on logbook forms, including the species, sex, and size of fish. This information is used in stock assessments and to help NMFS and SEFSC verify logbook information.” Critical to the purpose of the POP is the minimization of the observer effect in order to support the assumption that the behavior of observed vessels is representative of the balance of the fleet. Therefore, POP staff do not proactively report fisheries violations to OLE, although observers and vessels are told that observer data must be made available to Law Enforcement upon request and that in certain cases could be used to investigate a violation³.

The POP does (and did in the case of Mr. Combs) instruct observers that it is important to document any fisheries violation they witness; if the violation is able to be captured in a specific data form it should be noted there (for example, finning) and if there is no specific data form to capture the violation, document it in their field notes (further detail is given in a response below). These data forms have in the past been requested by OLE for use in investigation of fisheries violations. However, the only violations that are proactively communicated to OLE are violations in observer compliance; such as fishing without an observer when selected, obstruction of an observer, harassment or assault of an observer, etc.

¹ 50 CFR 679.50 (b): *“The purpose of the Groundfish Observer Program is to allow observers to collect Alaska fisheries data deemed by the Regional Administrator to be necessary and appropriate for management, compliance monitoring, and research of groundfish fisheries and for the conservation of marine resources or their environment.”*

² 50 CFR 635.7 (b): *“Selection of vessels. NMFS will notify a vessel owner, in writing, when his or her vessel is selected for observer coverage. Vessels will be selected to provide information on catch, bycatch and other fishery data according to the need for representative samples.”*

³ See attachment 1, POP letter of authorization.

According to the letter “Observers reported that Mr. Larry Beerkircher, who was the NMFS trainer and de-briefer for the POP program until last year [June 2010], told observers during two separate trainings that they would witness fisheries violations, such as shark-finning (taking fins off live sharks and discarding the mutilated animal alive) and marine pollution (“MARPOL”), but that these violations were not of interest to the POP.”

Response: This allegation is not factually correct. Observers were told that they might witness fisheries violations such as removal of fins from dead sharks caught incidental to swordfish/ tuna longlining, as observers had previously reported (via their data forms and field notes) very rarely witnessing ethnic Vietnamese fishermen taking fins for personal consumption on the vessel or at home. Observers were not told, as the PEER letter seems to imply, that they would inevitably and regularly witness fins being removed from live sharks and the living bodies subsequently discarded overboard. They were also never told that fisheries violations were of no interest to the POP. In fact, observers were specifically instructed that it was important to document any fisheries violation they saw (see above response). Observers were told that they would see various levels of refuse from the vessel discarded overboard, and that the POP had no data forms specifically designed to document this information. Observers were also told that neither upper level NMFS staff, OLE, nor United States Coast Guard (USCG) had ever requested information regarding MARPOL violations from the POP. Because of this and the fact that MARPOL is not mentioned in the HMS regulations, the POP interpreted that MARPOL violations were not fisheries violations. In the absence of any policy guidance or specific law enforcement requests for MARPOL information, the POP interpreted that only fishery violations needed to be documented. However, no observer was ever told to not document any violation they felt was important enough to be noted, including MARPOL. They were only told that they must document fisheries violations.

According to the letter “At least two observers have reported having witnessed shark finning and daily MARPOL violations”

Response: To handle Shark-finning and MARPOL violations, OLE attends Galveston observer trainings and explains what constitutes egregious violations. The Panama City Shark Observer program’s data forms contain a field for an observer to record if a shark is finned and observers have recorded this in the past. These are, in turn, reported immediately to OLE. POP observers have two avenues for reporting and documenting fisheries violations. In some cases, certain violations such as shark finning, closed area incursions, excessive mainline length, illegal offsets on hooks, etc. can be captured on the actual data forms themselves and will reside not only on the paper copies of the forms but also in the electronic data. In cases where a fishery violation cannot be adequately described on a data form, a description of the violation is noted in the observer’s field notes, which according to the Magnuson-Stevens Fishery Conservation and Management Act (MSA) are considered observer data. These field notes are not digitized or stored electronically, but reside as the original paper records in the trip files. OLE is not specifically contacted and informed of these violations unless the violations involve observer harassment, assault, intimidation, etc. However, according to a letter of introduction provided to all POP observers, “the data collected must be turned over to an authorized enforcement officer upon request, and is accessible to authorized enforcement personnel for the investigation of violations”. POP observers were provided no training for documenting MARPOL but they had the ability to document these alleged violations in their field

notes if they wished. No observer's field notes were ever altered to remove mention of trash being thrown overboard, nor were any observers ever instructed that they should discontinue noting this practice in their field notes.

Specifically, in response to the allegation that other observers had reported witnessing finning, a data query of the POP database indicates that since 2007 (the year Mr. Combs started with the program) 18 different observers documented 30 individual cases (i.e., 30 individual animals) of sharks being finned, according to the definition of finning as returning a shark carcass to the water and retaining one or more fins from that individual. Since the total number of sharks observed during this same time period was 39,079 individuals, the percent of sharks observed finned was 0.08%. A number of POP observers reported MARPOL violations during debriefing or in their field notes; however this information is not digitized. We would have to go through hundreds of notes to obtain this number. The POP will yield the point that it is factual that more than two observers reported MARPOL violations.

According to the letter “Mr. Combs also witnessed crewmembers shooting seabirds two days in a row. When Observers reported these violations during their debriefing, Mr. Beerkircher told them, again, that writing the details in their field diary was sufficient but that the violations would not be pursued unless someone requested the information.”

Response: Mr. Combs was deployed on a trip that he reported seagulls being shot, although the language of the PEER complaint makes it appear that Mr. Combs was forced to report the violation verbally during debriefing. In fact, the circumstances surrounding the violation were noted in Mr. Combs' field diary when the POP received the data, exactly as he had been instructed to do during training. The seabird shooting was also further noted and written in independently on the debriefing form by POP debriefing staff. No specific action to alert OLE was taken by the POP, according to the standard procedure detailed previously.

According to the letter “When Mr. Combs reported shark-fining on a vessel that was contracted by NMFS for a bycatch mitigation study on hook design, Mr. Beerkircher “chuckled at the fact that the boat did it while [the observer] was on board and while they were working under a government contract.”

Response: Mr. Combs' data did indicate that two sharks, dead upon gear retrieval, had their fins removed and kept by the crew subsequent to discarding the carcasses. POP animal log data forms have a numeric code associated with finning; the observer documented this occurrence in his data as instructed. NMFS OLE was not notified as per procedure described previously. Mr. Combs' portrayal of his debriefing with Mr. Beerkircher is misleading. The context of the conversation was about how some practices are so embedded in certain cultures (in this case, retaining fins by ethnic Vietnamese crewmen, for personal consumption) that a fisherman would not consider it in violation to take the fins, even while an observer was on board.

2. Subjecting Fisheries Observers to Unsafe Conditions.

According to the letter “However, Mr. Combs' reports that NMFS POP staff and his contractor [employer], Mr. Chad Lefferson, IAP Services, Inc., pressured him to take assignments that had indicated a “no-go” status. In two instances he found expired stickers

for hydrostatic releases and one expired sticker for an Emergency Position-Indicating Radio Beacon (EPIRB). The POP program manager, Mr. Kenneth Keene, pressured him to take the assignment regardless.”

Response: This is untrue. The SEFSC abides by its own policies and procedures to ensure observer safety and does not pressure observers to work on a vessel determined to be unsafe. The SEFSC safety check-off list is required and completed prior to departure. Any questions regarding deficiencies are directed to the observer coordinators or program managers. These in turn are resolved (often requiring the captain to remedy deficiencies). If in doubt, the program staff contacts USCG for clarification and guidance. While rare that the USCG Examiner does not detect it during the inspection for the safety decal, an unmarked hydrostatic release can be validated with the proper documentation. According to Mr. Combs’ historical vessel safety checklists, he has documented 1 expired life raft hydrostatic release, multiple unmarked EPIRB hydrostatic releases, and a few expired EPIRB registrations. The expired life raft hydro in question was a judgment call made by POP staff. The judgment call was made based on the fact that Mr. Combs was carrying our valise raft with him. Expired EPIRB NOAA registrations are not a “no go” issue for the POP. In any case, if Mr. Combs was concerned with these matters, he could have indicated his discomfort with the scenario, and like any observer he would have the ability to refuse the trip without repercussion.

According to the letter “Instead of the program coordinators contacting the vessels to enforce observer safety laws, other observers have reported that they were instructed by NMFS POP staff to either fix the problem themselves or talk the captain into fixing the problem. For example, Mr. Combs disclosed that some vessels’ hydrostatic releases did not have any expiration date at all. A properly maintained hydrostatic release to a vessel’s life raft could mean a matter of life or death in a vessel sinking and its proper maintenance shouldn’t be dismissed. This is why it is considered by all US Observer Programs to trigger a “no-go” if it doesn’t follow the Coast Guard’s protocol. In those instances, he was instructed by POP staff to “tell the captain to scratch in a date” – in other words: to lie.”

Response: This is untrue. SEFSC staff does not pressure observers to go on unsafe vessels. The safety check-off listed is required and completed prior to departure. Any questions regarding deficiencies are directed to the observer coordinators or program managers. These in turn are resolved (often requiring the captain/owner to remedy the deficiencies). If in doubt, we contact USCG for clarification and guidance. While rare that it is not detected by the MSO during the inspection for the safety decal, an unmarked hydrostatic release can be validated with the proper documentation. As observers are carrying out a vessel’s safety check with a representative of the vessel, they are trained to notify that person of any deficiencies. This courtesy invites a way to alleviate the deficiency before the vessel departs. However, the SEFSC staff will become involved if for any reason the observer has a problem relaying the proper information, or requests the office to explain to a vessel captain/owner why it is not in compliance. Regarding “fix the problems themselves,” this is false. Observers are trained to not touch the equipment during a vessel safety check. Observers are trained to ask a representative of the vessel to handle any and all safety equipment during the vessel safety check. Most hydrostatic releases are sold by retail stores, and come unmarked. When the POP coordinator approached multiple USCG Examiners about the circumstances when they find releases unmarked, they state that they try to rebuild the time frame of when it was bought and/ or installed (month), which is the expiration (2 years from that month and year), then have the installer mark it.