

Statement of Elizabeth Mitchell
Association for Professional Observers

**Examining Opportunities to Improve Prevention and Response of
Sexual Assault and Sexual Harassment at the National Oceanic and
Atmospheric Administration**

Subcommittee on Oversight and Investigations
Natural Resources Committee
United States House of Representatives

Thursday, February 27, 2020
2:00PM

Dear Chairman Cox and members of the Oversight and Investigations Committee:

Thank you for the opportunity to share our organization's perspective on preventing harassment and needed response at the National Oceanic and Atmospheric Administration (NOAA). My name is Elizabeth Mitchell and I've been a fisheries observer for 25 years (1983 - 2008). I've worked in several programs, but mostly in the North Pacific Observer Program out of NOAA's Alaska Fisheries Science Center. I've been volunteering for the Association for Professional Observers (APO) since 1996 and became its president in 2000. Our organization's expertise is focused on advocacy for the health and welfare of fisheries observers, both in fish plants on shore and at sea and protected species/endangered species observers.

The APO organized in 1995, due to a lack of agency and contractor support. Observers were stranded at sea without pay because their contractor had gone bankrupt while they were out at sea. Observers attempted to get NOAA to intervene but they refused, demanding of the observers, under threat of lawsuit, the data they had already collected, claiming no authority over the contractor to demand their payment. Despite the fact that observers provide critical data to one of NOAA's primary functions, NOAA refused to help the observers. It remains so to this day, where outsourced observers are falling through legal cracks with little protections.

Observers in the North Pacific were forced to unionize due to NOAA's hands-off approach to our welfare but, with the exception of Hawaii observers, the rest of the programs in the country are not unionized and remain vulnerable to abuses. This isn't to say the union is working or is a legitimate replacement for NOAA's responsibility. It is a desperate measure in absence of agency oversight of worker protections.

Harassment, both sexual and non-sexual, assault, bribery attempts, interference and even murder has plagued fisheries observers for decades and we believe it is more pervasive in the population of observers than of NOAA federal employees. Moreover, I believe we will see a rise in this harassment as ocean resources dwindle, requiring urgent action, implementation and monitoring of anti-harassment/interference policies at all levels – NOAA (including NOAA Contracting Offices), monitored entities (fishing vessels, dredging or oil companies), observer providers and observers. Further, because observers are not federal employees, they frequently fall

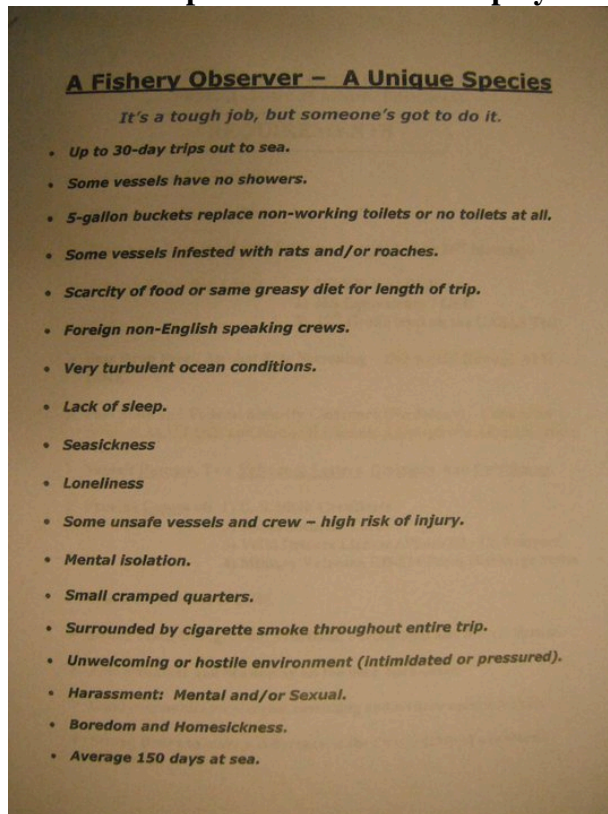


through legal cracks that increase their vulnerability both in personal safety and job security. **This is why, if nothing else, we desperately need for those protections and worker rights afforded to NOAA federal employees to legally be extended to the agency's observers and those in programs that NOAA mandates observer coverage (such as the dredge programs).**

FACTORS CONTRIBUTING TO OBSERVER HARASSMENT

Workplace harassment is a result of bad company management. Since these are publicly funded programs, public accountability must be the cornerstone of NOAA's responsibly managed observer programs. From start to finish, there should be accountability measures for the factors influencing employee protections:

- **Hiring practices** – NOAA has established hiring standards through the NOAA National Observer Program (NOP) but has not implemented them at the program level. In some programs, they have lowered the requirements, specifically because most people are not willing to put up with the hardships, except those who have little opportunities elsewhere. The pamphlet below used to be the Hawaii program's promotional pamphlet, training done through a local non-profit, the Alu Like program. They accepted workers without formal education, trained them, and then placed them in NMFS observer training reserved for those who met the educational requirements. While meant in jest, the flyer reveals a more serious flaw – that a hostile environment, intimidation and harassment, including sexual harassment, was part of the job. **Observers must know from the onset that harassment is NOT an acceptable condition of employment.**



- **Firing practices** – Most work places practice a ‘progressive disciplinary approach’ toward holding employees accountable for professional performance. In Hawaii, a long-time observer was fired without any evidence of wrongdoing by either his employer or NMFS. This is after he *reported sexual harassment from a captain*. The union agreement required a progressive disciplinary approach to termination. Because the company, who was bound by the union agreement, couldn’t fire him, they turned to the NOAA Contracting Officer Representative (COR) to circumvent the Union Agreement and declare him ‘ineligible’ for the program. NOAA admitted that this is a standard method of getting rid of observers and they are able to do it because NOAA is not the observer’s employer. He said¹:

As COR I don't have to give a reason why an observer is no longer allowed to collect data for our program. Although I always do. Basically I do not terminate a contractors employee, I am just saying they can no longer work for our program. If the contractor has other work for them in other areas they can still work for the contractor. But the case usually is they are specifically trained for our program and the contractor does not have work for them in other areas. This is one of the BIG advantages of having contract observers. In the past whenever we needed to disqualify an observer's eligibility from our program, this is how we did it. We meaning I work together with the contractor so we both agree and I send an email to the contractor disqualifying the observer.

B5

In this way, NOAA is able to fire an observer without the observer having any legal recourse or appeal process normally afforded NOAA’s own employees. **Each time an agency uses a shady practice and gets away with it, it sends a message to others to “put up and shut up” or this will happen to you. This contributes to an under-reporting of harassment. NOAA needs legislation to close this loophole.**

- **Removal of conflicts of interest** – Observer providers having direct contract with the fishing company with no obligation of public transparency, rather than with NOAA; A port coordinator marrying a prominent local captain whose multiple vessels she is in charge of providing an observer; Hiring a fisherman to monitor his own fishery – these are just some examples of unresolved conflicts of interest in NOAA observer programs and demonstrates a lack of oversight and confidence that NOAA will have the observers’ back.
- **Adequate training** – Training, especially in adequate documentation of violations and one’s own harassment, is extremely vital – *especially* for observers because they often don’t have a cooperating witness, so their documentation of events must be stellar. **Observers need a clear pathway toward reporting violations, addressing an emergency at sea, their worker rights, and how to appeal a decision.**
- **Lack of appeal process** – Most programs do not have an appeal pathway to follow if they disagree with an agency decision.

¹ Obtained through the Freedom of Information Act (FOIA)



- **Trauma resources and policies** – At the International Fisheries Observer and Monitoring Conference (IFOMC), observer mental health was highlighted as a significant threat due to the stresses of the job. **NOAA should coordinate the NOP with each program to develop local resources and have this be a part of each program’s Emergency Action Plan. Observers must be informed of who, what, where and how they will be rescued if their well-being is threatened.**
- **Effective communication with the vessel** – Observers are working on vessels where English is not the first language. Often stresses develop when the crew is not aware of the observers’ duties and their responsibilities. **NOAA should translate and distribute to vessels critical documents that clearly express observer rights and stakeholder responsibilities toward each other.**
- **Enforcement follow-up.** Many observers have complained that they never hear from OLE regarding updates on the investigation of their complaints. In Fiji, an observer reported several violations on board a US purse seine vessel. OLE took 6 months to reach out to him and interview, a delay that likely compromised the investigation. To date, he hasn’t heard about the results of his report or the investigation of the US vessel.
- **Public transparency and analysis of observer harassment** - Public oversight of fisheries monitoring programs is necessary to make sure that observers receive adequate support to effectively and safely carry out their duties, free from violence and interference. Transparency imparts the necessary confidence to the observer community and the public that the agency is monitoring the observers’ safety to ensure that they may continue to successfully report on this critical information. If observers lack confidence in the system that is supposed to represent and protect them, they cannot be expected to do their job appropriately or effectively. Likewise, without transparency, the public will not have confidence in the veracity of the fisheries monitoring program. Securing the confidence of the public, and of the observers reporting the information, can only be achieved through an open and transparent reporting system.

Yet, most observer programs do not report on observer harassment or compliance information in a systematic or transparent way. Many observer programs also require observers to be sworn to secrecy, but with vague parameters so that you never really know what your rights are, and with threats of punishment should they violate rules of engagement with the public. This secrecy surrounding what observers experience and witness misleads the general public about the true challenges in attaining sustainable fisheries. It also stifles observers from discussing harassment openly.

APO has been attempting to receive observer harassment statistics through FOIA since 2006 but it is obvious that NOAA does not track observer harassment, either nationally or regionally, because each year, the statistics released are plagued with delays and incompatible formats from year to year, making it impossible to follow trends. Only one program in the country



reports annually on observer harassment and interference (North Pacific) but the outcomes are impossible to follow. **NOAA should analyze observer harassment in all programs separately and do this annually (with a report that is publicly available) in such a way that allows following each case to outcome to gauge effectiveness of enforcement and influence of other factors.**

- **Lack of adjudication processes** - In the United States, there are only three Administrative Judges, under the Environmental Protection Agency, in the entire country to adjudicate cases of observer harassment. In one harassment case by a repeat offender in the Hawaii longline fishery, NOAA brought this case for prosecution. Despite the observer clearly getting harassed for over a month and having to lock himself into his room as he called the coast guard to be rescued, the EPA Administrative Judge claimed it never turned physical and dismissed the case because the observer was deemed to be able to conduct his assigned duties. I think you'll find that when someone is being abused and they have no control over it, it's common to concentrate on what you do have control over, which, in this case, was carrying out his duties. While he was able to complete his duties, I don't know of any workplace where someone is expected to tolerate a repeatedly hostile environment. Indeed, NOAA has a warning poster (intended for fishermen) that states, "It is unlawful to...harass an observer...**or otherwise create an intimidating, hostile, or offensive environment** (my emphasis)". So why did NOAA not appeal? The Magnuson-Stevens Act actually doesn't forbid harassment, offensiveness or a hostile environment. It says, "...it is illegal to...**forcibly assault, resist, oppose, impede, intimidate, sexually harass, bribe, or interfere with any observer on a vessel...**". NOAA needs to analyze observer complaints and figure out exactly all the many ways observers are prevented from doing their job and entering into a hostile environment. The MS language needs to reflect a prohibition of these acts. NOAA should adjust the language in the MSA and other Acts governing US-flagged vessels by **removing the word "forcibly" (because all assault is forcible); add "harass" (no qualifiers); and add, "...or otherwise create an intimidating, hostile, or offensive environment."**
- **Lack of National Strategy** – There have been many reviews dating back decades to address these vulnerabilities but we have seen little changes at the program level despite efforts by the National Observer Program (NOP) to bring about standardized best practices. **NOAA should implement best practices and standards developed by the NOP to all programs for every aspect of the observer program management and implement these throughout the nation.**

Types of Observer Employment under NOAA's jurisdiction

- **National - Observer provider contracted directly with the fishing company - portion of the North Pacific (unionized) and Northeast observer programs:** This competitive arrangement with multiple observer providers for the vessels to choose from, has long been recognized as a conflict of interest and a bad arrangement for observers because fishing



companies have more influence over the observer. Despite unionizing in the North Pacific program, harassment persists. Because of this, in 2004, NOAA's Office of Inspector General (OIG) recommended that NOAA scrap this model but NOAA ignored the recommendation and brought it to the Northeast. These observer providers are only "certified" by NOAA, further removing NOAA from responsibility.

- **Observer provider contracted directly with NOAA - portion of the North Pacific; Southeast observer programs).** NOAA has potential to have greater control over the contractor's performance by inserting requirements for observer welfare in the observer provider contracts with NOAA. This is currently lacking.
- **Observer provider contracted directly with NOAA but the observers are unionized (Hawaii).** This ideally would be the best model of all employment arrangements for observer protections for contracted observers if NOAA inserted observer protections into its contract and the union covered any gaps. Unfortunately, not only are there gaps in the contract for observer protections but NOAA deliberately and openly admits it regularly circumvents Union protections and are able to do it because they are not the observers' employer.
- **Observer provider hires the observer as an Independent Contractor (Protected Species/Endangered Species Observers)** – These observers are some of the most vulnerable to abuses because NOAA mandates oil and dredge platforms to carry observers but has nothing to do with them or the oversight of these programs. They're not even a program. There's no training, professional standards, debriefing, injury insurance or information on their worker rights or emergency plans. Some observers have to volunteer to be "trained" on the platform by another observer prior to working alone.
- **Non-US Observers are hired by their Regional Observer Program to monitor a US-flagged vessel.** Here NOAA must ensure US-flagged vessels are abiding by US law, including anti-harassment laws.

Thank you for allowing me to submit this testimony and I hope you'll consider the suggestions.

Elizabeth Mitchell
Association for Professional Observers

