

National Oceanic and Atmospheric Administration

**Administrative Inquiry of
National Marine Fisheries Service's
Southeast Observer Program Management**

**Office of Inspector General
Report No. PPC-CI-12-0221-H
January 25, 2013**

Introduction

This report presents the results of the National Marine Fisheries Service (NMFS) administrative inquiry of the Southeast Observer Programs, specifically the Atlantic Pelagic Longline Observer Program (POP). The objectives of the inquiry were to determine the merits of the allegations raised by a fisheries observer named Jonathan Combs in a complaint filed with the Department of Commerce, Office of the Inspector General (OIG) and where necessary, to recommend corrective actions to address the complaints.

The NMFS National Observer Program (NOP) received an informal letter of allegations against the POP from Mr. Combs on November 19, 2011 followed by the formal complaint filed by Public Employees for Environmental Responsibility (PEER) and the Association for Professional Observers (APO) on December 1, 2011 on behalf of Mr. Combs with the OIG. The OIG formally referred the investigation to NMFS on December 14, 2011.

Based on the allegations in the complaint, the goals of the investigation were to determine whether NMFS (1) failed to report major marine resource violations, e.g., shark-finning and marine pollution; (2) subjected fisheries observers to unsafe conditions, e.g., pressured to accept inadequate accommodations and pre-deployment safety checklist violations; and (3) tolerated improper accommodations for observers, e.g., sleeping accommodations equivalent to those provided to the crew¹.

The NMFS Southeast Fisheries Science Center manages four separate commercial fisheries observer programs: the Southeast Shrimp Trawl Observer Program, the Southeast Shark Driftnet and Bottom Longline Observer Program, the Gulf of Mexico Reef Fish Fishery Observer Program, and the POP. Collectively the programs are referred to as the Southeast Observer Programs. Any recommendations in the report are directed primarily at the POP and the National Observer Program which is responsible for implementing national policies and priorities for observer programs. Oversight for implementing the recommendations would be the responsibility of the specific laboratory in which the program is located. Supervision for the program staff would also be at the laboratory level.

The inquiry, which focused primarily on the POP but also reviewed all Southeast Observer Programs, found that there were instances when the POP process for reporting marine resource violations were inadequate and circumstances in which the POP may have subjected observers to unsafe conditions. NMFS has proposed specific actions to remedy these

¹ Other allegations not specified in the APO/PEER complaint but included in a separate written statement by Jonathan Combs are also addressed.

situations. The inquiry did not find that the POP tolerated improper accommodations for observers, but provides recommendations to address some of the concerns raised with regard to this issue. In addition the report addresses specific concerns raised by Mr. Combs in the informal letter sent to the NMFS NOP that were not included in the formal OIG complaint.

Based on the findings in this report, NMFS recommends that the Southeast Observer Programs develop and implement procedures for reporting marine resource violations to the National Oceanic and Atmospheric Administration (NOAA) Office of Law Enforcement (OLE). NMFS also recommends that the Southeast Observer Programs review all policies, procedures, and controls for observer refresher safety training to ensure that fisheries observers are not subjected to unsafe conditions. Furthermore, all policies, procedures, and controls, including processes for reporting marine resource violations, must be consistent across all observer programs, and procedures must be documented and included in observer orientation and refresher training. The National Observer Program shall review all regional observer programs for policy, procedure and control consistencies as applicable and report back to the Director, Science and Technology with recommendations.

Background

In a letter dated December 1, 2011 the APO and PEER requested that the OIG investigate the NMFS Southeast Observer Programs based on allegations from a fisheries observer named Jonathan Combs (Appendix 1).

The APO and PEER requested an investigation of the Southeast Observer Program's management practices for the handling of observer reports of vessel non-compliance with fisheries regulations and other applicable law and the Program's compliance with regulations for observer safety and vessel accommodations. In their letter, the APO and PEER reference claims from an observer employed by IAP Services Inc. which provided observer services to the Southeast Observer Program. The observer claimed that the POP disregarded observer reports of vessel non-compliance with applicable regulations and only referred such reports to NOAA OLE upon request. In addition, the observer claims to have been pressured to board vessels with unsafe conditions and inadequate accommodations.

In a memorandum dated December 14, 2011 from the OIG to NMFS, the OIG referred the inquiry to NMFS and requested a formal response, together with any inquiry report and supporting documents within sixty calendar days of the date of the memorandum. The NMFS was granted extensions allowing independent observer interviews to continue through July 2012.

The OIG requested that NMFS provide the following:

- Results of any internal reviews, evaluations, or inquiries that NMFS has conducted since January 1, 2008, to present regarding its National Observer Program, particularly the Southeast Observer Program and/or the Pelagic Observer Program;
- Mechanisms NMFS has in place to ensure that fisheries observers are encouraged to document evident marine resource violations (e.g., shark-finning and marine pollution), and directly report such potential violations to NOAA OLE;
- Internal control processes by which NMFS ensures that fisheries observers are encouraged to directly report to NMFS any mistreatment aboard fishery vessels (i.e., unsafe conditions, harassment or other abusive treatment, or improper accommodations), and how reported instances of mistreatment are addressed; and
- All complaints of observer mistreatment, nationwide, reported to NMFS since January 1, 2008, to present, and any associated reports presenting findings and resultant actions.

Where available the responsive materials have been provided in Appendices 2-11, respectively.

Methodology

The OIG referred the inquiry to NMFS on December 14, 2012 and requested NMFS to conduct its own administrative inquiry into the allegations. The OIG informed NMFS that the OIG would be reviewing the alleged whistleblower reprisal referenced in the complaint correspondence and that NMFS should not address this issue. The NMFS convened a team of headquarters and National Observer Program (NOP) staff to conduct the administrative inquiry (Appendix 6). On March 5, 2012 Captain Mark P. Ablondi, NOAA Executive Officer, was assigned by the Deputy Assistant Administrator of Fisheries to lead the administrative inquiry. Mr. Combs was interviewed By Captain Ablondi on April 12, 2012 and by Captain Ablondi and Chris Rilling (NOP Manager) on April 20, 2012. Captain Ablondi and Mr. Rilling interviewed Southeast Observer Program staff on April 20, 2012 and requested Southeast Observer Program staff to provide written responses to each of the allegations raised in the complaint (Appendix 7). The questions and responses from the interviews are provided in Appendix 8. Additional observer interviews were conducted from a pool of 151 past and present Southeast observers. Seventy-five observers were randomly selected for voluntary interviews. After consultation with OIG and APO, the interview time period was extended twice in an effort to increase observer input. The last observer interview was conducted on July 10, 2012. Twelve observers voluntarily participated in the interviews and all but one requested that their identities remain anonymous. For consistency, all voluntary observers interviewed are listed anonymously. Eight

of the twelve randomly selected observers had extensive experience in other observer programs and commercial fisheries covering all U.S. regions currently under observer programs. Based on their experience, the random interviewees are considered a dedicated group of professional observers.

Sample questions and anonymous responses are provided in Appendix 9 for SEFSC Observer Program staff and Appendix 11 for observers. The Appendix 11 observer interviews are split into two groups corresponding to an expansion of the interview questions for observers #7-12 based on the follow-up discussions that consistently arose during observer #1-6 interviews. Based on a review of the allegations in the APO PEER complaint filed with the OIG, the Southeast Observer Program's written responses to the allegations, the interviews with Mr. Combs, the Southeast Observer Program staff and the twelve random observers, this inquiry developed the following list of findings and recommendations. Unless otherwise noted, action items are due to the Director of the Office of Science and Technology, National Marine Fisheries Service, NOAA.

Findings and Actions

- a) The complaint filed with the OIG alleges that Mr. Combs was never instructed during training on protocols to follow should observers witness a violation and that alleged violations were not forwarded to OLE.

Finding: NMFS determined that the process used by Southeast Observer Programs, specifically the POP, for reporting marine resource violations is inadequate.

The POP may have a process for collecting information on marine resource violations, but there is no uniform or consistent procedure for training observers on the collection of such data or for transmitting the information to NOAA OLE. At least one observer program in the Southeast, the Shark Observer Program, routinely forwards information on potential violations to OLE whereas the POP does not. The Southeast Observer Program staff explained that the information is provided to OLE upon request however this is inadequate for appropriate and timely pursuit of potential marine resource violations. Similarly, there is no uniform or consistent procedure for reporting International Convention for the Prevention of Pollution from Ships (MARPOL) violations.

Action #1: The POP, in conjunction with NOAA OLE, shall develop a uniform, transparent, and consistent procedure for collecting and reporting all potential marine resource violations to

NOAA OLE. The NMFS Southeast Observer Programs shall also develop a uniform, transparent, and consistent procedure for collecting and reporting all potential MARPOL violations to appropriate enforcement agencies. Furthermore, Southeast Observer Programs shall coordinate with NOAA OLE to provide training to all current and future fisheries observers on the process for reporting potential marine resource and MARPOL violations. Due date: September 30, 2013 to the Deputy Assistant Administrator for Operations, NMFS.

- b) The complaint filed with the OIG alleges that Mr. Combs was pressured to deploy on vessels that had allegedly failed the pre-deployment safety checklist.

Finding: NMFS determined that the Southeast Observer Programs, specifically the POP, allowed Mr. Combs to deploy after a vessel had apparently failed the pre-deployment safety checklist.

The POP claimed that Mr. Combs was not pressured and that observers are allowed to decline a trip for documented health and safety concerns, even if the vessel has a current United States Coast Guard (USCG) Commercial Fishing Vessel Safety Decal and passes the POP pre-trip safety checklist. In cases where the vessel meets USCG and POP safety checklist requirements and the observer chooses not to sail, the POP requires a written statement from the observer documenting the concerns.

In the example described by Mr. Combs, he was approved to deploy on a vessel, F/V Charleston Star even though Mr. Combs alleged that the vessel's liferaft had an expired hydrostatic release. NMFS found that the vessel safety checklists for F/V Charleston Star on trips prior to and subsequent to Mr. Combs' October 2010 trip in question showed a current (i.e., non-expired) hydrostatic release date.² However the POP did not have this information at the time. Given that an expired hydrostatic release is considered a safety hazard and a "no-go" for observer deployment, Mr. Combs should not have deployed on this particular trip, despite the fact that he was carrying a spare (valise) liferaft which is not equipped with, nor is it a substitute for, a float-free liferaft rigged with a hydrostatic release.

Communication between the observer and POP personnel is essential relative to the status of vessel safety equipment and the pre-sail decision process. Questions from offsite POP

² The safety checklist from a January 2010 trip # C02058 showed an expiration date of Aug 2011; the October 2010 trip #T03026 by Mr. Combs showed an expiration date of Aug 2010; the July 2011 trip #E05031 showed an expiration date of April 2013.

personnel should not be considered pressuring an observer as the goal is to establish the current condition of the vessel and/or equipment in question. Had there been further investigation on this specific case aboard F/V Charleston Star in October 2010, the POP and Mr. Combs may have determined through review of other safety checklists that the hydrostatic release may not have been expired.

Action #2: The NMFS Southeast Observer Programs shall review all safety procedures and ensure that no observers are deployed on vessels that fail to pass the vessel safety checklist. Observers shall be instructed to complete the vessel safety checklist in full prior to reporting back to supervisors. The NMFS Southeast Observer Program shall not allow observers to deploy on vessels that have unmarked or expired hydrostatic release dates. The valise liferaft should only be used if the vessel's hydrostatic release equipped liferaft (vessel's liferaft) does not have sufficient capacity for the observer. The valise liferaft shall not be used in lieu of an expired hydrostatic release. In the example cited by Mr. Combs, the valise liferaft did not have sufficient capacity for both Mr. Combs and the crew; furthermore, the valise liferaft is not an approved substitute for a vessel's liferaft. Observer training shall specifically emphasize that POP-provided valise liferafts are in addition to vessel liferafts if the vessel's liferaft capacity is exceeded (for the purpose of meeting exceeded capacity over the vessel liferaft). Valise liferafts shall be stowed in an unobstructed manner and be readily accessible for launching in an emergency (Appendix 7, Attachment #4). Due Date: April 30, 2013.

- c) Mr. Combs alleges that he was deployed prior to taking the required three-year safety refresher training.

Finding: NMFS determined that the POP deployed Mr. Combs after his training had expired.

Current national standards require that at a minimum, active observers shall be required to attend a hands-on marine safety training course every three years.

Action #3: The NMFS Southeast Observer Programs, specifically the POP, shall ensure that all observers attend a marine safety training course at a minimum once every three years, and observers shall not be allowed to deploy until they have completed the refresher training. POP shall provide oversight and tracking procedures. Due date: March 29, 2013.

- d) Mr. Combs alleges that he was pressured to deploy under unsafe conditions during the Deep water Horizon (DWH) oil spill.

Finding: NMFS determined that Mr. Combs was not pressured to deploy under unsafe conditions during the DWH oil spill.

During the DWH oil spill NMFS closed a large portion of the Gulf of Mexico to all commercial and recreational fishing, including vessels subject to observer coverage and those participating in NMFS-sponsored experiments. No vessels were allowed to fish inside the closed area, but vessels were allowed to fish outside the closed area in areas that were considered safe. Mr. Combs invoked his right not to expose himself to conditions he considered hazardous which was accepted by the POP. Per POP protocol Mr. Combs submitted his request in writing to the POP and remained on standby status, with pay (but no opportunity to earn overtime pay), for the duration of the experiment.

No Action Taken.

- e) Mr. Combs alleges that the Southeast Observer Program tolerated drug use aboard fishing vessels.

Finding: NMFS determined that the POP did not tolerate drug use aboard fishing vessels. However, the POP does not have a procedure in place to notify law enforcement officials in the event of drug use that does not result in injury or harassment, but that could be considered a safety concern to observers.

The POP has a policy to notify NOAA OLE or other enforcement officials in cases where drug use results in injury or harassment to the observer. The Southeast Observer Program training materials instruct observers to inform the captain or crew if drug use is witnessed and to immediately report to the observer program coordinator if the drug use affects the observer's safety. The debriefing forms also provide an opportunity to document any drug use aboard the vessel. However the POP does not have a process for reporting drug use that did not result in injury or harassment but was considered a safety concern to the observer.

Action #4: The NMFS Southeast Observer Program in conjunction with NMFS OLE shall develop policies and procedures to standardize the legal collection of data on drug and alcohol use during observer deployments, and shall forward such information to appropriate law enforcement agencies. To be effective, such procedures must be covered by the Statement of Work for Observer Contractors. Due date: September 30, 2013 to the Deputy Assistant Administrator for Operations, NMFS.

- f) Mr. Combs alleges that the requirement for vessel owners/operators to provide accommodations and food equivalent to those provided to the crew were regularly violated.

Finding: NMFS Southeast Observer Programs did not tolerate improper conditions for observers, however recommendations are provided to improve the process of addressing lack of adequate accommodations aboard small vessels.

Many commercial fishing vessels in the Southeast and other parts of the country are small vessels that may not have adequate bunk space. In the case of the POP, observers are notified in advance if a vessel does not have bunk space and are given the option to decline the trip. If an observer declines a trip due to lack of accommodations and the vessel departs for a fishing trip, the vessel may be subject to enforcement action. Vessels owners are regularly informed of the requirement to provide equal accommodations during the observer selection process, but many vessels are unable to comply due to space restrictions on their vessels. In the instances when an observer arrives at a fishing vessel and discovers improper accommodations, the observer has the opportunity to turn down the vessel. It was also reported that Captains and crew offered up their bunks to observers with some observers taking them up on the offer of a bunk, while other observers preferred to sleep on deck. Crew slept in similar conditions (on deck, etc.) as observers and that equal accommodations (accommodations equivalent to the crew) were followed. Where an observer deemed the accommodations improper he/she had the ability to turn down the trip.

Action #5: The NMFS National Observer Program in conjunction with the Southeast Observer Programs and other NMFS observer programs shall review the current policy and regulations regarding equal accommodations (accommodations equivalent to the crew) for observers with particular focus on small vessels that have space limitations. The NOP will review potential solutions and alternatives (e.g., technology) to collect data on vessels that are considered too small, inadequate or unsafe and report back to Director Science and Technology. Due date: October 30, 2013.

Other Concerns Raised by Mr. Combs

A number of other concerns were raised in the letter by Mr. Combs regarding the NMFS Southeast Observer Programs, but were not specifically included in the APO and PEER complaint filed with the OIG. These concerns are addressed here.

1. Mr. Combs alleges that the NMFS POP ignored the 72-hour notice required by vessels prior to departure, and that observers were expected to be available to deploy in less than 72 hours.

Finding: NMFS determined that the POP does not have policies, procedures, or timelines for notifying observers in the event they are offered a deployment.

The NMFS POP does not have a 72-hour regulatory notification requirement for vessels selected for observer coverage. The POP selection letter requests that vessels provide five-day advance notice of any planned trips. If a vessel contacts the observer program within five days of departure and an observer is available, then the POP makes an attempt to deploy the observer. Observers have the option of declining a trip and there are no negative repercussions associated with such a refusal. However, the Southeast Observer Programs have no policy, procedures, or timelines regarding advance notice given to observers in the event that they are selected for deployment.

Action #6: The Southeast Observer Programs shall develop policies, procedures, and timelines regarding advance notice given to observers in the event that they are offered a deployment. Due date: June 30, 2013.

2. Mr. Combs alleges that the POP lacked permits and protocols for collection of protected species samples, and that NMFS instructs observers to avoid declaring protected species samples with U.S. Customs.

Finding: NMFS determined that the POP has the necessary permits and protocols for collection of protected species samples.

The NMFS Southeast Observer Program has protocols and a list of state and federal permits established for protected species. The protocols for collecting and transporting specimens are provided during observer training and described in the permits that each observer is required to carry on all deployments. Copies of the permits are included in Appendix 10.

Mr. Combs was instructed by Larry Beerkircher, the POP manager at the time, to retain his biological samples when returning from Canada rather than shipping them via FedEx. This was to ensure that samples were received in the U.S. in a timely manner and were not held up in Customs or at a FedEx location after the observer had departed and was no longer on site to deal with any issues. Mr. Combs was instructed that it would be easier to pack the samples

(small vials of dimethyl sulfoxide, or DMSO, preservative with small biopsy plugs of tissue) inside his checked bags rather than in his carry-on due to airport policy regarding liquids in carry-on luggage. Mr. Beerkircher recalled that he may have used the term “avoiding hassles”; however, at no point did Mr. Beerkircher instruct Mr. Combs to conceal any item that was required to be declared, nor did he tell him not to declare these samples. Mr. Combs was provided with a permit that allowed for retention and transportation of samples from endangered species, and was expected to follow the lawful instructions provided by Customs Officials to travelers at immigration checkpoints. Of the twelve random observers voluntarily interviewed, seven had foreign observer trip experience and none reported being instructed to not follow appropriate Customs laws relative to protected species samples or any other samples. The fact that protected species permits were current and in order makes it unlikely that POP managers would instruct observers to not follow Customs protocols. Better communications between observers and POP managers along with clearly laid out procedures are recommended.

3. Mr. Combs alleges that the NMFS Southeast Observer Program “blackballs” fisheries observers who do not accept trips or question protocols.

Finding: This inquiry found no proof that the POP harassed or punished observers who refused trips or questioned protocols; however, there is significant belief in the field that an observer’s opportunity to sail on future trips will be impacted (i.e., blackballed or penalized) by turning down trips. Fifty percent of the random observers interviewed believe that there was pressure on them to sail and that an observer would be penalized if he/she did not accept trips.

Under current POP policy observers who refuse trips are placed back into rotation (in-line) in the same spot they were previously in and offered the next available trip. Mr. Combs was unwilling (due to reprisal concerns for the affected individual) to provide an example of an observer who was penalized due to questioning protocols. NMFS was unable to find evidence of the Southeast Observer Programs punishing observers for refusing trips or questioning protocols, however based on the interviews there were indications of pressuring observers.

Of the twelve random observers voluntarily interviewed, six reported feeling pressured to deploy or felt the potential for being blackballed for not deploying. Two of those observers were terminated for the following reasons on those referenced trips or potential trips in question. One of these observers failed a urinalysis test twice (did not sail) and was terminated. The second observer was terminated for violation of the company's drug/alcohol policy, though that observer felt that he/she was terminated due to calling 911 and then setting

off an Emergency Position Indicating Radio Beacon (EPIRB) when the fishing vessel's lines were hung up in oil rig gear. A third observer believed that the Galveston lab would not hire him/her because of previous POP work experience and so he/she felt effectively terminated (i.e., not hired) by the Galveston lab but remained actively employed by IAP working for the POP. The remaining three observers felt pressure to adapt to tight schedules, or felt blackballed by not being used in the fishery they were originally hired for (i.e., the belief that the senior observers got the best boats), and receiving less than desirable fishing vessels after voicing concerns.

Examples from the DWH Horizon oil spill indicate that all observers who raised health concerns remained on standby duty, with pay (but no opportunity to earn overtime pay), and did not sail per their request.

Action #7: The POP shall set up a transparent system of tracking observers and their relative placement in line (or in the rotation) for fishing vessel trips. POP policy shall note criteria for substituting observers (when not used 'next-in-line') due to government costs saving efforts; e.g., relative to port location/logistics when applicable. Due date: June 30, 2013.

4. Mr. Combs alleges that the NMFS Southeast Observer Program lacked standards for fisheries observers participating in the Bluefin Tuna Special Study research project.

Finding: NMFS determined that the POP does not lack standards for fisheries observers participating in the Bluefin Tuna Special Study research project.

The POP has a standard procedure for training all observers selected for the Bluefin Tuna Special Study. These observers receive the same two week observer training course that regular observers do, which includes safety, data forms protocols, species identification, and protected species data collection. These standard procedures are included in the observer training manual.

5. Mr. Combs alleges that NMFS manipulated observer coverage to accommodate a TV reality show filming.

Finding: NMFS determined that the POP did not manipulate observer coverage to accommodate a TV reality show filming.

The POP policy allows substitutions of vessels that have the same owner, if the substitute vessel fishes the same type of gear, and will be fishing in the same statistical area and selection quarter as the vessel originally selected, which was the case in the example cited by Mr. Combs.

6. Mr. Combs alleges that observers in the POP have no appeal process, nor any avenue to express their concerns.

Finding: NMFS determined that the POP did not provide routine, transparent, and consistent process for feedback to IAP Services on the observer's performance.

Fisheries observers are contractors hired by observer service providers such as IAP Services Inc., and it is the employer's responsibility to provide an opportunity for employees to express their concerns regarding their employment status. However, NMFS observer programs are responsible for providing routine, transparent, and consistent process for feedback to the observer provider on the observer's performance. The Southeast Observer Programs did not have in place a formal mechanism for providing this information to the observer provider at the time the complaint was filed. To ensure that observer issues are promptly and appropriately addressed, there is a need to better define the responsibilities of contract firms managing observers and the role of SEFSC Observer Program coordinators, especially given the level of coordination and interaction that takes place between contractor staff and SEFSC Observer Program coordinators.

Action #8: The POP shall develop a formal communication process for observers to provide any concerns they have about the program. This could be done during the debriefing process or some other prescribed time during the observer's employment. Due date: September 30, 2013.

Action #9: SEFSC Observer Program in conjunction with NOAA Acquisition personnel shall develop a list of clear responsibilities for SEFSC Observer Program staff, and a list of duties for managers of contract observers (e.g. IAP Services, Inc.). Due date: September 30, 2013.

Follow-up on Actions

NMFS Southeast Observer Programs and the National Observer Program will provide regular updates to the Director, Office of Science and Technology on the status of implementing the actions required in this document.

Action Summary Table

#	Action	Due Date	Responsibility
1	Develop a uniform, transparent, and consistent procedure for collecting and reporting all potential marine resource violations to NOAA OLE	September 30, 2013	Pelagic Observer Program & Office of Law Enforcement *Reportable to DAA of Operations
2	Review safety procedures, develop and execute as necessary so that no observers deploy on vessels that fail to pass pre-trip safety checklist	April 30, 2013	SEFSC Observer Program
3	Execute minimum marine safety training and refresher training for observers without exception	March 29, 2013	National Observer Program, SEFSC Observer Program & Pelagic Observer Program
4	Develop policies and procedures to standardize the collection of drug/alcohol use data during observer deployments	September 30, 2013	National Observer Program & Office of Law Enforcement *Reportable to DAA of Operations
5	Review current policy and regulations for equal accommodations of observers	October 30, 2013	National Observer Program
6	Develop policies, procedures and timelines for advanced notice to observers prior to deployment	June 30, 2013	SEFSC Observer Program
7	Develop transparent observer tracking system	June 30, 2013	Pelagic Observer Program
8	Develop formal communication process for observers' concerns	September 30, 2013	Pelagic Observer Program
9	Develop contractual list of responsibilities for SEFSC Staff and duties for managers of contract observers	September 30, 2013	SEFSC Observer Program