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. If injured, all of an observer's medical expenses should be paid for and they should receive compensation for so long as they are unable to work. Because observers work on fishing vessels that often operate in Federal[1](?) or international waters, state workers compensation programs are generally inapplicable. While many observer provider companies carry coverage for claims[2] arising under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. §§ 901-950 (hereafter "LHWCA")~~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~~the LHWCA 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[3] 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,[4] 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,

[1] This term in Section 2(a) needs a definition and in that definition be distinguished from international waters. It should read "Because observers work on fishing vessels that often operate beyond the limits of any State or in international waters, . . ."
[2] Is there data to support this assertion?
[3] Is there data to support this assertion?
[4] See discussion at Footnote 5, below.

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, FECA does not extend coverage to observers while working in processing plants, during debriefing sessions, or while transiting to and from deployments. It is also possible that an observer 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 prevents an observer compensated under FECA from also filing a Jones Act claim against the observer provider company.[5] 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,[6] 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~~ replacing FECA coverage ~~and, instead,~~ by ~~bringing~~ providing observers~~,~~ with ~~by statute, under~~ the ~~terms~~ remedies of the Longshore and Harbor Workers Compensation Act (LHWCA). Once FOCA is enacted,~~The~~ the LHWCA ~~is to~~ would apply to observers wherever their duties take them,

[5] This sentence mixes apples and oranges. A Jones Act claim is asserted against the vessel owner, owner pro hac vice, etc., etc. If the observer provider has no title or other legal interest in the vessel no "Jones Act" claim may be asserted against it merely because it is the observer's employer.

Assume that on observer is analogous to an inspector of fruits and/or produce, and his employer is hired by a cargo consignee to examine the condition of the cargo before accepting it from a vessel. In furtherance of that assignment, the inspector boards the vessel and is injured. The inspector's employer would pay LHWCA comp, and the inspector would have a LHWCA §905(b) claim against the vessel. The inspector has no cause of action under the Jones Act against his employer.

[6] What evidence is there that "observer providers are still paying for an expensive and expansive range of duplicative or potentially inapplicable coverages?" Why is that so? Under FECA, no insurance is required. Further, what mechanism requires the "observer providers" to provide coverage? Even under the present system relatively simple guidelines could solve that problem short of legislation. The real point is that the LHWCA provides a more certain remedy to the observer, with the consequent benefit to those who must have observers on their vessels.

whether it ~~be~~is on board a vessel, on an offshore platform, at a processing plant, in transit, or being debriefed on land. The models for this approach ~~is~~ are 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. It has the additional advantage of a compensation schedule superior to many state workers compensation programs.[7] The LHWCA, unlike FECA, provides for judicial review of adverse compensation decisions. 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, unless the Government is itself the employer of the observer.[8] 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.

[7] This assertion needs further explanation, particularly in light of the remedies available under the Alaska Worker's compensation statute. For example, Observers may now be covered for non-job related injuries suffered while on standby awaiting an assignment in Alaska, or they are compensated for a debilitating non-employment related illness. Field work is necessary to review the worker's compensation statutes in states where significant numbers of observers work and the scope of remedies applied to non-work related injuries or illness which have been covered in the past under state plans and which may not be covered under FOCA/LHWCA.

[8] Please see comments in footnote 16, below.

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. 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.[9]

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

[9] See comments in footnote 16, below.

25 percent of the base compensation, while observer "overtime" may amount to 75% of "base pay."[10]

A second important limitation of the current FECA coverage for observers is that 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 and premiums for ~~and premiums of~~ P&I or other insurance by vessel owners by limiting observer claims against them to willful misconduct.[11]

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[10] Some thought ought to be given to outlining what observer overtime would be covered under FECA and what would not to provide a fuller understanding to field observers. Field people believe that no overtime is included in FECA compensation – their evaluation of FOCA might vary depending on the scope of FECA's coverage, given what FOCA, as drafted, requires them to give up.

[11] Has anyone priced this? The problem is evidenced by the use of the word "reduces" rather than "eliminates." Why would a claim alleging "willfulness" not be brought to leverage a settlement? If the thought is that willfulness might not be covered under applicable P&I policies, that avenue should be supported by applicable coverage terms. Savings in premium could be realized by better insuring advice to the vessel owners – it seems that the cost savings to the vessel owners is a makeweight which cuts against the more serious arguments which support of this legislation.

fn 11 (cont.) Further, there are two aspects to the cost issue. First is the marginal cost of obtaining P&I coverage for an observer on a vessel which already has P&I in place; the second is the cost of obtaining P&I for a vessel which has no coverage to begin with. Again, this is both readily ascertained and once ascertained, can provide a basis for meaningfully evaluating cost savings.

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 attorneys' 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~~ ample 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 LWHCA 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 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.[12]

[12] It is precisely in this context that some comparison must be made with State worker's compensation acts, and their scope of coverage.

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 during transportation 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 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."[13] 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 directly by the federal government or by a contractor or subcontractor. Section 2(a) also specifies that FECA does not apply to injuries or death covered under the Act, even if the injured or deceased fisheries observer is deemed a federal employee for any other purpose. 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 and 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) 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); *Artic 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

[13] The proposed revisions to the FOCA Section 2(a) expands the definition to include all observers, not just those in monitoring "Fisheries," particularly in the context of the sentence following and includes offshore platforms within the scope of the Act using a definition from the Outer Continental Shelf Lands Act. If observers are placed on platforms on other continental shelves, additional descriptive language will be required.

co-employee.[14] 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 that "contracts with or otherwise hires one or more fisheries observers. It makes it clear that an "employer" may be the United States government, or an agency, corporation or instrumentality thereof, or 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) the federal government because it hired the employee, or (2) a contractor with the federal government under

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[14] [Seamen's claims for negligence against vessel owners predate the Jones Act – the difference is that under the Jones Act, the seaman is entitled to a jury trial on issues of negligence. It must be understood that the claim runs against the vessel owner or operator as an "employer" – observers employed by a contractor and assigned to a vessel do not have claims under the Jones Act if injured, they are business invitees. The same is true of contract scientists on seismic survey vessels, or other specialists aboard a vessel for particular purposes who are not employed by the vessel owner. They may have other claims against their employer, but should FOCA be enacted, those would be limited to LHWCA remedies. Thus, there is a need to preserve the LHWCA §905(b) claims for observers to be able to proceed against the vessels. (See footnote 16, below). A seaman has two other claims, one for unseaworthiness, the other for maintenance and cure. Unseaworthiness and maintenance and cure claims arise under the general maritime law, and standing alone are tried to the judge. Under usual current practice, Jones Act negligence, unseaworthiness and maintenance and cure claims are all tried before the jury, with the jury rendering advisory verdicts to the court on the unseaworthiness and maintenance and cure claims. These claims are available only to seamen.]. The Jones Act authorizes a claim for negligence against a "seaman's" employer when the employee is injured or killed during the course of employment, by the negligence of the employer or another employee. The Jones Act extends the provisions of the Federal Employers' Liability Act ("FELA"), a statute that provides remedies for injured workers, to provide similar remedies for seamen. As a result, an injured seaman can recover damages from the employer when an employer or a co-worker's negligence causes an injury. The Jones Act applies only to "seamen," ~~which~~ who are persons with an employment-related connection to a vessel in navigation and who contribute to the vessel's function or mission; that is, persons who do the ship's work. While negligence must be shown to recover for damages such as pain and suffering, a seaman injured on a vessel, regardless of the fault of the vessel or its operators, also has the legal remedy of maintenance and cure. "Maintenance" is a small daily compensation designed to provide the food and shelter that would have been provided to the seaman while aboard the vessel. Today, maintenance rates range from $7 to $35 per day. "Cure" is the obligation of the seaman's employer to provide medical treatment, prescription drugs, nursing services, hospitalization, rehabilitation and therapy, until the seaman reaches maximum medical improvement. Also, the vessel owner owes the seaman a strict and absolute duty to provide a seaworthy vessel. A seaworthy vessel is one that is reasonably fit for its intended use, and is a safe place to work and live.

a contract to provide observers, or (3) 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 neither a vessel owner/operator nor the United States government shall be deemed to be the employer of a fisheries observer unless the United States government or 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 neither the vessel owner/operator nor the U.S. government be deemed the employer unless they directly hire 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.[15] 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, 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

[15] Why is this necessary (with all due respect to the drafters of the LHWCA)? First, an "employer" is defined to include both a contractor and subcontractor. Second, surely both the prime contract and subcontract will require both the contractor and the subcontractor to procure the necessary insurance or other vehicle for the payment of compensation. Why give either of them an out? Third, it seems to me that the language opens a hole in a seamless program to the detriment of the employee. Put another way, this raises uncertainty about the source of compensation for the employee which this Act is trying to eliminate, in consonance with subsection (b).

(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. 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 LWHCA 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). [16] The language reflects the fact(?) that vessels – whose cooperation is

[16] This is bad policy, and the rationale for it is substantially flawed.

There are both practical and policy reasons why this section should not be included.

The purpose of FOCA is to provide observers, or their survivors, with a sure means of prompt compensation for disability or death, yet not exclude other routes they may take to be compensated. Section 905(b)

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 See 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

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of the LHWCA preserves the right to proceed against a third party, here the vessel owner, on negligence theories in the event of an injury or death. That right was carefully considered and approved in the context of the enactment of the LHWCA and the rationale of the LHWCA should be applied to FOCA.

First, vessel owners' reluctance is either grounded in fact, or it is not, but anecdotal "exhibited . . . unwillingness because of concerns of liability for negligence claims by observers" provides no basis on which to limit observers' remedies. If a vessel owner is negligent, it should be held to account for any resulting injuries. There should be data available showing the number of claims for personal injuries asserted by observers against vessel owners, or claims made under FECA. Once that data is assembled, a real assessment can be made of the risks presented to vessel owners comparing that data to data showing the number of voyages observers have completed overall, and without injury.

Second, vessel owner's insurances for such non-seaman's claims are normally included in their basic policies at a much lower rate than Jones Act coverage would be. Other remedies having been excluded under Section 6 of FOCA (before my new ¶3), observer-related, non-Jones Act premium should impose minimal economic hardship on vessel owners. Actual cost data, applied to the analysis set forth in the preceding paragraph would put the cost issues arising from §905(b) claims into perspective.

Third, 28 U.S.C. 1333(a) "saves" to "suitors in all cases all other remedies to which they are otherwise entitled." In essence, an person injured aboard a vessel, no matter what his or her status may be aboard that vessel, may file a suit in state court to recover damages. Thus, even if they are not a "Jones Act seaman," they may have a trial of the case before a jury. If appropriate "diversity" jurisdiction exists 28 U.S.C. 1332, the defendant may "remove" the action to Federal Court, where the plaintiff would still be entitled to a jury. Federal law, including the general maritime law, will be applied to the merits of the case, whether the trial is held in state or Federal Court. *Southern Pacific v. Jensen*, 244 U.S.205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917).

Fourth, even without the foregoing ~~two~~ three paragraphs, there is no reason to discriminate against observers when others have the right to sue the vessel owner in order to convince vessel owners to accommodate observers. Fishers participate in a business which needs regulation, and observers provide an opportunity to obtain the best data available to support that regulation. Owners should understand that the observers are an essential element of managing what ultimately is their livelihood, and, accordingly, that observers are in their long-term best interests. Acceding to vessel owners' anecdotal "unwillingness" sends the wrong message.

Fifth ~~Fourth~~, commercial fishing is the most dangerous occupation in the United States (and England, according to a recent article in *Lancet*). If leaving the risk of a tort claim in place provides an incentive to vessels owners, US or foreign, to improve safety, then the benefits far outweigh the vessel owners' inconvenience, financial, or other concerns.

(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.[17] 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 would preclude the liability of the federal government in those cases where the observer is not directly employed by the federal government. Specifically, where the U.S. government is not the direct employer of the observer, 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. In those circumstances where the United States government is the employer of the observer, the liability of the government with respect to the injury or death of that person shall be limited to the remedies available in the Act. 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.[18]

[17] Similarly, where the LHWCA applies, the courts will not enforce an indemnification or hold harmless agreement provided to the vessel (owner or operator) by the employer of the injured employee, assuming the employer has paid the LHWCA benefits. *See* 33 U.S.C. § 905(b) ("In the event of injury to a person covered under this chapter caused by the negligence of a vessel**,** then such person * * * may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.") However, some courts have allowed the employer to promise to procure insurance that names the vessel as a beneficiary. Although section 905(b) of the LHWCA voids indemnitee agreements between the employers and a vessel owner, the Fifth Circuit has held that section 905(b) does not void an agreement by an employer to name a vessel owner as an additional assured on its liability insurance policies. *Voisin v. Odeco Drilling Co.,* 744 F.2d 1174 (5th Cir. 1984).

[18] Why should observers not have Federal Tort Claims Act remedies? The exceptions in the FTCA are fairly broad and the Court hears all cases without a jury. Just as in the case of the vessel owners, if the government's act or omission results in personal injury or death of an observer, the government should be held to account for the resulting damages.

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.