

the Observer Program Office.²

Appellant began work as an observer in December 1990.³ He worked on at least one cruise in every year from 1990 through 2009.⁴ In 2009, he attended a four-day annual briefing from March 23, 2009, to March 26, 2009.⁵ During that briefing, he received the 2009 Observer Manual.⁶ NPGOP has the current Observer Manual, as well as past manuals, on its website.⁷

In September 2009, a month before the cruise at issue, Appellant received a letter of recommendation from NPGOP, which indicated that he was, at that point, eligible for rehire and continued work as an observer.⁸ In that letter, the Director of Fisheries Monitoring and Analysis Division stated that Appellant had worked aboard 57 different vessels and three shore side plants for a total of 1,439 days and was a very good observer.⁹

From October 11, 2009, to October 25, 2009, Appellant was under contract with an observer provider and served as an observer aboard the [REDACTED] (VESSEL).¹⁰ VESSEL is a longliner vessel operating in the Bering Sea and Aleutian Islands.¹¹ From October 29, 2009, to November 4, 2009, Appellant went through the debriefing process for Subject Cruise with Dennis Moore, a NMFS-certified debriefer from the North Pacific Fisheries Observer Training Center (Debriefer). Debriefer gave Appellant a score of "0" for Subject Cruise and recommended that he be decertified.¹²

The primary grounds for the recommendation concerned the species composition data that Appellant collected during Subject Cruise. NPGOP determined that Appellant did not use the correct method for tallying different species caught during a haul, which is to personally tally or count everything on the line, and that Appellant did not show how he tallied species composition totals in a large number of hauls and that Appellant's species composition data was inaccurate.¹³ The NPGOP deleted from its database all of the sample and subsample data that Appellant collected for Subject Cruise. The NPGOP kept the length and otolith data.¹⁴

² IAD at 1, 5, 7, 9, 10, 11, 12, 13-14, 15.

³ Domestic Observer Comment Summary [Document 5].

⁴ Domestic Observer Comment Summary [Document 5]

⁵ NMFS Response to Request for Specification at 1 (Dec. 14, 2010).

⁶ NMFS Response to Request for Specification at 1 (Dec. 14, 2010).

⁷ See <http://www.afsc.noaa.gov/FMA/document.htm>.

⁸ Letter of Recommendation (Mar. 22, 2010) [Document 28]; IAD at 18.

⁹ Letter of Recommendation (Mar. 22, 2010) [Document 28].

¹⁰ IAD at 3.

¹¹ Daily Notes, Subject Cruise Data (Appellant embarked and disembarked at [REDACTED] Document 7); IAD at 17.

¹² Recommendation from Debriefer (Nov. 16, 2009) [Document 1].

¹³ IAD Findings 1, 2.

¹⁴ Report from Data Deletion Committee, Subject Cruise (undated, unsigned) [Document 18]. The

Heather Weikart, Decertification Official with NPGOP (Decertification Official), independently analyzed the data from Subject Cruise to evaluate Debriefer's recommendation.¹⁵ The NPGOP Decertification Official that NPGOP had grounds to proceed with decertification.

On December 21, 2009, Decertification Official sent Appellant a notice which did three things: [1] it informed Appellant that NPGOP was considering whether to revoke Appellant's observer certification based on eight violations of the standards of observer conduct; [2] it described in detail the eight alleged violations; and [3] it gave Appellant thirty days to submit, in writing, evidence and argument, including any mitigating circumstances, in opposition to the proposed certification.¹⁶ Decertification Official stated in the Notice: "The violations above are supported by at least some evidence, but until I heard your side of the story, are not yet considered proven."¹⁷

Appellant requested a copy of the administrative record. NPGOP provided it to Appellant, after Appellant signed a confidentiality agreement with respect to the data.¹⁸ Appellant submitted a response to the notice.¹⁹ The Decertification Official considered Appellant's response in the IAD.²⁰

The IAD was issued on April 30, 2010, and in it, NPGOP explained that Appellant failed to comply with various duties listed in the Observe Manual. However, the IAD did not specify the sections of the Observer Manual that it contended Appellant violated. By order, I requested that NPGOP specify the sections of the Observer Manual that it contended Appellant violated.²¹ NPGOP responded to the order.²² Appellant requested an extension of the deadline for him to respond to NPGOP because he was out of the country.²³ I granted the request.²⁴ Appellant submitted a statement.²⁵

members of the committee are not listed.

¹⁵ The following documents contains Decertification Official's independent analysis of the data from Subject Cruise: Analysis of Mismatches in the Species Composition Data [Document 10]; Determination of Predominant Species [Document 11]; Analysis of Species Weight Samples [Document 12]; Analysis of Sexed Length Frequency Data [Document 13]; Analysis of Otolith Data [Document 14]; Comparison of Species Observed and Species Description Forms [Document 17]; Total Sample Weight by Sample Number [Document 18]; Analysis of Species Identification Samples [Document 19].

¹⁶ Notice of Opportunity to Submit Evidence and A Defense in a Proceeding to Consider Whether your Certification should be Revoked (Dec. 21, 2009) [Document 22].

¹⁷ Notice at 17 [Document 22]

¹⁸ Data Access Agreement (Jan. 11, 2010) [Document 24].

¹⁹ Appellant's Response (Feb. 5, 2010) [Document 27].

²⁰ IAD (Apr. 30, 2010).

²¹ Request for Specification (Dec. 1, 2010).

²² NMFS Response to Request for Specification (Dec. 14, 2010).

²³ Order Establishing Deadline for Additional Evidence and Argument (Jan. 5, 2011) (the deadline was January 18, 2011); Letter from Appellant to OAA (dated Jan. 14, 2011).

²⁴ Second Order Establishing Deadline for Additional Evidence and Argument (Jan. 20, 2011).

²⁵ Letter from Appellant to OAA (Mar. 17, 2011).

On May 6, 2011, I issued an order explaining that NPGOP had shown that Appellant violated a written standard for observer conduct as alleged in IAD Findings 1, 2, 4(b), 7 and 8.²⁶ Through the order, I asked the NPGOP Decertification Official to review the record and determine whether, in her judgment, the IAD Findings that I sustained warranted decertification and, if she believed they did, the basis for her judgment. NPGOP submitted the Decertification Official's determination that decertification was still warranted.²⁷ Appellant submitted a statement in response.²⁸

I conclude that the record is sufficient to issue a decision on the merits of this appeal, as required by 50 C.F.R. § 679.43(g)(2). I therefore close the record.

For the reasons that follow, I conclude that NPGOP has shown that Appellant failed to perform the duties of an observer as alleged in IAD Findings 1, 2, 4(b), 7 and 8. I conclude that NPGOP's decision to decertify is reasonable and not arbitrary. I also conclude that Appellant has had notice and opportunity to contest the proposed revocation and is not entitled to receive additional material from prior cruises from NPGOP. I therefore uphold the IAD that is the subject of this appeal.

ISSUES

1. Did NPGOP show that Appellant failed to perform the duties of an observer?
2. Is Appellant entitled to additional information from prior cruises?
3. Did NPGOP abuse its discretion in concluding that decertification was warranted?

FINDINGS OF FACT

1. Appellant submitted species composition data for 87 samples.
2. The Observer Manual and written instructions given to Observer required Appellant to personally tally, or count, everything on the line during a tally period.
3. Appellant did not record tally data, as instructed, for 25 species composition samples.
4. Appellant did not record any tally data for 25 species composition samples.

²⁶ Order Requesting NPGOP Determination (May 6, 2011).

²⁷ NPGOP Determination (May 13, 2011).

²⁸ Statement by Appellant (May 26, 2011).

5. Appellant submitted tally data on the left side of 26 deck forms which did not match the species composition data on the right side of the deck forms.
6. Appellant treated black cod or sablefish as the predominant species.
7. Appellant did not weigh 15 individuals of the non-predominant species in 20 samples.
8. Appellant did not submit a Species Description Form for six species that he saw on this cruise, for which he had not submitted a Species Description Form since NPGOP adopted the new species identification system in June 2005.
9. Appellant did not record the 6-digit specimen number for otolith specimens on numerous deck forms.
10. Appellant did not record the species names on length frequency tables and otolith data tables on numerous deck forms.
11. Appellant did not record the percentage of a species retained for subsamples on numerous deck forms.
12. Appellant did not completely fill out observer haul forms and observer haul forms.
13. The data on the deck form for Haul 447, sample 2, was unorganized and difficult to interpret.

PRINCIPLES OF LAW

Pursuant to 50 C.F.R. § 679.50(j)(3), NMFS may decertify an observer if NPGOP shows that decertification is warranted.

For decertification to be warranted, NPGOP must show two things. First, NPGOP must show, by a preponderance of evidence in the record, that the observer failed to abide by standards for observer conduct as specified in 50 C.F.R. § 679.50(j)(2). The standards of observer conduct relevant to this appeal are in 50 C.F.R. § 679.50(j)(2)(ii)(A) and (B).²⁹

Pursuant to 50 C.F.R. § 679.50(j)(2)(ii)(A), observers must perform their assigned duties as described in the Observer Manual or other written instructions from the Observer

²⁹ The other standards in 50 C.F.R. § 679.50(j)(2) are a limitation on conflict of interest in 50 C.F.R. § 679.50(j)(2)(i) and a prohibition against disclosing collected data and observations except to the owner or operator of the observed vessel, an authorized officer, or NMFS. 50 C.F.R. § 679.50(j)(2)(ii)(C).

Program Office. Other written instructions from the Observer Program Office include written materials distributed in an observer training class and written comments during the debriefing process that the observer received after a prior cruise.

Pursuant to 50 C.F.R. § 679.50(j)(2)(ii)(B), observers must accurately record their sampling data, the provision at issue in this appeal, as well as write complete reports, and report accurately any observations of suspected violations of regulations relevant to conservation of marine resources or their environment.

Second, if NPGOP shows that the observer failed to meet the standards for observer conduct, NPGOP must decide whether the observer's conduct warrants decertification and, if NPGOP concludes that decertification is warranted, NPGOP's decision must be reasonable and not arbitrary. The regulation gives NPGOP discretion whether to seek decertification. The only requirement is that the suspension/decertification review official determines that it is warranted.³⁰ The standard of review for the decertification official's determination is whether NPGOP has shown a reasonable basis for its conclusion that decertification is warranted.

ANALYSIS

1. Did NPGOP show that Appellant failed to perform the duties of an observer?

I examine each IAD Finding.

IAD Finding 1: Failure to tally species composition samples as instructed

The IAD described species composition sampling:

On longline vessels, the species composition sample procedure occurs in two distinct phases: the tally period and the non-tally period. During the tally period observers count all catch observed on the line as it is retrieved. Tallying species on the line is the most critical aspect of longline species composition sampling. Resource managers determine the amount of fish caught by extrapolating tally data up to the entire set. If organisms are not accurately tallied, the data is not accurate and the process of fisheries management is negatively impacted.³¹

Is this an assigned duty as described in the Observer Manual or other written instructions? Yes. The Observer Manual states that an observer should count all the catch on the line during a tally period. [Manual 7 – 24] Other written instructions include

³⁰ 50 C.F.R. § 679.50(j)(3)(iii).

³¹ IAD at 3 (Apr. 30, 2010).

the written debriefing that an observer receives after prior cruises. In the debriefing in two prior cruises, Appellant was instructed in writing to count all the catch observed during the tally period.³²

Did the observer fail to perform this assigned duty? In the IAD, the NPGOP determined that Appellant did not tally the species composition samples as instructed, namely Appellant did not count everything on the line during the tally period.³³

Observers record their collection of species composition samples on deck forms. On the deck forms, the right side has space for the observer to list the species in the sample and the number of individuals in each species. The left side has space for the observer to write “notes, length viability, injury, specimen, and tally data.”³⁴ The tally data would consist of marks on the left side, in groups of five, showing that the observer counted the individual fish. The Observer Manual has samples of correctly, filled-out deck forms, which each have tally data. [Manual 7 -44, 7- 48, 7 – 49]

I find that Observer recorded species composition data for 87 samples and did not record any tally data for 25 of the 87 samples, as listed in Document 10.³⁵ In 25 samples, Observer had totals on the left side of the deck form and no tally marks on the right side of the form. For example, the left side of Deck Form 4 lists these numbers in the sample:

S. spine (the name edited in red by NPGOP to be Thornyhead) – 19
BC (the name edited in red by NPGOP to be sablefish) – 18.

But the right side of Deck Form 4 is blank. Therefore, a person looking at the deck form cannot determine how Observer arrived at these totals.

The Decertification Official concluded that, for those samples, Observer must have relied on vessel personnel to save the species composition sample for him and Observer arrived at the species numbers by simply counting the individuals given to him by vessel personnel.³⁶ Given the absence of tally data showing how Appellant arrived at the totals, that is a reasonable conclusion.

The vessel crew member who would be in a position to save samples for an observer is

³² Domestic Observer Comment Summary [Document 5]. Cruise, May 2008, Document 5 at 20; Cruise, July 2009, Document 5 at 10.

³³ IAD at 3 – 5.

³⁴ Document 7.

³⁵ NPGOP Decertification Official’s Analysis of the Mismatches in the Species Composition Data [Document 10]. In reviewing Document 10, I believe I found 26 instances, rather than 25, where Observer did not record species composition data. Order Requesting NPGOP Determination at 2 – 3 (May 6, 2011). I find 25 instances because I did not give the parties the opportunity to comment on the difference and the difference is not material to resolving any issue in this appeal.

³⁶ IAD at 4.

the rollerman. But the Observer Manual states: “Even though you think the rollerman is doing an excellent job of collecting fish, you must always tally everything, because some fish may be displaced by the rollerman or lost before they can be weighed by you.” [Manual 7 – 29]

Observer raised two points. First, he stated in his response to the NPGOP Notice of Opportunity to Submit Evidence: “I was attempting to do a rather complicated % retained/discard calculation on species that were being kept/not kept on a constantly changing basis.”³⁷

On appeal, Observer did not describe his method for arriving at the totals for the species composition data. But, for 25 samples, Observer did not document on the deck forms, or any other place in the observer’s logbook, how he arrived at the totals in the species composition data. The lack of specification of his method of tallying would itself violate the Observer Manual, and standard scientific sampling protocol, which requires that an observer show all his calculations.³⁸

Second, Observer states that he requested an additional meeting to defend his method of tallying species and offered to conduct a video demonstration on a vessel of his method.³⁹ Observer stated he offered “two possible solutions to defend my position during debriefing and was turned down flat on both of them.”⁴⁰ Appellant stated that the data was not bad, that it should not have been thrown out or deleted, that he did not rely on the rollerman to save the catch and that, after the debriefing, NPGOP had scheduled a teleconference with him, the debriefer and other NPGOP staff, so he could defend the data but that NPGOP staff cancelled the teleconference because “they had already made up their minds.”⁴¹ Debiefer also states: “[Observer] did repeatedly offer to try to explain his data set with a written note or by video verification in an effort to save the data. Both of these requests were denied.”⁴²

Debiefer reviewed the cruise data with Appellant during the debriefing and Decertification Official carefully reviewed the cruise data. While NPGOP staff could have met with him again, could have allowed him to submit additional evidence and could have allowed him to meet with additional NPGOP staff, the regulation does not require NPGOP to do that. Their failure to do so does not violate any legal requirement and does not make their decision unreasonable or arbitrary.

I therefore find that [1] the Manual requires an observer to personally tally, or count,

³⁷ Document 27.

³⁸ Manual at 2 – 8.

³⁹ Appellant’s Response to Notice of Opportunity to Submit Evidence and a Defense (Feb. 2, 2010) [Document 27]; Appellant’s Statement (May 26, 2011).

⁴⁰ Document 27.

⁴¹ Document 27

⁴² Recommendation from NMFS Debiefer for Decertification [Document 1].

everything on the line during a tally period; [2] prior written instructions, namely written debriefing comments from prior cruises, required Observer to count everything on the line during a tally period; [3] Observer did not personally tally the species on the line during 25 samples on Subject Cruise or, if he did, he did not record his method of calculations of those tallies on the deck forms or anywhere in the Observer's logbook. [Appellant did not record tally data, as instructed, for 25 species composition samples on Subject Cruise.

I conclude that that this failure violated Observer's assigned duties as described in the Observer Manual and other written instructions from the Observer Program Office. A failure to record tally data would also violate 50 C.F.R. § 679.50(j)(2)(ii)(B), which requires observers accurately record sampling data.

IAD Finding 2: Failure to accurately record species composition data.

Of the 87 species composition samples that Observer collected, the subject of IAD Finding 1 was the absence of tally data in 25 samples. This means Observer submitted tally data for 62 species composition samples: $87 - 25 = 62$. The subject of IAD Finding 2 is that in 26 of the 62 samples where Observer submitted tally data, the tally data on the right side of the deck forms did not match the data recorded on the left side of the deck form. The data on the right side (tally data) is supposed to match, and add up to, the data on the left side (species totals).

Is this a standard of conduct established for observers? Yes. The Observer Manual gives examples of species composition forms [Observer Manual at 7-41, 7-42] and, in those examples, the species listed on the right side of the deck form adds up to the species total on the right side of the deck form.⁴³ The Manual tells the observer to check the species composition form so that "[t]he number of fish tallied equals the sum number for that species in the reported data."⁴⁴ If an observer inaccurately records sampling data, that is also a violation of federal regulation that observers must accurately record their sampling data.⁴⁵

Did Observer fail to meet this standard of conduct by not accurately recording species composition data? I find that Observer did not accurately record sampling data in 26 samples because the tally data in 26 samples on the right side of the deck form did not add up to the totals on the left side of the deck form as identified the NPGOP Decertification Official's Analysis in Document 10.⁴⁶ Either the tally data on the right side

⁴³ Observer Manual at 7- 41 & 7 – 42.

⁴⁴ Observer Manual at 7 – 42.

⁴⁵ 50 C.F.R. § 679.50(j)(2)(ii)(B).

⁴⁶ In Document 10, the total of 26 comes from 24 instances where observer tallied some species on the right side of the deck form that were not recorded on the left side of the deck form and 2 instances where the number of individuals in a species tallied on the right side did not equal the number of individuals recorded on the left side. It appeared to me that there was an additional item in the latter category: Haul 466 has 5 Grenadier Unid on the right side (tally) and 4 on the left side (species composition totals). But I found 26

was inaccurate or the total data on the left side was inaccurate. I therefore conclude that Observer failed to meet this standard of conduct.

IAD Finding 3: Failure to correctly identify the predominant species.

The allegation in IAD Finding 3 is that Observer did not correctly identify the predominant species. The Observer Manual provides for different requirements for sampling predominant and non-predominant species. An observer must weigh more individuals of the predominant species [Manual 7 – 29, 7 – 30]. The Manual therefore indicates that an observer must determine, in a sample, what is the predominant and what is the non-predominant species.

In Document 11, which was the Decertification Official's analysis of the data on predominant species, she stated: "Observers usually determine the predominant species of the haul based on the species composition of the first sample. Therefore, I only entered the data for the first composition sample."⁴⁷

A haul has numerous sets. The standard implicit in Document 11 is that an observer must determine the predominant species in a haul by the predominant, i.e., most numerous, species in the first sample of the first set within the haul.

I asked NPGOP to specify the written standard in the Observer Manual for each of the allegations in the IAD.⁴⁸ For IAD Finding 3, NPGOP cited the definition of predominant species in the glossary of terms in the Observer Manual: "species which are the most abundant in the catch – not necessarily the target species."⁴⁹ This tells an observer what a predominant species is not, but it does not tell an observer how to determine what is the predominant species.

The NPGOP also cited this statement in the Manual: "the predominant species comprise more of the catch than the non-predominant species."⁵⁰ This does not specify how to determine the predominant species and does not tell the observer that the observer should determine the predominant species in a haul by using the most numerous species in the first sample of the first set within the haul. I did a word search in the Observer Manual for the term "first sample" and "first set" and did not find either term.

Is the standard in Document 11 contained in contained in other written instructions that were provided to the observer? The only written instructions cited in the IAD for

instances (24 + 2) rather than 27 instances (24 + 3) because I did not give the parties the opportunity to comment and the difference is not material to resolving any issue in the appeal.

⁴⁷ Determination of Predominant Species by Decertification Official [Document 11]

⁴⁸ Request for Specification (Dec. 1, 2010).

⁴⁹ NMFS Response to Request for Specification at 3 (Dec. 14, 2010).

⁵⁰ Observer Manual at 7 – 30, quoted in NMFS Response to Request for Specification at 3 (Dec. 14, 2010).

determining predominant species were the following comments from the debriefing comments from a cruise May 26 to June 17, 2006:

Also, on the [REDACTED] there were times when Grenadier vastly overshadowed the target species (Black cod) as the predominant species. However, you continued to collect only enough 15 Grenadier instead of the requested 50 for predominant species. In this specific case, I would recommend collecting 50 of both Black Cod and Grenadier since they still caught Black cod in relatively high numbers and it was the target species.⁵¹

This comment does not establish the standard in Document 11, namely that an observer should establish the predominant species based on the species composition of the first sample on the first set within a haul.

NPGOP alleges that Observer always treated the predominant species as sablefish.⁵² Observer did not deny this in his written statements. VESSEL was a longliner targeting sablefish, also known as black cod. The deck forms show that the only species for which Observer took a subsample was black cod. The Manual states that an observer will usually only take a subsample of the predominant species.⁵³ I find that Observer did treat sablefish as the predominant species. And the Manual does state that the predominant species is not necessarily the target species.⁵⁴ So it appears that Observer used the wrong standard but NPGOP did not point out the correct standard in the Manual or other written instructions.

It may be that the standard in Document 11 for determining the predominant species in a haul is in a Manual section not cited by NPGOP or in written instructions that are not in the record or in verbal instructions given to observers. But I could not locate in the Observer Manual, or other written instructions, the standard used by NPGOP in its analysis of the data, namely that the predominant species in a haul is the most numerous species in the first sample of the first set in a haul. Therefore I do not conclude that Appellant violated a standard by not using that standard and do not rely on this allegation in evaluating whether decertification is warranted.

IAD Finding 4: Failure to meet the weight sample requirements.

The IAD addressed this issue with respect to weight samples for the predominant species and weight samples for the non-predominant species.⁵⁵

⁵¹ Document 5 at 35 – 38.

⁵² IAD at 7.

⁵³ Manual at 7 – 30.

⁵⁴ Manual at 7 – 30.

⁵⁵ IAD at 7 – 9.

A. Predominant species weight sample.

The Manual states that an observer should collect “about 60 fish” from the predominant species and weigh them. [Manual 7 – 30] To analyze whether Appellant met this standard, NPGOP determined the predominant species in each haul by using the standard in Document 11, namely the most numerous species in the first sample in the first set in a haul. NPGOP determined that if Appellant collected 55 fish of the predominant species in all the sets of that haul, he met the “about 60 fish” standard.⁵⁶ NPGOP determined that Observer did not meet the sample weight requirement for the predominant species for any of the hauls that the observer samples for species composition.

Since I did not find NPGOP’s criterion for determining predominant in the Manual or other written instructions, I do not find that NPGOP proved that Observer violated a written standard in IAD Finding 4A and do not rely on IAD Finding 4A in reviewing whether decertification is warranted.

B. Non-predominant species weight sample.

With respect to the less predominant species, the IAD stated that Observer did not collect at least 15 individuals of a non-predominant species in 20 of 41 samples of non-predominant species.⁵⁷

Is this a written standard of conduct for observers? Yes. The Observer Manual states with respect to non-predominant species weight samples: “You must collect at least 15 individuals of a given species per sampled haul.”⁵⁸

Did the observer fail to meet this standard? Yes. Excluding sablefish, which Observer always treated as the predominant species, Observer collected non-predominant species weight samples of shortspine, thornyhead rockfish shortraker rockfish, skates, Kamchatka/arrowtooth flounder, and grenadier in 41 samples.⁵⁹ I find that in 20 samples, Observer did not weigh 15 individuals of the non-predominant species.⁶⁰ I therefore conclude that Observer violated a written standard by failing to meet the weight sample requirements in 20 samples.

⁵⁶ Document 12.

⁵⁷ IAD at 9.

⁵⁸ Manual at 7 – 29.

⁵⁹ Analysis of Species Weight Samples [Document 12].

⁶⁰ Analysis of Species Weight Samples [Document 12].

IAD Finding 5: Failure to meet the species identification sample requirements.

In the IAD, NPGOP determined Observer did not meet species identification sample requirements: “Most species can be identified on the line with minimal difficulty. However, some groups of species are too morphologically similar to be reliably identified on the line. Observers are instructed to tally individuals at the appropriate group code while collecting a subset of at least 15 fish per set for identification to species.”⁶¹

On this record, I conclude that NPGOP has not shown that Appellant violated a written standard. I could not determine the standard used by Decertification Official in analyzing the cruise data for this allegation [Document 19]. It appeared that it made a difference whether Appellant took 15 species *and weighed them*. The Observer Manual sections cited by NPGOP refer to gathering 15 from the set, but the Manual did not specifically state that the individuals in all the difficult-to-differentiate species groups had to be weighed.⁶² This requirement may be implicit, or may be in other language in the Manual, or may be in debriefing comments.

But since I concluded that the proven allegations in the IAD warranted decertification, I did not hold an oral or written hearing to determine whether this is a written standard for observer conduct and whether Appellant violated it.⁶³

IAD Finding 6: Failure to meet the length and otolith sample requirements.

The IAD determined that Observer did not collect the required number of specimens for length frequency data and for otolith data.⁶⁴ An otolith is a calcereous concretion in the inner ear of a vertebrate or in the otocyst (the auditory organ) of an invertebrate, such as a fish.⁶⁵ An observer collects the actual otolith and submits it to NPGOP for examination and analysis.

The observer’s duty is to sample a specific number of individuals in a species to measure their length and to collect the otolith varies by what is the predominant species in the haul and whether that is also a species listed in the Length and Otolith Priority Lists for Bering Sea/Aleutian Islands [Manual at 11 – 24, 11 – 25]. Since I did not find the criterion for predominant species in the Observer Manual or other written instructions, I will not rely on this allegation to evaluate whether decertification is warranted. If the other IAD findings were insufficient to warrant decertification, I would have inquired further through written questions, or through a hearing, into this allegation.

⁶¹ IAD at 10.

⁶² Manual at 7 – 26 to 7 – 28.

⁶³ See 50 C.F.R. § 679.43(g)(3)(iv) (A hearing will be conducted only if “resolution of the factual issue in the way sought by the appellant is adequate to justify the action requested.”)

⁶⁴ IAD at 11 – 12.

⁶⁵ Webster’s Third New International Dictionary (1986).

IAD Finding 7: Failure to complete Species Description Forms for all species observed.

The Observer Manual requires an observer to complete species identification forms for all species “that are new to you.”⁶⁶ NPGOP relies specifically on Observer’s failure to fill out species identification forms on species that Observer identified since June 2005.⁶⁷ In the IAD, NPGOP states: “Beginning in June 2005, the Observer Program began capturing species description information in an electronic format. Prior observers were instructed to complete a new Species Description Form for every species encountered.”⁶⁸

The source for that statement was Document 16 in the administrative record, which is a one-page document, which does not have a date or an author, and is entitled “Species ID Form Requirements.” Read carefully, it does indicate that, after the beginning of the new system, the observer needs to complete a species ID form for every species the observer encounters and that the observer can obtain from NPGOP a list of species for which the observer has entered a species ID form in the new system. This enables the observer to know what species the observer has yet to enter.

The IAD does not state explicitly that NPGOP distributed Document 16 to observers. But that is implicit in the assertion in the IAD that observers were “instructed” to do this. Observer offered no argument or evidence that he was not instructed to do this and did not receive the document.

Whatever ambiguity exists in Document 16 itself, and whatever weakness in the record as to whether and how Document 16 was distributed, is completely outweighed by the written comments to Observer from prior cruises. These comments instructed Observer to fill out species ID forms for a species if he encountered the species on a cruise and had not entered an ID form for that species in the electronic system. The most stringent warning on this point was in the debriefing comments after an April to July 2007 cruise:

Three species id forms were submitted but many more are still needed. Failure to complete species id forms on future cruises will result in a deployment score of 0 ‘did not meet expectations’. Please obtain a new species verified list prior to your next deployment and completely forms for unverified species to prevent this from happening.⁶⁹

⁶⁶ Manual at 2 – 6.

⁶⁷ IAD at 12 – 14.

⁶⁸ IAD at 12.

⁶⁹ IAD at 13, quoting Document 5, Debriefing Comments at 31. But overall Observer’s performance on this cruise was quite good, as reflected by the debriefing comments on the general quality of his data: “[A]nother great job! You maintained an excellent sampling effort throughout your deployment, only really rough weather prevented or limited your sampling. Your data was neat, organized and ready for debrief with a minimal amount of corrections.” Document 5 at 31.

But the topic was covered in debriefing comments from six other cruises.⁷⁰ Based on Document 16 and the debriefing comments from seven prior cruises, I find that Appellant had received written instructions to fill out species ID forms for species [1] he encountered on this cruise [2] if he had not already submitted a form for that species into the electronic database.

Did Appellant violate this standard? In the IAD, NPGOP alleges that Observer encountered the following seven species on the cruise which is the subject of this action and did not fill out a species ID form for those seven species, and had not already submitted a form for that species into the electronic database: Pacific halibut, Atka mackerel, Pacific flatnose, Eelpout unidentified, Northern fulmar, gull unidentified and thornyhead sculpin unidentified.⁷¹

With respect to the first six species, I find that Appellant encountered these species on this cruise,⁷² did not fill out a species ID form for these six species, and had not already submitted a form for those species into the electronic database.⁷³ Those species are Pacific halibut (identified as halibut), Atka mackerel, Pacific flatnose, eelpout unidentified, Northern fulmar, and gull unidentified.

With respect to the seventh species, “thornyhead sculpin identified,” I do not find that species listed on a deck form as a species seen by Appellant.⁷⁴

I therefore conclude that, by failing to fill out species ID forms for six species, Appellant violated a standard of observer conduct established in written instructions.

IAD Finding 8: Failure to complete data forms as instructed.

In this finding, the NPGOP determined that Observer did not record all required data on deck forms, vessel haul forms, and observer haul forms and that Observer submitted deck forms that were unorganized and difficult to interpret.⁷⁵

A. Lack of required data

I conclude that an observer is under an obligation to submit the data required on deck

⁷⁰ IAD at 12 – 13, quoting debriefing comments in Document 5.

⁷¹ IAD at 12 relying on Document 17, Comparison of Species Observed and Species Description Forms.

⁷² The following is the first time on Subject Cruise where Appellant listed the following species: eelpout unidentified [Deck Form 2]; Pacific flatnose [Deck Form 3]; Pacific halibut [Deck Form 11]; Northern fulmar [Deck Form 21]; Atka mackerel [Deck Form 31]; gulls unidentified [Deck Form 33].

⁷³ Species Description Forms Submitted by Appellant on all cruises after June 1, 2005 [Document 15].

⁷⁴ Deck Forms [Document 7]. The Analysis by NPGOP Decertification Official did not list “thornyhead sculpin unidentified” as a species seen by Observer on Subject Cruise and not made the subject of a Species ID form but did list “thornyhead rockfish unidentified.” [Document 17].

⁷⁵ IAD at 14 – 15. These forms are in the Subject Cruise Data [Document 7].

forms, vessel haul forms and observer haul forms. I base that conclusion on federal regulation 50 C.F.R. § 679.50, which states: “Observers must accurately record their sampling data.” I accept NPGOP’s argument that this regulation requires that observers accurately record the data they submit *and* that observers record all data required on standard forms.

I also rely on the Observer Manual, which states: “Specific directions on how to fill out each form can be found in the following chapters. **Always have your manual with you when you are filling out paperwork.** Refer to the instructions for the form type you’re working with when filling out that form.”⁷⁶ This establishes an obligation to fill out the forms in accord with the directions for that form in the Manual and the examples of correctly filled-out forms in the Manual.

The IAD accurately stated that the issue of recording all data clearly and completely was addressed in the debriefing comments to Observer in three cruises that preceded the Subject Cruise.⁷⁷

The IAD found four areas where Observer failed to submit required data.

1. *Six-digit specimen number on otolith samples on deck forms.* The IAD found that Observer did not record the 6-digit specimen number for otolith samples on deck forms. The Observer Manual establishes this as a duty: “Copy the bar coded specimen number on the otolith vial for each pair of otoliths taken for that haul. Each vial number is unique and cannot be altered!”⁷⁸ The Manual has an example of a deck form with otolith specimen data which have 6-digit numbers.⁷⁹

The NPGOP stated that the observer submitted otolith specimens and did not document the 6-digit number on the deck form. The NPGOP did not submit a list of deck forms where it contended that occurred. I determined that the observer submitted numerous deck forms that did not contain the 6-digit specimen number for the otolith sample. If information is in red or blue pencil on the Subject Cruise Data, I believe it was added in debriefing.

The 6-digit specimen number was added in debriefing to otolith specimens taken from at least the following hauls: haul 449, sample 1, subsample 101; haul 450, sample 2, subsample 201; haul 453, sample 3, subsample 301; haul 454, sample 1, subsample 101; haul 455, sample 1, subsample 101; haul 455, sample 2, subsample 202.⁸⁰ Far more deck forms did not have a 6-digit number on otolith specimens than did.⁸¹ I find that

⁷⁶ Observer Manual at 2 – 5 (emphasis in original).

⁷⁷ IAD at 14 – 15 *quoting* Document 5.

⁷⁸ Observer Manual at 11 – 17.

⁷⁹ Figure 11 – 17, Observer Manual at 11 – 19.

⁸⁰ Subject Cruise Data, Deck Forms [Document 7].

⁸¹ Subject Cruise Data, Deck Forms [Document 7].

Observer violated a written standard by not recording specimen numbers on otolith samples on deck forms.

2. *Lack of species names for length frequency and otolith samples on deck forms.* The deck form example in the Observer Manual with length frequency and otolith sample data has the species names.⁸² It would be very unusual for an observer to take a sample and *not* have to record the species name.

I determined that Observer submitted numerous deck forms where he did not record the species name for the length frequency and/or otolith sample. The following are examples: haul 446, sample 3, no species name for length frequency data; haul 446, sample 3, subsample 301, no species name for length frequency data; haul 447, sample 1, subsample 101, no species name for length frequency data and otolith data; haul 455, sample 1, no species name for length frequency data; haul 455, sample 101, subsample 101, no species name for length frequency data; haul 456, sample 1, subsample 101, no species name for length frequency data. In many instances, the species name was obvious and was probably easily filled in during debriefing. But an observer is supposed to fill in this information during the cruise. I find that Observer violated a written standard by not recording on the deck forms the species names for length frequency and otolith samples.

3. *Percent retained for subsamples on deck forms.* The sample deck form in the Observer Manual had the percent retained for subsamples filled in.⁸³ This piece of data on the deck forms is almost uniformly in red pencil, which means it was put on the form after the cruise. I find that Observer violated a written standard by not recording on the deck forms the percent of a species retained for subsamples.

4. *Data on observer haul forms and vessel haul forms.* These forms had the following data in blue pencil: the bird deterrence column on the three pages of observer haul forms; the total number of hooks or pots in a set on the second and third pages of the observer haul forms; the trip number, vessel type, gear performance and location code for most hauls on the second and third pages of the vessel haul forms (there were three total pages of vessel haul forms). I find that the observer violated a written standard by not completely filling out the vessel haul forms and the observer haul forms.

B. Difficult to interpret data.

In the IAD, NPGOP gave one instance of this.⁸⁴ In Haul 447, sample 2, Observer recorded 28 “rough/short (keep),” which Decertification Official understood to mean that Observer kept 28 shortraker/rougeye fish. Observer also recorded 7 shortraker

⁸² Figure 11 – 17, Observer Manual at 11 – 19.

⁸³ Figure 11 – 17, Observer Manual at 11 – 19.

⁸⁴ IAD at 14.

rockfish in the species composition data. The IAD states that it was not clear from the Deck Form whether the 7 shortraker rockfish were in addition to, or were a subsample of, the 28. I reviewed the deck form and, from the deck form, it is not clear whether the 7 shortraker rockfish were in addition to, or were a subsample of, the 28.

I do not know if Debriefing asked Observer to explain this during the debriefing. It is possible, and even likely, that Observer could explain the deck form and explain whether the 7 fish were included in the 28 or were not. But observers are supposed to complete the deck forms in a way that makes facts like that clear and does not require verbal explanation after the event. I find that Observer violated a written duty by submitting data for Haul 447, sample 2, that was unorganized and difficult to interpret.

2. Is Appellant entitled to additional information from prior cruises?

Observer asserts with respect to alleged violations in IAD Findings 3 to 8: “Alleged violations 3-8 are all due to mitigating circumstances that I can refute (repeatedly) with past data – if I had access to it.”⁸⁵ For several reasons, I conclude that Observer has not shown grounds to have access to more data from prior cruises.

First, Observer did not allege with specificity what he believed that the data from the prior cruises would show.

Second, for some allegations in the IAD – namely 1, 2, 7, 8 – NPGOP relied on written comments to the Observer in his evaluations after prior cruises. NPGOP included in the record, and provided Observer with, the written debriefing comments from *all* his prior cruises, not merely the ones that NPGOP quoted in the IAD.⁸⁶ Observer therefore can contest whether NPGOP accurately represented the comments NPGOP did cite and whether other comments, which NPGOP did not cite, support his position.

Third, NPGOP is requesting decertification based on problems with the data from the Subject Cruise. NPGOP provided Observer with the complete data from Subject Cruise – approximately 200 pages – and with the analyses of the data from Subject Cruise that the NPGOP Decertification Official performed. I conclude that Appellant has had notice and opportunity to be heard on the proposed decertification and that the record is sufficient for me to fairly evaluate Appellant’s arguments.

3. Is NPGOP’s decision to decertify reasonable and not arbitrary?

The NPGOP regulation states that “[u]pon determination that suspension or decertification [of an observer] is warranted,” the NPGOP decertification official will

⁸⁵ Document 27 at 3.

⁸⁶ Document 5.

initiate decertification proceedings.⁸⁷ I review NPGOP's decision that decertification is warranted to determine whether NPGOP's decision was reasonable and not arbitrary.

I do not understand NPGOP's position to be that any violation of the Observer Manual, no matter how small, would be a reasonable basis for decertification. For example, under IAD Finding 8, I found that Observer did not completely fill out the vessel haul forms on the Subject Cruise because Observer did not write in the number "1" under trip number. Since, on this cruise, there was only one trip, the failure to submit required data, though a violation of an observer duty, is easily remedied in the debriefing and certainly would not lead to confusion or loss of data.

In the final rule adopting the then new observer decertification process in 2002, NPGOP stated that it would continue to address "less serious observer misconduct or poor performance issues through policies and procedures that currently are in practice,"⁸⁸ with the clear implication that it would resort to suspension or decertification only for serious issues of poor performance.

In reviewing Debriefers' recommendation to decertify Observer, the NPGOP Decertification Official independently analyzed the data from the Subject Cruise and reviewed all the debriefing comments from Observer's prior cruises beginning in 1995.⁸⁹

NPGOP Decertification Official concluded that, based on Observer's failure to meet written standards in IAD Findings 1, 2, 4B, 7 and 8, his continued deployment with NPGOP posed an unacceptably high risk that either data would be lost or data quality would be compromised.⁹⁰ NPGOP relies on the fact that it deleted from its database all the species composition data from Subject Cruise: 154 samples and subsamples collected during 35 hauls. NPGOP deleted this data because of the deficiencies in Observer's species composition samples in IAD Findings 1 and 2, namely failure to personally count everything on the line during a tally period and failure to accurately record species composition data.

NPGOP acknowledges Observer's history of solid performance through 2007 but relies on the fact that Observer had been informed of the problems in IAD Findings 1, 2, 7 and 8 in the three cruises immediately preceding the Subject Cruise, namely cruises occurring from March 31 to April 5, 2008; August 21 to August 27, 2008; October 11 – October 25, 2009.⁹¹

⁸⁷ 50 C.F.R. § 679.50(j)(3)(iii)

⁸⁸ Final Rule, 67 Fed. Reg. 72,595, 72,599 (Dec. 6, 2002)

⁸⁹ The documentation from Observer's early cruises (1990 – 1994) had no debriefing comments.

⁹⁰ NPGOP Determination at 5 (May 13, 2011).

⁹¹ NPGOP Determination at 4 – 5 (May 13, 2011).

I conclude that NPGOP has established a reasonable basis for decertification of Observer. I therefore uphold the IAD that is the subject of this appeal.

CONCLUSIONS OF LAW

1. Appellant failed to perform the duties of an observer as specified in the Observer Manual or other written instructions from the Observer Program Office within the meaning of 50 C.F.R. § 679.50(j)(2)(ii)(A) through the conduct alleged in IAD Findings 1, 2, 4A, 7 and 8.
2. Appellant failed to perform the duties of an observer as specified federal regulation 50 C.F.R. § 679.50(j)(2)(ii)(B) to accurately record sampling data through the conduct alleged in IAD Findings 1, 2, 4A, and 8.
3. Appellant is not entitled to additional material from prior cruises.
4. NPGOP's decision to decertify Appellant was reasonable and not arbitrary.
5. NPGOP's decision to decertify Appellant is warranted within the meaning of 50 C.F.R. § 679.50(j)(3)(iii).

ORDER

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect on November 11, 2011, unless by that date the Regional Administrator reverses, modifies, or remands the Decision or stays the effective date of the Decision.

Appellant or NPGOP may submit a Motion for Reconsideration, but it must be received at this Office not later than October 24, 2011. A Motion for Reconsideration must be in writing, must allege one or more specific material matters of fact or law that were overlooked or misunderstood by the administrative judge, and must be accompanied by a written statement of points and authorities in support of the motion. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or the issuance of a Decision on Reconsideration.



Mary Alice McKeen
Administrative Judge