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U.S. Department of Commerce  
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**National Marine Fisheries Service (NMFS) Southeast Observer Programs –  
Region-wide Mismanagement and Illegal Activities**

Dear General Zinser:

This is a request for investigation filed by the Association for Professional Observers and Public Employees for Environmental Responsibility (PEER) into reported violations and gross mismanagement in the Southeast NMFS Observer Programs, the Pelagic Observer Program (POP) in particular. We request that an investigation be conducted on the protocols and practices of this and other Southeast Observer Programs, with respect to NMFS' disregard for the safety and welfare of Fisheries Observers and witnessed fisheries violations.

The Association for Professional Observers is a non-profit organization that advocates for the safety and welfare of Fisheries Observers and also for the integrity of our nation's Fisheries Monitoring Programs. PEER is a non-profit service organization dedicated to defending public servants who protect our environment.

Enclosed is a statement written on November 18, 2011 by Jonathan Combs, a Fisheries Observer with the POP. He said that he originally sent a similar statement with more details to the National Observer Program on that same day. His statement reflects what other Fisheries Observers have also reported. The only reason Mr. Combs is able to go on record is because he was fired without cause by 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.

This statement outlines three major substantive and two organizational concerns, which we are asking the OIG to review. Specifically:

## **I. Failure to Report Major Marine Resource Violations**

In contrast with the 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<sup>1</sup>. 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, nor is any guidance available from reviewing POP materials. In fact, it appears that only one of the six Observer Programs managed by this region includes the reporting of violations as an objective of the Program.

Observers reported that Mr. Larry Beerkircher, who was the NMFS trainer and de-briefer for the POP program until last year, 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. He told them that “if you have a problem with MARPOL violations, you better get out of the program now.” Mr. Beerkircher said that it was just the “culture of the fishermen” and that they (Observers) should just accept that.

He specifically instructed them to enter violations into their field diary so that NMFS would legally be covered, but were told that the violations would not be pursued unless someone asked for the information. Moreover, the field diaries would not likely be examined because they were told that there is no communication between the POP and other agencies or even between departments of their own agency.

Observers afterwards expressed consternation at the POP staffs’ lack of concern for fisheries law and the lack of cooperation or coordination with regard to the enforcement of fisheries law, especially coming from the very agency charged with the enforcement of many of these laws.

At least two Observers have reported having witnessed shark-finning and daily MARPOL violations. Mr. Combs reported that he did not document MARPOL violations in his field diary because he was told during training that POP did not care about these violations but recalls having seen it daily. These observers recall that “every observer” they spoke with about MARPOL violations experienced the same thing. 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.

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<sup>1</sup> North Pacific Groundfish Observer Program Manual, 2011. Page 20-1 – 20-3

When Mr. Combs reported shark-finning 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.” As far as he knew this was not reported to NMFS enforcement.

Similarly, Mr. Combs further reports POP staff instructing him to take actions that would have broken laws with U.S. Customs, regarding the carrying of samples of endangered species.

## **II. Subjecting Fisheries Observers to Unsafe Conditions.**

Mr. Combs describes how NMFS and/or IAP Services, Inc. [the Observer Provider] pressured Fisheries Observers to take unsafe assignments, disregarded safety violations, and neglected medical support to Fisheries Observers.

All observer programs have protocols that stipulate that certain safety features must be present on a vessel and these are listed on a “Pre-trip Safety Check List” that Observers follow before departure. This list does not guarantee that a vessel is seaworthy but rather lists a *minimum* of safety features that can lessen safety risks at sea. Certain critical features trigger a “no-go”, meaning if the item is expired, not properly installed or non-existing, the Observer must not accept the assignment.

However, Mr. Combs’ reports that NMFS POP staff and his contractor, 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 EPIRB. The POP program manager, Mr. Kenneth Keene, pressured him to take the assignment regardless.

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.

During the Gulf of Mexico BP oil spill in 2010, Observers felt pressured to take assignments right in the middle of the oil spill, exposing them to hazardous levels of toxic fumes and liquids. These assignments were made by NMFS POP staff even after one observer had reported becoming ill because of his exposure to the spill. IAP Services initially denied this Observer access to medical attention for an entire week upon his return. POP and IAP staff pressured other Observers into taking assignments in the same area as the spill, dismissing the Observer’s illness and giving them false safety information to marginalize the actual risks.

Because of the other Observers' health reaction to the exposure, these Observers requested that POP staff require that vessels must take the Observers back to port if they begin to feel ill. Mr. Beerkircher refused, saying that NMFS "can't tell fishermen where and when to fish", which is completely untrue. Instead, he instructed Observers that their only option would be to call the Coast Guard to rescue them if they felt that was necessary.

Relying upon a costly Coast Guard rescue operation was not only fiscally irresponsible but showed a total disregard for preventative measures to ensure Observer safety during an environmental crisis. NMFS should have exercised precaution with regard to Observer safety, especially during a time when the Coast Guard was most likely not available because they were dealing with the enormity of the spill. When Observers still refused to take the assignments, IAP Services and NMFS increased the pressure, requiring them to sign a legal document describing their reason for refusing the assignments. It should have been a non-issue.

As an illustration of the broken safety culture within NMFS, Mr. Combs states that POP staff knows of specific vessels that engage in heavy drug use, yet they show little concern for the Observers' safety on those vessels. He reported POP staff joking about it when Observers are assigned to those vessels and also joking about "punishment trips" – vessels with known hardships, safety problems and disregard for fisheries laws that were assigned to some Observers as "punishment".

Moreover, Mr. Combs was told during a "safety refresher" course (safety training recertification every three years) regarding what to do if he should witness drug use on a vessel. He was told by Mike Harrelson of the NMFS Galveston lab to "request the captain and crew to go out on deck to do it and to not do such things during wheel watches".

Apparently, NMFS plays absolutely no role in ensuring Observer safety. Observers' relations with fishermen are often difficult enough without having to play the cop just to protect themselves, especially when everyone knows Observers carry no authority.

### **III. Tolerance for Improper Accommodations for Observers**

National law prohibits a vessel from commercial fishing if it cannot accommodate an Observer<sup>2</sup>. Reports we have received indicate that this requirement is often ignored with official approval by NMFS.

For example, Mr. Combs reported that the rule regarding the equal accommodations for Fisheries Observers<sup>3</sup> which states that the owner/operator of a vessel must "provide accommodations and food that are equivalent to those

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<sup>2</sup> 50cfr Part 600.746(i)

<sup>3</sup> 50CFR Part 600.746; 50CFR Part 229.7(c)(4)(i) and (d)(2); 50CFR Part 635.7(e)(1) and/or 50CFR Part 622.8(c)(1)

provided to the crew” is regularly violated. Observers are sometimes forced to sleep at the galley table or on the floor, while crewmembers all have bunks. This means the Observer would lack any personal space and be forced to attempt to sleep where crewmembers were watching movies, smoking cigarettes and stepping over the Observer. In another instance, he met resistance from crewmembers when he requested that they move equipment out of a bunk that was only being used as storage. Observers believe that these violations are region-wide.

In fact, Observers are informed of these conditions before being hired<sup>4</sup> but they are not told that vessels will be breaking the equal accommodations law. NMFS is essentially telling Observer candidates before hire that they will witness violation of laws that are supposed to protect Observer welfare, but that everyone will be ignoring these laws and that accepting this is a condition of being hired.

Observers are told they have the right to refuse a vessel but they report pressure by NMFS and their contractor, IAP Services, Inc., to accept these assignments. Mr Combs believes that NMFS has never informed the vessels of this regulation or suggested to the vessels that they are required to comply. Observers in at least two Southeast programs report that vessels are allowed by NMFS to refuse female observers, which is against federal law, and that NMFS just sends a male Observer to accommodate them.

### **Organizational Concerns**

The root causes for the above substantive concerns stems from organizational dysfunction that is within the purview of the OIG. Those root causes include:

- The lack of whistleblower protection for Observers, including the likelihood of removal without cause and blackballing. Mr. Combs is Exhibit A. Not surprisingly, Observers are reluctant to come forward for fear of reprisal; and
- A hostile work environment, not only on the vessels, but also with NMFS. The lack of concern for fisheries law by NMFS is contrary to the public trust, which wrongly assumes that NMFS monitoring programs are ensuring compliance with fisheries regulations. It also appears that this program is severely out of line with NMFS National Standards regarding Observer welfare and safety.

This organizational breakdown puts Observers in an untenable position. Observers are told up front by NMFS that their reports of witnessing illegal activity will essentially be ignored. Observers fear that challenging any policy, written or unwritten, legal or illegal, will result in a loss of their job. NMFS should be in solidarity with their observers, supporting them with sound transparent policies and protocols to ensure their safety and wellbeing. Without

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<sup>4</sup> IAP Services, Inc.. Fishery Observer job descriptions: “Work can be performed on a variety of vessels including small boats without facilities such as rest rooms or bunks”.

backing from NMFS, Observers are vulnerable to both professional and physical danger.

### **Investigation Request**

We therefore urgently request that the Inspector General conduct a region-wide investigation of the not only the POP but all Observer Programs within the Southeast Region of NMFS and that standards and protocols be instituted. We would strongly suggest that the OIG:

1. Survey or systematically interview all current and recently separated Observers throughout the region;
2. Audit field diaries or notes to check which recorded violations were ever officially reported and/or pursued;
3. Review all Southeast Observer Program protocols and policies for how each Program processes witnessed violations and recommend protocols and rules that would facilitate the coordination and cooperation between the Observer Programs and other agencies, and departments within NOAA, to process fisheries violations witnessed by Observers.
4. Recommend protocols and rules that would effectively protect Observers who report violations from reprisal, including standards for performance evaluations, transparency of the evaluations to Observers with steps they must take to prevent removal from the program, and an appeal process that Observers can follow to defend themselves from wrongful firing.
5. Review all Southeast Observer Program and Contractor policies and practices regarding the safety and wellbeing of Fisheries Observers, including whether and the extent to which—
  - a) NMFS provides a clear written explanation upon vessel selection for Observer coverage to the Owner/Operator of the vessel regarding laws that protect Observers and their responsibilities to accommodate an Observer and provide a copy to the Observer prior to deployment.
  - b) NMFS enforces laws protecting the health and safety of Fisheries Observers, especially with respect to the vessel's responsibility to fix any deficiencies of the vessel preventing accommodation of the Observer and does not allow the vessel to fish until the problem is resolved and that NMFS, not the Observer, ensures the problem is resolved.
6. Review each of the Southeast Observer Programs current policies and practices regarding Observer placement randomly without regard to race, color, religion, sex, or national origin as required under Federal Equal Opportunity Laws.

Thank you for your consideration of this request. Feel free to contact us for additional supporting information or clarification of any details provided herein.

Sincerely,

Elizabeth Mitchell, President  
Association for Professional Observers

Jeff Ruch  
PEER Executive Director