

**PLAN TO MANAGE RISKS AND MINIMIZE LIABILITIES
ASSOCIATED WITH THE DEPLOYMENT OF
CONTRACTED FISHERIES OBSERVERS**



**U.S. DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
NATIONAL MARINE FISHERIES SERVICE
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FINAL REPORT

Prepared by:

David C. Cox
QuanTech, Inc.
1815 Fort Myer Drive
Suite 908
Arlington, VA 22209

Roy Goldberg
Schnader Harrison Segal & Lewis
1300 I Street, N.W.
11th Floor East
Washington, D.C. 20005

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Introduction

The National Marine Fisheries Service (NMFS) deploys approximately 500 observers in more than 20 fisheries nationwide, under two primary service delivery models. The first model uses observer provider companies under contract to NMFS. The second model uses NMFS-certified observer provider companies which contract directly with fishing vessels to provide required observer coverage. In either model, observers are usually hired at an entry-level position, and work independently on commercial fishing vessels for up to three months without direct supervision. They must accommodate difficult living arrangements, demanding schedules, and hazardous and unpredictable working and weather conditions inherent in commercial fishing operations. It is the responsibility of the observer provider company to obtain adequate insurance and liability coverage for observers. Reimbursement of the companies' insurance expenses is made either by the Government (in the case of a direct contract with NMFS) or by the vessel owner (in the case of a NMFS-certified observer company contracting directly with the vessel).

There are currently no minimum legal requirements as to the type of insurance that must be provided, other than general guidance provided in the Federal Acquisition Regulations. A principal reason for this is that it is not a simple matter to provide adequate workers compensation coverage to observers in the event that they are injured or killed on the job. State workers compensation programs are generally inapplicable, because most such programs do not have jurisdiction aboard vessels. Many observer provider companies carry longshore and harbor workers coverage, but it is far from clear that observers meet the status test for longshore coverage, which is designed for workers such as longshoremen, ship repairmen, shipbuilders, ship-breakers and the like. In other words, observer claims under longshore coverage might be denied by the insurer. Another coverage possibility is the Merchant Marine Act of 1920, generally known as the Jones Act, which, however, would require observers to be "seamen" under the definition of the Act. There have been various lawsuits over the years on this issue, with some courts finding observers to be seamen and others not. Observer companies have generally responded to this confusing coverage situation by purchasing all types of insurance that might possibly apply – State workers compensation, longshore and harbor workers, and Jones Act coverage. Not only is this approach extremely expensive, it may still fail to provide timely and fair compensation to an injured observer. Observers could be forced to file suit under the Jones Act against their employer, the vessel they were injured on, or both. The possibility of such suits has the additional effect of

making vessels reluctant to take observers on board.

Congress attempted to solve the observer coverage problem in the October 1996 re-authorization of the Magnuson-Stevens Fishery Conservation and Management Act, which, with the Endangered Species Act, is the authority for observer programs. The 1996 re-authorization provided workers compensation coverage to observers under FECA, the Federal Employee Compensation Act. This has turned out to be inadequate, since the basis of compensation under FECA excludes overtime (which is a significant portion of most observers' pay), and FECA does not cover observers working in processing plants, during debriefings sessions, or while in transit. Also, FECA does not prevent observers from suing the vessel or the observer provider company for additional damages, even if they are compensated under FECA.

In 2000, NMFS' National Observer Program conducted an internal Management Control Review (MCR) of observer programs, which concluded that there were varying levels of understanding of what constituted adequate and cost-effective coverage for observers, as a result of which observer coverage was costly and in some cases redundant. Also, uncertainty regarding vessel liability in the event of an injury to an observer was found to hamper efforts to deploy observers, even though NMFS offers reimbursement to vessels for Protection and Indemnity (P&I) coverage to protect themselves from suit by observers. With regard to FECA coverage, the MCR found that one injured observer obtained inadequate disability payments under FECA.

In order to obtain input from insurance and labor experts on the issues raised by the MCR, NMFS conducted an Insurance, Liability and Labor Workshop in June, 2001. In addition to the MCR issues, the Workshop considered some additional issues, including liability concerns of smaller vessels (whether insured or not), coverage for observers when not on board a vessel, and feasibility of a national insurance policy to cover observers, vessels and observer provider companies. After the Workshop, NMFS concluded that a risk management plan should be developed to provide a clear and unambiguous mechanism for furnishing insurance coverage to observers for work-related injuries, and to resolve the legal and financial uncertainties surrounding observer program insurance issues. The object of the present contract, and the subject of this report, is the risk management plan.

Objectives

The first objective of the research was to devise insurance coverage options to provide assured and adequate compensation to observers in the event of an on-the-job injury, whether sustained at sea, in transit to a deployment, or on land (such as during debriefing after a trip). Consideration was to be given not only to existing insurance options, but also to possible statutory changes/legislative initiatives to create a customized approach to observer program insurance issues. The cost, feasibility and timing of all options was to be taken into account.

A second objective was to analyze and evaluate options for reducing the risk to vessel owners from liability to observers for injuries sustained while on board the vessel acting as an observer. The reluctance of vessels to take observers because of liability concerns is an important impediment to the effective conduct of NMFS' observer programs.

A third objective was to analyze and evaluate options for managing the Government's exposure to legal and financial risks related to the training, debriefing and deployment of observers under both service delivery models and in various work situations (on board a vessel, in a processing plant, during debriefing, etc.).

The final objective of the research was to develop an effective method for the Government to monitor and manage future changes in legal and financial risks associated with observer programs.

Review of Documentation

The first stage in the analysis was to review a considerable body of documentation on the observer programs and insurance issues furnished to us by NMFS. The documents included:

- *Management Control Review of National Marine Fisheries Service Observer Programs/Service Delivery Models* (September 2000)
- *Fisheries Observers Insurance, Liability and Labor Workshop, June 12-14, 2001* (Draft Report, November 2001)
- *Independent Review of the North Pacific Groundfish Observer Program* (MRAG Americas, Inc., May 2000)
- Contracts between NMFS and observer provider companies, and between observer provider companies and observers
- Certificates of Insurance from regional observer programs
- Observer programs' safety training protocols
- Manuals from various observer programs
- Sundry letters and memoranda relating to observer status as seamen under the Jones Act, the FECA designation of observers under the Magnuson Act, and insurers' loss experience with regard to observer injuries.

Of the three reports, the Insurance Workshop proceedings were the most useful. The other two reports addressed a large variety of issues concerning observer programs, and devoted limited space to insurance and liability issues. The reports generally confirmed the uncertain and confusing status of insurance coverage in the observer programs. There was considerable discussion of:

- the inadequacy of FECA compensation in the cases where it was actually invoked
- ambiguity of observer status under the Jones Act (sometimes found to be seamen, sometimes not) and also under the Longshore and Harbor Workers' Compensation Act (LHWCA) (may not meet the status test for coverage)
- Difficulties in providing liability protection to vessels, through P&I coverage (difficult even if vessel has insurance, impossible if it does not)

- Inadequacies of hold harmless agreements to protect vessels from liability to observers.

Many Insurance Workshop participants advocated extending LHWCA coverage to observers, after the model of the Defense Base Act, because LHWCA would provide an exclusive, assured remedy for observers (negligence does not need to be proved), and because its compensation schedule is better and more straightforward than most State worker's compensation programs. It was emphasized that LHWCA-type coverage should be status based, i.e., it should cover observers wherever they are working and whatever duties they are performing.

The various contracts provided were not particularly informative on insurance coverages, since they include either the standard FAR requirements, or a requirement to provide a variety of expensive and potentially duplicative coverages. The insurance certificates typically show General Liability and Worker's Compensation coverage, often with endorsements for Maritime Employer's Liability (MEL) and/or LHWCA coverage. The status issues with respect to the Jones Act and the LHWCA are not addressed, so it is unclear how much actual protection a seriously injured observer would have under these policies, expensive though they may be.

The observer program manuals and safety training protocols contain a wealth of information about the actual operation of observer programs, but do not address insurance or liability issues.

Analysis of Current FECA Coverage

By statute, FECA excludes overtime from the base for computation of benefits. This has a serious impact on observers, because in many cases they rely on overtime to a considerable extent. An illustrative example (based on the NE Observer Program) might be an observer with a base pay rate of \$10 per hour, who is compensated at sea on the basis of \$140 per day, computed as 8 hours at the base rate of \$10, plus 4 hours of overtime at time-and-a-half of \$15 per hour. For this observer, \$80 is base pay and \$60 is overtime. Thus, if the observer were injured, the FECA compensation calculation would award two thirds of \$80, or \$53.33 per day, which is only 38% of daily pay of \$140. An observer seriously injured in Hawaii was victimized by a similar calculation resulting in such

Analysis of Observer Program Insurance Issues

low disability benefits that he was obliged to return to work even though far from fully recovered. To add insult to injury, the desk job to which he was assigned paid far less than his job as an observer.

The problem with the FECA treatment of overtime where observers are concerned is that the nature of the job makes working more than 8 hours in a day the normal course of events, rather than an unusual occurrence such as an emergency or a tight deadline requiring long work hours over a short period of time. Thus, viewed from the perspective of an 8-hour workday, a large part of any observer's compensation is overtime. We considered the possibility that an observer's employer might be able to avoid the overtime issue if observer pay were explicitly placed on a sea-day basis, i.e., observers were paid a fixed rate per sea-day with no mention of hours worked. Thus, if a FECA claim were to be filed, there would be no mention of overtime in the observer's pay record. The problem with this approach is that observers working for Federal contractors, and also possibly observers working for certified observer companies (there is a difference of opinion between the Departments of Commerce and Labor on this issue), are subject to the Service Contract Act. This act requires payment of overtime at time-and-a-half to non-exempt employees. Thus, there would always be a risk that the examiner of a FECA claim by an observer would go behind the claimed daily rate and impute an overtime portion to the observer's pay. Hence, this approach does not meet the need to provide assured, adequate compensation to an injured observer.

Another possibility we considered is that some observer pay might fall within the definition of "premium pay" or "administratively uncontrollable overtime", which can be included in the base of compensation for FECA. Section 8114 (e) of FECA allows the government to include "premium pay under section **5445(c)(1)**," 5 U.S.C. In addition, the government has construed this allowance also to apply to "administratively uncontrollable overtime" under 5 U.S.C. **5445(c)(2)**. FECA Program Memorandum No. 106 (provides for inclusion of premium pay under 5 U.S.C. 5545(c)(2) in pay rate for compensation purposes); FECA Bulletin No. 89-26 (issued September 29, 1989) (states that by administrative determination the Office, pursuant to 5 U.S.C. 5545(c)(2), includes premium pay for administratively uncontrollable overtime in computing compensation).

Section (c)(1) provides that the "head of an agency, with the approval of the Office of Personnel Management, may provide that— * * * an employee in a position **requiring him regularly to remain at, or within the confines of, his station during longer than ordinary periods**

of duty, a substantial part of which consists of remaining in a standby status rather than performing work, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter [5 USCS §§ 5541 et seq.], **except for irregular, unscheduled overtime duty in excess of his regularly scheduled weekly tour. Premium pay under this paragraph is determined as an appropriate percentage, not in excess of 25 percent, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law)** (or, for a position described in section 5542(a)(3) of this title, of the basic pay for the position), by taking into consideration the number of hours of actual work required in the position, the number of hours required in a standby status at or within the confines of the station, the extent to which the duties of the position are made more onerous by night, Sunday, or holiday work, or by being extended over periods of more than 40 hours a week, and other relevant factors"

Section (c)(2) provides that the "head of an agency, with the approval of the Office of Personnel Management, may provide that— * * * **an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter [5 USCS §§ 5541 et seq.], except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty. Premium pay under this paragraph is an appropriate percentage, not less than 10 percent nor more than 25 percent, of the rate of basic pay for the position, as determined by taking into consideration the frequency and duration of irregular, unscheduled overtime duty required in the position."**

In the Matter of GEORGE MARTINEZ, 1997 ECAB LEXIS 4431, Docket No. 96-504, December 29, 1997, the Board said: Under Sec. 5545(c)(1) of U.S.C. of Title 5 the employee receives premium pay for overtime, such as time spent on standby status, required to be spent at his duty station, as part of a regularly established, controllable, pre-set time schedule, and reduction or discontinuance of such premium pay constitutes an adverse action. Administratively uncontrollable

overtime under Sec. 5545(c)(2) applies where hours of duty may not be administratively controlled, and where substantial amounts of irregular or occasional overtime is worked at the discretion of the employee.

The 25% cap on premium pay would be a serious problem for the observer in the example quoted at the beginning of this section. His “base” pay was \$80 per day and his “overtime” was \$60 per day. Thus, counting 25% of his base pay as “premium pay” would increase his basis for FECA by \$20 to \$100 per day, resulting in a benefit of \$66.67 per day, still only 48% of his total pay of \$140 per day. While this would certainly be an improvement, it is still inadequate. Not only that, it is by no means clear that observers meet the definition of premium pay or administratively uncontrolled overtime. The “standby status” qualification for premium pay appears to be closest to the situation faced by observers at sea.

In summary, the “premium pay” and “uncontrollable overtime” provisions are not clearly applicable to observers. Indeed, since they apply directly only to Federal employees, it could well be difficult to construe them as applying to observers who are not Federal employees (except for FECA purposes). Even if these provisions were found to apply to observers, they would still not solve the problem of inadequate compensation, because of the 25% cap. However, these provisions may be worth further investigation as an interim measure to improve the current situation for observers.

FECA coverage for observers under the Magnuson Act is explicitly limited to work on a vessel. Thus, observers working in processing plants, during debriefings, or in transit to or from deployments are not covered by FECA. The intent of Congress was apparently that State worker’s compensation should cover these scenarios. At a minimum, this is a potentially confusing coverage situation which is subject to misinterpretation by observer employers and could conceivably result in a gap in coverage. It is also possible that observers may void their FECA coverage by performing any duties in service to the vessel, even washing dishes or acting under the captain’s orders in an emergency.

A final drawback to FECA is the lack of judicial review of the Agency’s or the Department of Labor’s decisions on compensation. The seriously injured observer mentioned earlier who received such inadequate compensation he was forced to decline disability and return prematurely to work, had no recourse against the adverse decision in his case. It is clearly important in such cases that the observer have a right of appeal to the Federal courts, as well as a provision to obtain attorney’s fees if successful.

Our conclusion from this analysis of FECA as applied to observers is that there is no assured way to obtain adequate compensation for on-the-job injuries to observers within the current FECA framework. Although several methods might be tried to circumvent FECA’s disallowance of overtime pay in whole or in part, none are assured of success. Short of amending the Magnuson Act or FECA itself, nothing at all can be done about the lack of coverage off-vessel or the lack of judicial review of compensation decisions.

State Workers Compensation

Most, if not all, State workers compensation statutes contain “extra-territorial” provisions whereby employees hired in the State are covered, under many circumstances, for work outside the State and even outside the United States itself. At first sight, these extra-territorial provisions make State workers compensation a potentially viable avenue for coverage of observers. Unfortunately, there are so many differences between State statutes that it is impossible to craft a workers compensation solution for observers from State law alone. In addition, State workers compensation does not address other liability concerns of observer provider companies, such as Jones Act liability.

First, a cursory review of State laws reveals that there are serious inconsistencies between State statutes as to maritime coverage. Alaska, for example, covers maritime workers with the single explicit exception of commercial fishermen (*AS 23.30.230 (a)(6)*). Florida, on the other hand, excludes any worker covered by the LHWCA, the Jones Act or the Defense Base Act (*Florida Statutes, Title XXXI, Chapter 440, Paragraph 440.09 (2)*). Hawaii covers “employees in maritime employment and their employees not otherwise provided for by the laws of the United States” (*HRS 386-7*), which comes to about the same thing as Florida. Obviously, the Hawaii and Florida statutes leave the issue of observer coverage completely unresolved under current law, and even the Alaska law is not completely clear because of the question as to whether observers are seamen.

Second, there are large differences in benefits between the States. A review of benefits for permanent total disability provided by worker’s compensation statutes in the U.S. (information on the U.S. Department of Labor website at www.dol.gov/esa/regs/owcp) indicates that, for the 23 maritime States, the weekly benefit ranges from a low of \$316 for Mississippi to a high of \$923 for New Hampshire, with an average of \$588. This compares very unfavorably with the \$934 benefit

for USL&H. There are similar differences for temporary total and permanent partial disabilities.

Third, whatever position the State statute may take with respect to maritime workers such as observers, the typical workers compensation policy does not contemplate coverage of workers at sea. In cases where there is known maritime exposure, underwriters will generally attach a policy endorsement excluding, for example, "bodily injury to a master or member of the crew of any vessel." (*The John Liner Letter, August 1986*). Thus, under current law, observer provider companies often have no practical alternative to carrying Jones Act, Maritime Liability and USL&H coverage.

Fourth, the potential liability under current law for Jones Act or LHWCA claims against the observer provider company forces the companies to carry the range of expensive and duplicative coverages mentioned before. This is the situation even in Alaska, despite the fact that Alaska workers compensation apparently does cover observers.

Vessel Liability Issues

Many vessels are reluctant to take observers on board because of liability concerns. Specifically, they fear that an injured observer may bring suit for negligence on the part of the vessel (including the owner/operator). While FECA exempts the Government, as the observer's employer, from suit, nothing prevents the observer from suing the vessel. If the facts of the case support a negligence claim against the vessel, the Government itself may file suit against the vessel to recover any payments under a FECA claim, or may require the observer to file suit. Thus, in some respects, the FECA coverage of observers exacerbates the liability concerns of vessels.

Currently, NMFS attempts to address these concerns by reimbursing vessels for additional Protection and Indemnity (P&I) insurance premiums needed to extend coverage to an observer. Still, many vessels are unwilling to go through the hassle of obtaining the additional coverage. Worse, many smaller vessels have no insurance at all, so this option is not open to them.

Another approach to this problem is for the observer provider company to enter into a "hold harmless" agreement with the vessel under which the company assumes the liability for any claim by the observer against the vessel. A similar approach is for the observer provider company to furnish insurance to the vessel to defend against a negligence claim by the observer. Under either of these approaches, the key question is whether the observer provider company can itself obtain

insurance at a reasonable cost to cover negligence suits by the observer against the vessel. First, there is a real question whether the observer provider company has any insurable interest at all in the operations of the vessel. That is, protection against liability for the actions of the vessel is the responsibility of the vessel owner/operator. Normally, one cannot insure someone else against their own negligence. The second difficulty is that, even if such insurance could be obtained, it is liable to be very expensive, because the observer provider company's liability insurer would be carrying coverage for a large population of vessels of unknown condition and ownership. Finally, it is questionable whether vessels with a liability concern would be satisfied with any representation by the observer provider company with regard to insurance or a hold-harmless agreement.

We concluded from our review of this issue that the only sure way to remove vessel concerns about liability is to exempt them from liability suits by observers. Section 114 of the Marine Mammal Protection Act of 1972 originally provided such an exemption, but it no longer applies. The Magnuson Act never addressed this issue. Of course, Federal preemption of an observer's common-law right to bring a negligence suit against the vessel must be coupled with the provision of assured and adequate compensation to observers for on-the-job injury.

Observer Provider Company Liability Issues

As discussed above, FECA exempts only the Government, as the observer's employer, from liability suits for on-the-job injuries. Even if compensation is provided under FECA, the observer could still sue the observer provider company under the Jones Act for damages, including pain and suffering. Under the Jones Act, a "seaman" is entitled to sue his "employer" for injuries he suffered "in the course of his employment." To recover under the Jones Act, a plaintiff must show, among other things, that (i) he was a "seaman" when he suffered his injury; and (ii) the defendant was his employer at the time of the injury. As discussed below there are serious questions as to whether an observer could make either of these necessary showings. Specifically, he might not be able to prove that his role as an observer qualified him as a "seaman." In addition, the Magnuson Act, which designates the observers as employees of the Federal Government, would make it difficult for the observer to prove that the contractor was his employer at the time of the injury.

(a) *Requirement that the Injured or Deceased Person be a Seaman.*

Whether a person is a "seaman" under the Jones Act generally is a question of fact for the jury. *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 355 (1991). The Jones Act does not define the term "seaman." Rather, the term was intended to be defined by reference to the general maritime law when the Act was passed in 1920. *Id.* at 342. Certain early cases limited seaman status to those who aided in the navigation of the ship. The narrow rule was that a seaman -- sometimes referred to as a mariner -- actually must navigate. Notwithstanding the aid in navigation doctrine, Federal courts throughout the last century consistently awarded seaman's benefits to those whose work on board ship did not involve navigation of the vessel. For example, firemen, engineers, carpenters and cooks were all considered seamen.

In 1991, the U.S. Supreme Court made it clear that a person did not need to aid in the navigation of a ship to be deemed a seaman under the Jones Act. *Id.* at 353 ("[w]e think the time has come to jettison the aid in navigation language"). In holding that a person who did not perform transportation-related functions on board the vessel could nevertheless qualify as a seaman, the Court observed that "[a]ll who work at sea in the service of a ship face those particular perils to which the protection of maritime law...is directed." *Id.* at 354. The Court added that "[i]t is not the employee's particular job that is determinative, but the employee's connection to a vessel." *Id.* The Court declined to adopt a hard-and-fast rule for determining whether a person was a seaman, but did provide the following guidance: "the requirement that an employee's duties must 'contribut[e] to the function of the vessel or to the accomplishment of its mission' captures well an important part of seaman status"; "[i]t is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work." *Id.* at 355.

Significantly, since the decision in *McDermott* at least two courts have held that observers are not seamen. In *O'Boyle v. United States*, 993 F.2d 211 (1993), the Third Circuit -- which appears to be the only U.S. Circuit Court of Appeals to have considered the issue -- held that an American observer placed on board a Japanese fishing vessel to enforce a U.S.-Japan treaty was not a "seaman." The plaintiff argued that he was a seaman, even though the boat's owner and crew did not want him aboard, because he was essential to the vessel's mission in that the vessel could not engage in squid-fishing without him. The court rejected this argument, reasoning that the plaintiff

was aboard the vessel "solely because the treaty required him to be there in order to observe the types of marine life encountered by the ship during its voyage," and his "mission was not to catch fish or to have anything to do with the vessel." Rather, he "was simply an employee of [the contractor], aboard a Japanese fishing vessel as a business invitee." *Id.* at 313. Similarly, in *Key Bank of Puget Sound v. F/V Aleutian Mist*, Cause No. C91-107, Order on Motion for Partial Summary Judgment dated 1/16/92 (W.D. Wash. 1992), the Federal trial court concluded that fisheries observers do not meet the test for "seamen" status because they are independent scientific personnel who do not perform crew functions.

The outcomes and rationales of *O'Boyle* and *F/V Aleutian Mist* suggest that an observer suing an observer contractor would have difficulty meeting the "seaman" status requirement for suing under the Jones Act. However, other federal trial judges have concluded that observers are seamen because their actions contribute to the functions of the vessels to which they are assigned. *See, e.g. Key Bank of Washington v. Yukon Challenger*, Cause No. C93-1157D, Order of February 22, 1994 (W.D. Wash.); *West One Bank v. M/V Continuity*, Cause No. C93-1218C, Order of January 19, 1994 (W.D. Wash.) ("[a]n observer falls within the definition of seaman"); *State Street Bank & Trust Co. v. F/V Yukon Princess*, Cause No. C93-5465C, Order of December 22, 1993 (W.D. Wash.); *Key Bank of Washington v. Dona Karen Marie*, Cause No. C92-1137R, Order of October 26, 1992 (W.D. Wash.).

Thus, while the better argument is that observers are not "seamen," there currently is no guarantee that a court or jury would make this determination.

(b) *Requirement that the Defendant Have Been the "Employer" of the Injured or Deceased.*

Even if an observer qualifies as a "seaman" under the Jones Act, he cannot prevail against an observer contractor unless the contractor is the "employer" of the observer. Ordinarily, the employer of a seaman under the Jones Act is the owner of the ship. However, there are circumstances in which the employer will be an entity other than the ship owner. *Matute v. Lloyd Bermuda Lines, Ltd.*, 931 F.2d 231, 236 (3d Cir. 1991).

Whether an employer/employee relationship exists for purposes of the Jones Act is usually a question of fact for the jury, so long as there is an evidentiary basis for its consideration. *Glynn v. Roy AI Boat Management Corp.*, 57 F.3d 1495, 1498 (9th Cir. 1995). The fact finder

typically considers the following factors in deciding whether the defendant was the employer of the injured or deceased person: (i) who hired the person; (ii) who paid wages to the person; (iii) who had the power to terminate the person; and (iv) who controlled the person's conduct on the job. *Heath v. American Sail Training Ass'n*, 644 F. Supp. 1459 (D.R.I. 1986); see also Matute, supra ("The critical inquiry turns on the degree of control exercised over the [plaintiff]. Factors indicating control included payment, direction, and supervision. Also relevant is the source of the power to hire and fire").

In October 1996 Congress passed certain amendments to the Magnuson Act, including a provision which specified that observers were entitled to FECA protection. Pub. L. 104-297, Title II, section 204, Oct. 11, 1996, 110 Stat. 3609 (the "Amendment"). The application of FECA coverage to an observer means that he cannot sue the federal government for tort claims, including claims under the Jones Act. However, the immunity from suit which the government enjoys vis-a-vis persons covered under FECA is not shared by nongovernmental entities. Thus, the fact that FECA bars a person from suing the United States does not automatically mean the person cannot sue a third party, including a government contractor, to recover damages for his injuries.

Nevertheless, a critical aspect of the Jones Act may well cause the language of the Amendment to bar observers from suing a contractor under the Jones Act. Specifically, the Amendment states that

"[a]n observer on a vessel and under contract to carry out responsibilities under this chapter or the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 et seq.) shall be deemed a Federal employee for the purpose of compensation under the Federal Employee Compensation Act (5 U.S.C. 8101 et seq.)"

This language is critical because it makes the observer an employee of the federal government. This status of the observers is key because it appears that under the Jones Act, there can be only one employer. In *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783 (1949), the plaintiff alleged he was injured while on a voyage aboard a ship owned by the United States but managed by a private company, Cosmopolitan, under an agency agreement with the U.S. government. He sued Cosmopolitan under the Jones Act to recover for his injuries. The Supreme Court stated that it had "no doubt that **under the Jones Act only one person, firm, or corporation can be sued as employer,**" and added that "[e]ither Cosmopolitan or the Government is that employer," but not both. *Id.* at 791 (emphasis added). Other courts have held that a seaman may

have but one Jones Act employer. See *Mahramas v. American Export Isbrandtsen Lines*, 471 F.2d 165 (2d Cir. 1972); *Savard v. Marine Contracting, Inc.*, 471 F.2d 536 (2d Cir. 1972).

Accordingly, given the express statement in the Amendment that the observers are "Federal employees" there is a genuinely good chance that a Jones Act claim against a contractor by an observer would run afoul of the apparent limitation that there can be only one employer under the Jones Act. Since the government is the employer of the observer, how can the contractor also be the employer under the Jones Act? However, we cannot be absolutely sure of this result because there does not appear to have been a specific holding by any court -- much less the U.S. Supreme Court -- that a Jones Act claim is barred against a nongovernmental entity where, as here, a Federal law specifies that the U.S. government is the employer of the plaintiff. In addition, the statement in *Cosmopolitan* that there can be only one employer in terms of the Jones Act, while helpful, was dicta (i.e., not the holding of the case) and the case itself is over 50 years old. In addition, at least one court has surmised, without holding, that "a seaman may have more than one Jones Act employer." *Spinks v. Chevron Oil Co.*, 507 F.2d 216, 225 (5th Cir. 1975) ("We see nothing offensive in suing an immediate employer under the Act, or even both employers in the alternative. The defendants can sort out which between them will bear the final cost of recovery, either through common law indemnity or contribution principles, or contractual provisions").

Nevertheless, unless a court chose to ignore the language from *Cosmopolitan* that there can be only one "employer" for purposes of Jones Act liability, the observer, as a result of the language of the Amendment, would have a difficult chore of proving that the observer company was his "employer" under the Jones Act.

In summary, while it appears unlikely that an observer could successfully sue an observer company under the Jones Act, the issue has not been tested in court. It is therefore up to an observer company to evaluate the business risk involved and to decide whether to seek insurance coverage. One possibility is to look for contingent coverage, i.e., coverage that would apply only if the observer was found not to be a Federal employee under the Jones Act. Such coverage could be less expensive than full Jones Act coverage.

The analysis presented in the previous section shows that none of the major problems involved in compensating observers for work-related injuries can be satisfactorily solved within the current framework.

First, observers are not assured of adequate and timely compensation for on-the-job injuries primarily because the compensation formula under FECA (which excludes overtime) does not properly reflect their job situation. In addition, there are potential gaps in coverage when observers are working off the vessel. The problems are compounded by the lack of judicial review of FECA compensation decisions. While there is some possibility that observers may qualify for the “premium pay” or “administratively uncontrolled overtime” exceptions to FECA’s overtime exclusion, there is no guarantee that this will hold true in all cases. Even if it does, it will still result in inadequate compensation for injury because of the 25% cap on premium pay.

Second, FECA coverage for observers does not address, and may even exacerbate, the liability concerns of vessels required to carry observers. Not only does FECA not prohibit negligence suits by injured observers, the Government may sue (or require the observer to sue) to recover FECA payments from a negligent third party such as the vessel owner/operator. There is no completely satisfactory insurance solution to this issue. Reimbursement by NMFS of vessel expenses for P&I endorsements to cover observers has not been widely accepted by vessels, and does not apply at all to the large number of smaller uninsured vessels. Attempts to transfer the risk from vessels to the liability insurers of observer provider companies are problematic, both from a cost perspective and from an apparent lack of any insurable interest of the observer provider company in the operations of the vessel.

Third, observer provider companies are still subject to suit by injured observers under the Jones Act. To prevail in such a suit, an observer must establish that he/she is a “seaman” and that the observer provider company is his/her “employer”. The seaman status of observers is simply unclear, with some courts ruling that observers are seamen and others not. Absent a legislative solution, only a decision of the U.S. Supreme Court could settle this issue. Because the Magnuson Act makes observers Federal employees for purposes of FECA, it is certainly problematic for an observer to prove that the observer provider company is the employer for purposes of the Jones Act. However, there is no assurance that a court would not find that the observer can have two employers for purposes of the Jones Act. The net effect of all this uncertainty is that a prudent observer provider company needs (very expensive)

Jones Act insurance under current circumstances.

As recommended in the proceedings of the *Fisheries Observers Insurance, Liability and Labor Workshop (June 12-14, 2001)* the Longshore and Harbor Workers Compensation Act (LHWCA) can provide an exclusive, assured remedy for observers under a compensation schedule that is uniform, better and more straightforward than most state Workers Compensation programs. The LHWCA allows overtime to be included in the compensation base, thereby avoiding a serious problem with FECA coverage of observers.

At present, observers probably do not meet the “status” requirement of the LHWCA. Under the LHWCA, the injured person must be an “employee”, which is statutorily defined to mean “any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship-breaker”, but does not include a “master or member of a crew of any vessel”. This language has been construed to make the LHWCA applicable only to employees whose service is of a sort performed by longshoremen and harbor workers. While observers are not expressly exempted from the LHWCA, clearly they are not like longshoremen or harbor workers and, indeed, may even be (depending on the court making the decision) “members of the crew of a vessel”. Clearly, one cannot safely assume that the LHWCA is currently applicable to observers. Indeed, observer provider companies which now purchase LHWCA coverage may well be wasting their money.

Various extensions of the LHWCA have been enacted over the years in order to cover new classes of workers. These include the Defense Base Act (DBA), the Outer Continental Shelf Lands Act and the Nonappropriated Funds Instrumentalities Act. None of these acts is tailored to the unique situation of observers. For example, the Defense Base Act covers “workers engaged in employment...under contracts with the United States...for public work to be performed outside the continental United States”. Many observers are not working under Government contracts, they probably do not engage in “public work”, and much of their work is within the continental U.S.

These concerns mean that new legislation is needed to make the LHWCA applicable to observers. Because the LHWCA does not cover a “master or member of the crew of any vessel”, it is necessary for the legislation to provide that observers shall not be considered to be seamen. This has the additional benefit of preventing Jones

Risk Management Solution

Act suits by injured observers against the observer provider company.

The proposed new legislation, dubbed “the Fisheries Observer Compensation Act” (FOCA), is presented in Appendix A. An explanatory report, discussing the objectives of FOCA and presenting a section-by-section analysis, is in Appendix B. In addition to the provisions discussed above, FOCA Section 6(b) prohibits negligence claims by injured observers against vessels, except for willful injury or death. This removes any legitimate liability concerns of vessel owner/operators required to take observers. FOCA also exempts the Government from liability for injuries to an observer, unless the Government is actually the observer’s employer. Finally, FOCA repeals the FECA coverage of observers who are not federal government employees.

Implementation of FOCA

FOCA brings all observers working on federal programs, other than direct employees of the federal government, under the LHWCA, whether they work under contract to the Government or for certified observer provider companies contracting directly with vessels. Under the Act, observer provider companies will be required to purchase LHWCA insurance (some larger companies may be able to self-insure under Department of Labor rules). Since this insurance can be quite expensive, it is recommended that NMFS establish a single insurance contract which all observer providers will be required to use. Alternatively, NMFS may wish to consider self-insuring for LHWCA coverage. There are examples of both approaches in other Federal agencies. Whichever approach NMFS chooses, it will be important to obtain copies of the contracts used by other agencies.

Insurance Contracts

(a) U.S. Agency for International Development (USAID)

USAID uses LHWCA under the DBA to cover overseas workers. Apparently, no special legislation was needed to invoke the DBA in respect of USAID workers. DBA Section 1(a)(4) applies directly to USAID in that the agency's work is performed outside the continental U.S. under contracts "for the purpose of engaging in public works". The program is largely for consultants who don't have other types of coverage, since large contractors (such as IBM) self-insure for LHWCA.

Because of the variety of rates quoted by contractors for LHWCA insurance, USAID about 20 years ago put out a competitive procurement to establish rates. Each contract is for 5 years, with a basic rate fixed for the first 2 years. For each of the next 3 years, profit and loss formulas are applied to the insurance contractor's experience to determine revised rates (subject to a ceiling and a floor). The rate for the fourth year option of the current contract with Rutherford International of Alexandria, VA, (7/1/01 – 6/30/02) is \$1.44 per \$100 of employee remuneration. The contractor handles all claims except those covered under the War Hazards Act, which covers risks under any armed conflict (whether or not war is declared) occurring within a country in which a covered individual is serving. A special FECA fund pays any claim declared a war risk hazard.

Total policy premiums on the USAID LHWCA insurance contract for the 3.5 years from 7/1/98 to 12/31/01 were \$7,000,000. This would correspond to \$2,000,000 a year in premiums, or

about \$130,000,000 a year in covered salaries, equating to 2,000 people at an average salary of \$65,000 a year. This is several times the total observer workforce.

(b) U.S. Department of State (DOS)

The State Department has a very similar insurance contract to USAID, but rates are much higher presumably because of the more controversial nature of the State Department's overseas operations. The current DOS contract, also with Rutherford International, has rates of \$4.30/\$100 for services and \$5.56/\$100 for construction (1/22/02 – 1/21/04). As with USAID, the DBA is the direct authority for invoking the LHWCA to cover overseas State Department workers and contractors.

Self Insurance

The self-insurance approach is used by the Army and Airforce Exchange to cover approximately 40,000 employees on military bases in the U.S. and overseas. These individuals are not civilian employees of the Department of Defense, so they are not FECA covered, and do not fall under State Worker's Compensation either, because they are employed by the Federal Government. To deal with this situation, the LHWCA was extended to these employees under the Nonappropriated Funds Instrumentalities Act (NFIA) of 1952. The term "Nonappropriated Funds" refers to the fact that these employees are paid from revenue earned rather than through funds in the Defense Budget. Employees are covered both overseas and within the U.S.

The Marine Corps/Navy self-insure for LHWCA rather than hiring an insurance contractor like USAID and DOS. They believe that self-insurance is more cost-effective than having an insurance contractor. A Third Party Administrator (TPA) hired under contract handles all processing and adjudication of claims, and filings with the Department of Labor.

Potential Cost Savings from an Insurance Contract

It is anticipated that using a single insurance contract would provide cost savings over allowing each observer provider company to purchase LHWCA coverage independently. With a single contract, there is a larger experience base for the insurer to rate risk, and competition for the

contract between insurers will also tend to reduce rates. The apparently favorable rates obtained by USAID and DOS for their overseas workers further indicate the likelihood of savings.

While it is impossible to quantify in advance the possible cost savings from a FOCA insurance contract, some estimate of the size of such a contract can be made. The following are approximate sizes (measured in annual sea-days) for the principal current observer programs:

North Pacific Groundfish:	36,500 sea-days
Northeast Scallop:	300 sea-days
Northeast Groundfish:	3,700 sea-days
Southeast Pelagics:	3,400 sea-days
Southeast Trawl:	650 sea-days
Pacific Gillnet:	800 sea-days
Pacific Longline:	6,120 sea-days
Pacific Trawl:	6,500 sea-days

This gives approximately 58,000 total annual sea-days for all NOAA observer programs, whether Government funded or not. If we assume average pay of \$150 per sea-day, this gives approximately \$8.7M in total annual at-sea pay to be covered by LHWCA insurance. If the premium were, say, 10% of at-sea pay, the annual premium income on the insurance contract would be approximately \$870K and a 5-year contract would total \$4.35M. The USAID program averages about \$2M in annual premiums to the insurance contractor. Thus, while the FOCA insurance contract would likely be smaller than the USAID contract, it should still be large enough to attract meaningful competition from insurance companies. Also, it is likely that observer coverage will be increasing rather than decreasing in future years, making an insurance contract even more attractive to insurers.

Monitoring Future Changes in Legal and Financial Risks Associated with Observer Programs

Monitoring future changes in legal and financial risks is a simple matter once an insurance contract (or Third Party Administration contract in the case of self-insurance) is established. Because all observers will be covered under the same contract, comprehensive and detailed claims and premium data will be readily available for analysis by NMFS. Also, the long-term nature of the insurance contract (5 years is recommended) will provide considerable stability in the insurance rates, so that NMFS will have time to plan for any changes in the insurance climate which may affect rates and financial risks.

APPENDIX A

Proposed “Fisheries Observer Compensation Act (FOCA)”

The Fisheries Observer Compensation Act¹

(Annotated with footnotes)

§ 1. Compensation authorized

Except as herein modified, the provisions of the Longshore and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, 33 U.S.C. 901, et seq.,² shall apply in respect to the injury³ or death of any person, other than a person who has been directly hired by and is directly paid by the federal government, engaged in any employment as a fisheries observer, as defined below, irrespective of the place where the injury or death occurs, and shall include any injury or death occurring to any such person while in transit to or from his place of employment, where the employer or the United States provides the transportation or the cost thereof.⁴

§ 2. Definitions. As used in this Act—

(a) The term “fisheries observer” means a person (other than a person who has been directly hired by and is directly paid by the federal government) who is under contract or otherwise engaged in employment as an observer in connection with a fish or fisheries monitoring program created by or pursuant to a law of the United States. The provisions of the Federal Employee Compensation Act (5 U.S.C. 8101 et seq.)⁵ shall not apply to injuries or death to fisheries observers covered under this Act occurring after the effective date of this Act. A fisheries observer shall not be deemed to be a master, member of a crew, or seaman of the vessel to which the observer is assigned to perform any functions in connection with a program for the monitoring of fish or fisheries created by or pursuant to a law of the United States. A person employed exclusively to perform office, clerical, secretarial, security, or data processing work shall not be deemed a fisheries observer.⁶

(b) The term “employee” means a fisheries observer, as defined above.

(c) The term “employer” means a person, other than the United States government, that contracts with or otherwise hires one or more fisheries observers, and may be a contractor, subcontractor, or an entity certified or accredited by the United States government to provide fisheries observers, or other person.⁷ A vessel shall not be deemed to be the employer of a fisheries observer unless the vessel directly contracted with or otherwise hired the observer for

the provision of his services as a fisheries observer, and pays the salary of that observer directly to that observer.⁸

(d) The term “effective date” means 11:59 p.m., Eastern Standard Time, on the day on which the Act becomes law.

§ 3. Liability for compensation

An employer shall be liable for the payment to his employees of the compensation payable under 33 U.S.C. 907, 908, and 909, subject to the provisions of this Act.⁹ In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor. Compensation shall be payable irrespective of fault as a cause for the injury.¹⁰

§ 4. Coverage. Compensation shall be payable under this chapter in respect to disability or death of an employee if the disability or death results from an injury occurring while the employee is engaged in any employment as a fisheries observer, irrespective of the place where the injury or death occurs, and shall include any injury or death occurring to any such person (a) while that person is aboard, boarding or leaving a vessel to which he is assigned to engage in activities as a fisheries observer, (b) while that person is otherwise engaged in employment as a fisheries observer in any location, on land or otherwise, including training, or (c) while in transit to or from his place of employment, where the employer or the United States provides the transportation or the cost thereof.¹¹ No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another. Subject to the provisions of 33 U.S.C. 933 but otherwise notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this Act shall be credited against any liability imposed by this chapter. Unless provided for herein, no other provisions of 33 U.S.C. 903 are applicable to this Act. For any injury or death that occurs on or after the effective date of this Act, the liability under this Act shall become applicable to contracts and subcontracts heretofore entered into but not completed at the time of the effective date of this Act.

§ 5. Computation of benefits; application to aliens and nonnationals

(a) The minimum limit on weekly compensation for disability, established by 33 U.S.C. 906(b), and the minimum limit on the average weekly wages on which death benefits are to be computed, established by 33 U.S.C. 909(e) shall not apply in computing compensation and death benefits under this Act.¹²

(b) Compensation for permanent total or permanent partial disability under 33 U.S.C. 908(c) (21), or for death under this Act to aliens and nonnationals of the United States not residents of the United States or Canada shall be in the same amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of one year immediately prior to the date of the injury, and except that the United States Employees' Compensation Commission [Secretary of Labor] may, at its option or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens or nonnationals of the United States by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the Commission [Secretary of Labor].¹³

§ 6. Exclusiveness of liability

(a) **Liability of employer; failure of employer to secure payment of compensation.** The liability of an employer prescribed in 33 U.S.C. 904 and this Act shall be exclusive and in place of all other liability including any liability imposed by or arising out of any other workers' compensation law of such employer to the employee, his legal representative, spouse, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory or comparative negligence of the employee.¹⁴

(b) **Prohibition of Negligence Claims against Vessel.** A fishery observer who suffers injury or death aboard a vessel to which he is assigned to perform duties as a fisheries observer shall have no cause of action against that vessel¹⁵ for negligence or otherwise, except in cases where the vessel acted willfully in causing the injury or death. In no event shall the employer indemnify or otherwise be liable to the vessel for such claim, directly or indirectly, and any agreements or warranties to the contrary shall be void. No other provisions of 33 U.S.C. 905 are applicable to this Act. No provision of 33 U.S.C. 933 that is inconsistent with this subsection shall apply to this Act.¹⁶ Nothing in this subsection shall prevent recovery under this Act against a vessel that is the employer of a fisheries observer.¹⁷

(c) **Preclusion of federal government liability.** The United States government shall not be liable for any damages arising out of any injury or death to a person that occurs while the person is engaged in any employment as a fisheries observer, irrespective of the place where the injury or death occurs; however, nothing in this section precludes a person who was hired directly by and is paid by the federal government, and who is otherwise eligible, from obtaining benefits under the Federal Employee Compensation Act (5 U.S.C. 8101 et seq.).¹⁸

§ 7. Compensation districts; judicial proceedings

(a) The United States Employees' Compensation Commission [Secretary of Labor] is authorized to extend compensation districts established under the Longshore and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), or to establish new compensation districts, to include any area to which this Act applies; and to assign to each such district one or more deputy commissioners, as the United States Employees' Compensation Committee [Secretary of Labor] may deem necessary.¹⁹

(b) Judicial proceedings provided under sections 18 and 21 of the Longshore and Harbor Workers' Compensation Act in respect to a compensation order made pursuant to this Act shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the location at which the injury or death occurs.²⁰

§ 8. Repeal of 16 U.S.C. 1881b(c). Upon the effective date of this Act, 16 U.S.C. 1881b(c) is hereby prospectively repealed with respect to fisheries observers as defined herein, and any fisheries observer who was deemed to be a federal employee for the purpose of compensation under the Federal Employee Compensation Act (5 U.S.C. 8101 et seq.) shall no longer have such status, with respect to any injury or death which occurs on or after the effective date of this Act, but instead shall be entitled to compensation pursuant to this Act for any injury or death that occurs on or after the effective date of this Act. However, this Act shall not apply to any injury or death that occurred prior to the effective date of this Act.²¹

¹The model here is the Defense Base Act, 16 U.S.C. 1651 et seq. (“DBA”), however we have customized the language to address the situation here, where we seek to have a statute that covers observers in all aspects of their employment as observers.

²This is the U.S. Code citation for the LHWCA.

³The LHWCA defines “injury” to include “accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury * * *.” 33 U.S.C. 902(2),

⁴The intention here is to cover all observers in all observer-related activities, and to treat all observers the same, except that no federal government employee shall be considered to be an observer for purposes of this Act.

⁵This is the U.S. Code citation for FECA.

⁶This is included because employees exclusively engaged in clerical work are excluded from coverage under LHWCA.

⁷The intention here is to put the responsibility on procuring LHWCA insurance on the entity that hires the observers, whether that is (1) a contractor with the federal government under a contract to provide observers, or (2) a non-contractor which hires observers that has been certified or accredited by the federal government, and which is paid by vessels to obtain the use of the observers.

⁸This clarifies the intention that neither the vessel nor the U.S. government be deemed the employer

unless they directly hire the observer.

⁹This is adapted from 33 U.S.C. 904 of the LHWCA, and makes the payment provisions of LHWCA applicable to this Act.

¹⁰This is from 33 U.S.C. 904. It is sufficiently critical that the no-fault provision of LHWCA needs to be restated in the new Act even though it is otherwise incorporated therein.

¹¹While this is primarily based on the DBA and LHWCA, this language makes it clear that the coverage applies to all facets of the observers’ duties, including land-based activities (such as a debriefing after a voyage). The intention is to have LHWCA provide all coverage and to avoid the need for state workers’ compensation to apply to an observer. This is a desired result because: (1) it makes no sense to have potentially overlapping coverage under state workers compensation and LHWCA, (2) LHWCA is generally as good as or superior to all state workers’ compensation programs, and (3) consistency and predictability are important objectives here.

¹²This is taken directly from the DBA. Note that these sections, which are being incorporated into this Act, also contain maximum limits, which are being adopted herein without modification.

¹³This too is taken directly from the DBA, and simplifies the payment of claims to aliens and non-nationals.

¹⁴ This reflects the LHWCA, and clarifies that the employer is liable for compensation to the employee regardless of fault and, because of exclusivity, the employee is prohibited from a cause of action.

¹⁵ The LWHCA defines “vessel” as follows: “Unless the context requires otherwise, the term ‘vessel’ means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel’s owner, owner pro hac vice, agent, operator, charter or bare boat charter, master, officer, or crew member.” 33 U.S.C. 902(21).

¹⁶ This goes beyond the LHWCA, which would allow claims for negligence against the vessel (but does not allow for claims for lack of seaworthiness). Under this Act, the employee would be prohibited from a cause of action against the vessel.

¹⁷This is necessary for those instances, if any,

where the vessel is the employer of the observer, i.e., where the vessel is the person that contracted with the observer for services and which directly pays the salary.

¹⁸This is not in the LHWCA. It is added here primarily to preclude claims for negligent training, defective equipment and the like against the U.S. government by observers who are hired by contractors or subcontractors but trained by the government or who use government supplied equipment.

¹⁹This taken directly from the DBA, and is included because it identifies the responsible party that can extend coverage to districts beyond U.S. territorial waters, since LHWCA coverage does not extend beyond U.S. territorial waters.

²⁰ The LHWCA calls for direct appeals to the federal courts of appeal, while the DBA has a direct appeal to the federal district courts.

²¹Repeal is necessary so that observers are not covered under both FECA and LHWCA.

APPENDIX B

Explanatory Report in Support of Enactment of “The Fisheries Observer Compensation Act”

Explanatory Report in Support of Enactment of “The Fisheries Observer Compensation Act”

1. Introduction.

The Fisheries Observer Compensation Act is designed to solve a number of significant problems that have been identified in insurance coverages applicable to the variety of observer programs sponsored, directly or indirectly, by the National Marine Fisheries Service (NMFS). Direct sponsorship by NMFS involves hiring observers either as federal employees or as employees of NMFS contractors. Indirect sponsorship involves observers hired by NMFS-certified observer provider companies that are paid by fishing vessels for government-mandated observer coverage.

The most fundamental insurance problem in the observer programs is how to provide adequate workers compensation coverage to observers in the event that they are injured or killed on the job. Because observers work on fishing vessels, State workers compensation programs are generally inapplicable because most such programs do not have jurisdiction aboard vessels. Many observer provider companies carry Longshore and Harbor Workers coverage, but it is far from clear that observers meet the status test for longshore coverage, which is designed for workers such as longshoremen, ship repairmen, shipbuilders, ship-breakers and the like. In other words, observer claims under longshore coverage would likely be denied by the insurer. Only in the case of observers performing duties on fish-unloading docks or non-navigable barges is longshore coverage likely to apply. Another coverage possibility is the Merchant Marine Act of 1920, generally known as the Jones Act, which, however, would require observers to be “seamen” under the definition of the Act. There have been various lawsuits over the years on this issue, with some courts finding observers to be seamen and others not. Observer companies have generally responded to this confusing coverage situation by purchasing all types of insurance that might possibly apply – State workers compensation, Longshore and Harbor Workers, Maritime Employers Liability, and Jones Act coverage. Not only is this approach extremely expensive, it may still fail to provide timely and fair compensation to an injured observer. Observers could be forced to file suit under the Jones Act against their employer, the vessel they were injured on, or both. The possibility of such suits has the additional effect of making vessel owners/operators reluctant to take observers on board.

Congress attempted to solve the observer

coverage problem in the October 1996 re-authorization of the Magnuson-Stevens Fishery Conservation and Management Act, which, with the Marine Mammal Protection Act, is the authority for observer programs. The 1996 re-authorization provided workers compensation coverage to observers under the Federal Employee Compensation Act (FECA). This has turned out to be inadequate for a number of reasons, perhaps the most important being that the basis of compensation under FECA excludes overtime. Since observers may work 12 or more hours a day when at sea, 40% or more of their compensation may be considered overtime. Excluding this pay from the basis of compensation for on-the-job injuries results in a totally inadequate level of compensation. This situation actually occurred in the case of an injured observer who was a federal employee. In addition, the FECA claim application process for observers who are not direct federal employees is unlikely to provide timely reimbursement of medical and living expenses when they are needed most. Finally, FECA does not extend coverage to observers, other than direct federal employees, while working in processing plants, during debriefing sessions, or while transiting to and from deployments. It is also possible that an observer who is not a direct federal employee could void his or her FECA coverage on board the vessel by performing any duties in service to the vessel, including acting under the captain’s orders in an emergency.

Not only is FECA inadequate to provide fair coverage to observers, it also fails to address two other insurance concerns. The first is the exposure of vessel owners and operators to liability suits by injured observers. Nothing in FECA prevents such suits – only the Government, as the observer’s employer, is exempt from suit. Since many vessels do not have liability insurance at all, and most who do have no coverage for observers, many vessel owners/operators are reluctant to take an observer on board even if coverage is mandated by law. NMFS has attempted to address this issue by providing reimbursement to vessel owners for Protection and Indemnity (P&I) coverage for observers, but the problem persists, especially in the case of uninsured vessels. The second concern is the potential exposure of observer provider companies to Jones Act suits by injured observers. Nothing in FECA prevents an observer compensated under FECA from also filing a Jones Act claim against the observer provider company. Furthermore, FECA encourages the Government to pursue a subrogation claim against the observer company or the vessel if FECA benefits are paid. The net result of all these problems has been that observer providers are still paying for an expensive

and expansive range of duplicative or potentially inapplicable coverages, while observers still do not have a clear path to fair compensation for on-the-job injuries.

The proposed legislation solves the observer coverage problem by revoking FECA coverage and, instead, bringing observers, other than direct federal employees, by statute under the terms of the Longshore and Harbor Workers Compensation Act (LHWCA). Federal employees are excluded from FOCA for several reasons. First, federal employees might be unhappy at the substitution of LHWCA for FECA. Second, uncertainties about workers compensation coverage would arise because federal employees work only part of the time as observers. Third, a number of FECA coverage problems (e.g. at processing plants) do not apply to direct federal employees. Finally, NMFS expects few federal observers in the future.

The LHWCA is to apply wherever observers' duties take them, whether it be on board a vessel, on an offshore platform, at a processing plant, in transit, or being debriefed on land. The model for this approach is various extensions of the LHWCA which have been passed over the years, including the Defense Base Act, the Outer Continental Shelf Lands Act and the Nonappropriated Funds Instrumentalities Act. Each of these acts has extended longshore coverage to new classes of workers not falling under the original LHWCA. The LHWCA solves the FECA problem by including overtime in the basis for compensation, and would provide prompt compensation for living and medical expenses at the time they are most needed. It has the additional advantage of a compensation schedule superior to many State workers compensation programs. The LHWCA, unlike FECA, provides for judicial review of adverse compensation decisions and for payment of attorney's fees by a successful claimant. The LHWCA is administered by the U.S. Department of Labor.

The proposed legislation precludes Jones Act claims by observers by mandating that an observer shall not be deemed to be a master, member of the crew, or seaman of a vessel to which they are assigned as an observer. The legislation also prohibits negligence claims by the observer against the vessel. The observer can, of course, still file suit against the vessel for willful injury. Finally, the legislation exempts the U.S. Government from liability to injured observers for inadequate training, faulty equipment or any other reason. These provisions, which limit the rights of observers in return for a fair, assured compensation

schedule for on-the-job injuries, substantially mitigate liability concerns of vessels and observer provider companies.

2. Objectives of the Proposed Act.

The objective of this proposed legislation is to provide more comprehensive coverage for fishery observers in the United States by ensuring that the true nature of the observer's functions, duties and compensation are fully factored into the manner in which compensation is paid for observers that are injured or suffer a fatality while performing observer-related duties. The proposed legislation would provide a single source from which observers could receive compensation without the time and expense of retaining legal counsel. A concurrent but equal objective is to contain the costs incurred by employers of observers, vessel owners and operators and the U.S. government with respect to the compensation regime to be used for observers. The aim is to strike the appropriate balance between the rights and needs of observers to be appropriately compensated for injuries and fatalities experienced while engaged in the performance of observer activities, while simultaneously placing a reasonable cap on exposure and expenditures for such compensation.

Currently, observers are considered to be "federal employees" for purposes of the Federal Employee Compensation Act, 5 U.S.C. §§ 8101, et seq., which provides that "[a]n observer on a vessel and under contract to carry out responsibilities under this Act or the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 et seq.) shall be deemed to be a Federal employee for the purpose of compensation under" FECA. 16 U.S.C. § 1881b (c). The FECA model is not very satisfactory given the nature of observer functions and wages. Among other things, FECA does not suitably include "overtime" within the determination of the amount of compensation to be paid to the injured observer, despite the fact that overtime is an inherent characteristic of the observer position. Under FECA, in "computing monetary compensation for disability or death on the basis of monthly pay" * * * "account is not taken of – (1) overtime pay; (2) additional pay or allowance authorized outside the United States because of differential in cost of living or other special circumstances * * *." 5 U.S.C. § 8114(b), (e)(1), (2). "Overtime pay" is defined to mean "pay for hours of service in excess of a statutory or other basic workweek or other basic unit of worktime, as observed by the employing establishment." 5 U.S.C. § 8114(a).

Section 8114(e) of FECA does allow the government to include “premium pay under section 5 U.S.C. § 5445(c)(1). In addition, the government has construed this allowance also to apply to “administratively uncontrollable overtime” under 5 U.S.C. § 5445(c)(2). FECA Program Memorandum No. 106; FECA Bulletin No. 89-26. “Premium pay” under § 5445(c)(1), applies to employees whose positions require them “regularly to remain at, or within the confines of, [their] station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work * * *.” “Administratively uncontrollable overtime” under § 5445(c)(2) applies to employees “in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty * * *.” But these limited exceptions to the general rule against including overtime in FECA compensation are not adequate to ensure that observers obtain compensation that reflects overtime, primarily because (1) there will be circumstances in which the nature of the observer’s overtime duties does not fall within the definition of “premium pay” or “administratively uncontrollable overtime,” and (2) these exceptions cap the amount of such overtime generally at 25 percent of the base compensation, while observer “overtime” may amount to 75% of “base pay”.

A second important limitation of the current FECA coverage for observers other than direct federal employees is that it does not appear to include injuries that occur when the observer is not physically on the vessel. In order to be deemed a Federal employee under FECA, the observer, *inter alia*, must be “on a vessel * * *.” 16 U.S.C. 1881b(c). Thus FECA does not cover injuries that occur while the observer is in transit, working at a processing plant or involved in a debriefing session. There are even circumstances that could void FECA coverage for an observer on a vessel. The accompanying Senate Report to the 1996 MSFCMA reauthorization states that the amendment “would provide worker compensation under the [FECA] for observers while aboard a vessel for the purpose of performing their duties. However, this pecuniary arrangement would not apply to an observer while he or she is engaged in performing duties in the service of the vessel” 1996 USCAN, at 4111. Thus, an observer who performs any service to the vessel, even washing dishes or acting under the captain’s orders in an emergency, could jeopardize his or her FECA

coverage.

The proposed Act adopts the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. §§ 901 et seq. (“LHWCA”), as modified by the proposed statute to reflect the characteristics of observers. The LHWCA is modeled on State workers compensation laws, but applies to long shore and harbor workers injured while “upon the navigable waters of the United States.” The LHWCA model is much better suited to provide observers superior benefits and procedural rights, while still limiting the exposure of the U.S. government, employers and vessel owners and operators to personal injury claims by observers. Use of the LHWCA model would provide observers (1) the opportunity to recover for loss of wage earning capacity (including lost overtime if applicable), (2) the option of judicial review, and (3) the ability to recover attorneys fees as a prevailing party. Because the observer’s remedies under the LHWCA would be exclusive, the U.S. government would not be otherwise exposed to a claim arising out of the injury or fatality of the observer, even for a claim of negligent supervision, training or debriefing, or from a cross-claim or claim for indemnity or contribution from an employer or vessel owner or operator. The proposed legislation also reduces the need for and premiums of P&I or other insurance by vessel owners by limiting observer claims against them to willful misconduct.

In addition to generally not being eligible for compensation that reflects overtime wages, FECA claimants have no right to seek judicial review of agency determinations on their compensation claims. 5 U.S.C. § 8128(b) (action of the Secretary or his designee is “final and conclusive for all purposes with respect to all questions of law and fact” and is “not subject to review by another official of the United States or by a court by mandamus or otherwise”). However, LHWCA claimants have a right to judicial review. 33 USC § 921(c) (“[a]ny person adversely affected or aggrieved by a final order of the [Benefits Review] Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred”). Also, it is easier for LHWCA claimants to recover attorney’s fees in pursuing a claim for compensation than it is for FECA claimants. Under FECA, a claim for legal or other services furnished in respect to a case, claim or award for compensation is valid only if the Secretary of Labor approves, and there is no judicial review of that determination. 5 U.S.C. § 8127(b). By contrast, under the LHWCA, a claimant may recover a reasonable attorneys fee if his employer denies liability for compensation and

the claim is sustained. 33 U.S.C. § 928.

Significantly, there is a critical precedent for using the LHWCA model to serve as a compensation scheme. The Defense Base Act, 42 U.S.C. § 1651 et seq., generally applies the LHWCA to, *inter alia*, “the injury or death of any employee engaged in any employment * * * under a contract entered into with the United States or any executive department, independent establishment, or agency therefore * * *, or any subcontractor, or subordinate contract with respect to such contract, where such contract is to be performed outside the continental United States * * * for the purpose of engaging in public work * * *.” 42 U.S.C. § 1651(a)(4). However, the DBA modifies the LHWCA in several respects, to tailor its provisions to the relevant circumstances addressed by the DBA. Similarly the Act generally applies the LHWCA to observers but modifies it in several respects to tailor the provisions to the relevant circumstances involving observers.

3. Section-by-Section Analysis

Section 1 of the Act applies the LHWCA, as modified by the Act, to observers by stating that, except as modified, the provisions of the LHWCA shall apply in respect to the “injury or death” of any person (other than a federal government employee) engaged in any employment as a fisheries observer” as defined in the Act. The term “injury” includes “illness” because the LHWCA defines “injury” to include “occupational disease or infection as arises naturally out of [the] employment or as naturally or unavoidably results from such accidental injury * * *.” 33 U.S.C. § 902(2). Thus neither the LHWCA nor the proposed Act covers *each and every* illness that happens to befall an “employee” while at work. Rather, it must be an “occupational disease or infection as arises naturally out of such employment.” In other words, the fact that an employee becomes sick on the job does not mean he gets compensation under the Act, unless there is a job-related reason for the sickness. LHWCA and the proposed Act are not a replacement for a general health care plan; rather they are to compensate employees for job-related injuries, including diseases or infections that arise naturally out of the employment.

Section 1 also makes clear that the Act applies to fisheries observers irrespective of the place where the injury or death occurs, and shall include any injury or death occurring to any such person while in transit (including waiting for a vessel to sail) to or from his place of employment, where the employer or the United States provides

the transportation or the cost thereof.

Section 2 is the “Definitions” section of the Act. Unless noted otherwise, the definitions of the LHWCA are incorporated into the Act. However, the Act contains three definitions not found in the LHWCA. Section 2(a) of the Act defines the term “fisheries observer” to mean a “person (other than a federal government employee) under contract or otherwise engaged in employment as an observer in connection with a fish or fisheries monitoring program created by or pursuant to a law of the United States.” The intention here is to cover all observers in all observer-related activities, and to treat all observers the same, regardless of whether they are hired by a contractor, subcontractor, or certified observer-provider company. Section 2(a) also specifies that FECA does not apply to injuries or death covered under the Act. This is to avoid double coverage for an observer, and ambiguity as to whether the observer’s remedy is under the Act (applying the LHWCA) or FECA.

Section 2(a) further makes it clear that a fisheries observer shall not be deemed to be a “master, member of a crew, or seaman of the vessel to which the observer is assigned to perform any functions in connection with a program for the monitoring of fish or fisheries created by or pursuant to a law of the United States.” This too is to prevent the opportunity for double recovery -- under the Act, under general maritime law, and under the Jones Act, 46 U.S.C. § 688 et seq. -- and confusion as to whether the observer is to be compensated under either the Act (applying the LHWCA), general maritime law, or the Jones Act. Although the Jones Act may provide an observer with the opportunity to obtain a higher amount of damages for injuries suffered while on board a vessel, compensation under the Jones Act is not guaranteed. To begin with there has been a divergence of judicial opinion whether observers are “seamen” under the Jones Act. Compare *O’Boyle v. United States*, 993 F.2d 211 (11th Cir. 1993) (American observer placed on board Japanese fishing vessel to enforce U.S.-Japan treaty not a “seaman” under the Jones Act); *Arctic Alaska Fisheries Corp. v. Feldman*, No. 93-42R (W.D. Wash. Mar. 5, 1993) (observer not a seaman under the Jones Act); *Key Bank of Puget Sound v. F/V Aleutian Mist*, Case No. C91-107 (W.D. Wash. Jan.10, 1992) (fisheries observers not seamen), with *West One Bank v. M/V Continuity*, Case No. C93-1218C (W.D. Wash. Jan. 19, 1994) (observers were seamen under 46 U.S.C. § 10101(3)); *State Street Bank & Trust Co. v. F/V Yukon Princess*, Case No. C93-5465C (W.D. Wash. Dec. 22, 1993) (observers were seamen for purposes of perfecting

preferred maritime liens); *Key Bank of Washington v. Dona Karen Marie*, Case No. C92-1137R (W.D. Wash. Oct. 26, 1992) (observer was a seaman for purposes of asserting a preferred maritime lien for crew wages).

In addition, even assuming for the sake of argument that an observer is a seaman, to recover significant damages under the Jones Act (including for elements such as pain and suffering) the injured observer would need to prove negligence on the part of the employer or a co-employee. By contrast, application of the LHWCA results in compensation to the observer regardless of fault. In essence, the injured observer receives the benefit of assured coverage and the payment of a claim in a reasonably expeditious manner, without having to prove negligence, in exchange for foregoing the possibility of obtaining additional damages under the Jones Act, for items such as pain and suffering.

Section 2(a) also clarifies that a person employed exclusively to perform office, clerical, secretarial, security, or data processing work shall not be deemed a fisheries observer. This clarification is included because employees exclusively engaged in clerical work are excluded from coverage under LHWCA, and to ensure that the protections of the Act are reserved for personnel who are actually involved in observer-type functions.

Section 2(b) of the Act defines “employee” to mean a “fisheries observer” as defined in Section 2(a) of the Act.

Section 2(c) of the Act defines “employer” to mean a person, other than the U.S. government, that “contracts with or otherwise hires one or more fisheries observers. It makes it clear that an “employer” may be a contractor, subcontractor, or an entity certified or accredited by the United States government to provide fisheries observers, or other person. The intention here is to put the responsibility of procuring LHWCA insurance on the entity that hires the observers, whether that is (1) a contractor with the federal government under a contract to provide observers, or (2) a non-contractor which hires observers that have been certified or accredited by the federal government, and which vessels pay for observer coverage. However, Section 2(c) clarifies that a vessel owner/operator shall not be deemed to be the employer of a fisheries observer unless the vessel owner/operator directly contracted with or otherwise hired the observer for the provision of his services as a fisheries observer, and pays the salary of that observer directly to that observer.

This clarifies the intention that the vessel owner/operator shall not be deemed the employer unless he directly hires the observer.

The LHWCA contains an important provision to guard against the problem of an employer default, or a default by the employer’s insurance carrier. Specifically, 33 U.S.C. § 918(b) provides that “[i]n cases where judgment cannot be satisfied by reason of the employer’s insolvency or other circumstances precluding payment, the Secretary of Labor may, in his discretion and to the extent he shall determine advisable after consideration of current commitments payable from the special fund established in section 44 [33 U.S.C. § 944], make payments from such fund upon any award made under this Act.” Thus the general fund may be accessed to deal with the situation where the employer or its insurer default on the obligation to the observer.

Section 3 of the Act makes it clear that an “employer” undertakes the responsibility to pay his observers compensation payable under the LHWCA. However, as with the LHWCA, in the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor. Compensation shall be payable irrespective of fault as a cause for the injury.

Section 4 of the Act provides that compensation shall be payable for disability or death of an observer if the disability or death results from an injury occurring while the observer is engaged in any employment as a fisheries observer, irrespective of the place where the injury or death occurs, and shall include any injury or death occurring to any such person (a) while that person is aboard, boarding or leaving a vessel to which he is assigned to engage in activities as a fisheries observer, (b) while that person is otherwise engaged in employment as a fisheries observer in any location, on land or otherwise, including training, or (c) during transportation to or from his place of employment, where the employer or the United States provides the transportation or the cost thereof. While this is primarily based on the DBA and LHWCA, this language makes it clear that the coverage applies to all facets of the observers’ duties, including land-based activities (such as a debriefing after a voyage). The intention is to have LHWCA provide all coverage and to avoid the need for State workers’

compensation to apply to an observer. This is a desired result because: (1) it makes no sense to have potentially overlapping coverage under State workers compensation and LHWCA, (2) LHWCA is generally as good as or superior to all State workers' compensation programs, and (3) consistency and predictability are important objectives here. As with the LHWCA, no compensation is available if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another. Subject to the provisions of 33 U.S.C. § 933, any amounts paid to an observer for the same injury, disability, or death for which benefits are claimed under the Act are to be credited against any liability imposed by the Act.

Section 5(a) of the Act is taken directly from the DBA. It provides that the minimum limit on weekly compensation for disability, established by 33 U.S.C. § 906(b), and the minimum limit on the average weekly wages on which death benefits are to be computed, established by 33 U.S.C. § 909 (e) shall not apply in computing compensation and death benefits under this Act. Sections 906 and 909 also contain maximum limits, which are also part of the Act. Section 5(b) is taken directly from the DBA.

Section 6(a) of the Act is intended to make it clear that the liability of an employer to the observer under the Act is the observer's exclusive remedy against that employer, assuming that the employer has secured payment of compensation under the Act. It explicitly preempts State workers compensation laws in order to avoid duplicative coverage and insurance costs. The employer is liable for compensation to the observer regardless of fault, but because of exclusivity, the employee is prohibited from maintaining any cause of action against the employer. However, if an employer fails to secure payment of compensation as required by the Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory or comparative negligence of the employee.

Section 6(b) provides that a fishery observer who suffers injury or death aboard a vessel to which he is assigned to perform duties as a fisheries observer shall have no cause of action

against that vessel for negligence or otherwise, except in cases where the vessel acted willfully in causing the injury or death. "Vessel," as defined by the LHWCA and incorporated into the Act, "means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charter, master, officer, or crew member." 33 U.S.C. § 902(21). This subsection goes beyond the LHWCA, which allows claims for negligence against the vessel (but does not allow for claims for lack of seaworthiness). The language reflects the fact that vessels – whose cooperation is essential for the observers to perform their functions – have exhibited an unwillingness to accept observers because of concerns of liability for negligence claims by observers. Under the Act, the employee would be prohibited from a cause of action against the vessel.

There is ample precedent for Congress to preempt private claims for negligence under State common law. Courts applying 33 U.S.C. § 904 have held that the LHWCA immunizes employers from claims for negligence to the extent they comply with the compensation requirements of the Act. Similarly, FECA preempts negligence claims against the federal government where the FECA provisions apply. 5 U.S.C. § 8116(c). Other examples of federal statutory preemption include the Federal Rail Safety Act of 1970, 49 U.S.C. § 20106 (preemption of some claims for negligence against railroads regarding safety conditions at crossings, etc.); Federal Fungicide, Rodenticide and Insecticide Act of 1947, 7 U.S.C. § 136, et seq. (preemption of negligence claims relating to labeling against companies that sell pesticides, et al., where the labels comply with federal labeling requirements); Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) (preemption of tort claims against employers where the matter is covered by a collective bargaining agreement).

Also, the employer of the observer may not indemnify or otherwise agree to be liable to the vessel for a claim by the observer, directly or indirectly, and any agreements or warranties to the contrary shall be void. This language is necessary to avoid defeating the cost-containment purpose behind providing LHWCA-style coverage to observers, which would occur if observer employers agreed to shoulder the burden of a liability claim against the vessel. However, the provision makes clear that it is not intended to preclude recovery under the Act against a vessel

owner/operator that is the direct employer of a fisheries observer. This is necessary for those instances, if any, where the vessel owner/operator is the employer of the observer, i.e., where the vessel owner/operator is the person that contracted with the observer for services and which directly pays the salary.

Section 6(c) of the proposed Act eliminates liability on the part of the federal government. Specifically, the government shall not be liable for any damages arising out of any injury or death to a person that occurs while the person is engaged in any employment as a fisheries observer, irrespective of the place where the injury or death occurs. (Note that federal employees doing observer work are not considered “observers” within the meaning of FOCA.) This provision is not in the LHWCA. It is added in the proposed Act primarily to preclude claims for negligent training, defective equipment and the like against the U.S. government by observers who are hired by contractors or subcontractors but trained by the government or who use government supplied equipment.

Section 7(a) of the Act adopts the DBA provisions (42 U.S.C. § 1653(a)) with respect to the venue in which a claim can be brought for compensation under the proposed Act. Thus, as in the DBA, the Secretary of Labor is authorized to extend compensation districts established under the LHWCA to establish new compensation districts, to include any area to which this Act applies; and to assign to each such district one or more deputy commissioners, as the Secretary may deem necessary. This language has been taken from the DBA because it identifies the responsible party that can extend coverage to districts beyond U.S. territorial waters, since LHWCA coverage does not extend beyond U.S. territorial waters.

Section 7(b) provides that court challenges of a compensation determination by the Department of Labor are to be filed in the federal district court jurisdiction wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the location at which the injury or death occurs. This is adopted directly from the DBA. (42 U.S.C. § 1653(b)). Unlike the DBA, the LHWCA provides for direct appeals to the federal courts of appeal. However, under the proposed Act – as with the DBA – decisions of the district court can be appealed to the federal court of appeal for the circuit that covers the geographical area of the subject district court.

Thus, the DBA model provides the observer – and any other interested party – with an additional level of judicial review not available under the LHWCA. This also may be more convenient for claimants who wish to pursue a judicial challenge, because the federal district courts are more spread out geographically than the courts of appeal.

Section 8 of the proposed Act repeals 16 U.S.C. § 1881b(c), the provision that applies FECA to observers. Repeal is necessary so that observers are not covered under both FECA and LHWCA.