

**DRAFT**  
**Amendment 13 to the Atlantic Sea Scallop FMP**  
**And Public Hearing Document**

Including an  
Initial Regulatory Flexibility Analysis

Prepared by the New England Fishery Management Council, in consultation with the  
National Marine Fisheries Service and the Mid-Atlantic Fishery Management Council

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*Final Submission to NMFS:*

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**ATTACHMENTS**

Attachment A-Atlantic Sea Scallop Observer Program Regulations Implemented by  
Emergency Action (with necessary clarifications underlined)

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## **1.0 BACKGROUND AND PURPOSE**

### **1.1 BACKGROUND**

Since 1999 observer coverage in the scallop fishery has been funded through the Scallop set-aside program. A percentage of the total allowable catch (TAC) in access areas has been deducted before allocations are made to generate funding for vessels required to carry an observer. Amendment 10 extended that requirement to open areas as well so a percent of potential allocated effort in DAS from open areas is set-aside to help fund the program as well. Observer coverage is necessary in the scallop fishery to monitor bycatch of finfish and to monitor interactions with endangered and threatened species. About 1% of the scallop TAC for access areas and 1% of open area DAS are deducted before allocations are made to generate funds for the program. Vessels required to carry an observer are authorized to land more than the possession limit from trips in access areas, and in open areas vessels are charged a reduced amount to help compensate for the cost of an observer. Observers were deployed through a contractual arrangement between National Marine Fisheries Service (NMFS) and an observer provider until June 2004. This arrangement was not renewed because of unresolved legal issues concerning the use of a contract to administer the industry funded observer program. It was determined that NMFS cannot require a vessel to pay for an observer when NMFS also had a contract with the observer provider. Without the arrangement, there was no mechanism for vessels to pay for observers, and in its absence NMFS did not require vessels to pay for observers, rather NMFS provided the necessary observer coverage through the Observer Program. NMFS explored administrative solutions that would not have required regulatory action, but could not resolve the issue without a regulatory solution.

In February 2006 the Northeast Fisheries Science Center received their budget for fiscal year 2006 and the level of funding was only sufficient to support minimal observer coverage in the scallop fishery. In April 2006 NMFS determined that it could not reconcile the reduced level of observer coverage. Without an additional mechanism to fund observers the level of coverage would be below recommended levels in the Scallop Fishery Management Plan (FMP) for precise estimates of bycatch, and would make it difficult to monitor and estimate interactions with sea turtles. Therefore, NMFS implemented an emergency action in June 2006 to re-activate the industry funded observer program [71 CFR 34842] under Magnuson by specifying the observer service provider certification program. This emergency regulation was implemented before the access areas opened on June 15 and before the time of year when interactions with sea turtles in the Mid-Atlantic are most likely (June – October). Emergency regulations are in effect for six months; therefore this program will expire in mid December unless a second emergency action is filed. Even if a second emergency action is filed that will only extend the industry funded observer program another six months until June 2007. Since this action was initiated, a second emergency action was filed on November 29, 2006 to continue the observer service provider certification program until June 11, 2007 [71 CFR 69073].

Funding at the Northeast Fisheries Science Center is not expected to increase to levels needed to fund the entire observer program necessary to monitor the scallop fishery. Therefore, this industry funded observer program is essential to maintain the level of coverage recommended in the Scallop FMP. Only two consecutive emergency actions can be implemented related to this

issue, so in order for regulations to be in place before the access areas open for the 2007 fishing year, a Council action will have to be initiated to re-activate the industry funded observer program. The Scallop FMP still sets aside 1% of access area TAC and open area DAS to fund observers even though the program has not utilized that set-aside in part of 2004 and all of 2005. Framework 18 was recently implemented for FY2006 and 2007 and it also included a provision for 1% of the TAC and open area DAS to be set-aside to help defray the cost of industry funded observers. But an action under the Scallop FMP would be necessary to specify the observer service provider certification mechanism that would reactivate the industry funded observer program. These details need to be specified in regulation under the FMP, and for legal purposes the mechanism must include non-contracted vendors. The previous program used from 1999 to 2004 presented potential conflicts with augmentation of appropriations law and policy. For these reasons a new mechanism had to be developed and it was advised that the specific regulations of the mechanism be specified in the FMP so that standards and quality control of the data collected through non-contracted vendors could be maintained.

It should be noted that the Council recently approved a Standard Bycatch Reporting Methods Amendment (SRRM Amendment) to all FMPs in this region. *(Once the Council selects final measures for this action a summary of the proposed action will be included in this document for reference).*

## **1.2 PURPOSE AND NEED**

The purpose of this action is to re-activate the industry-funded observer program for the scallop fishery. Observer coverage is necessary in the scallop fishery to monitor bycatch of finfish and interactions with endangered and threatened species. The need for this action is to provide a mechanism to certify observer service providers so that the set-aside program can be utilized to help defray costs of carrying the necessary level of observers in the scallop fishery.

## **2.0 GOALS AND OBJECTIVES**

The goal of this action is to implement an observer service provider mechanism for the Atlantic sea scallop fishery that would reactivate the industry funded observer program through a scallop total allowable catch (TAC) and days-at-sea (DAS) set aside program to help defray the cost of carrying observers.

The objectives of the observer service provider program would: 1) include criteria for becoming an approved observer service provider; 2) define observer certification criteria; 3) define decertification criteria; and 4) define observer deployment logistics.

It is the intent of the Council to consider and implement regulations in this action that would mirror the mechanism adopted under the Emergency Action. In order for the scallop fishery to operate as it has been it is critical for this observer provider service certification mechanism to be in place. Since NMFS has identified a solution to the problems identified with the original mechanism that implemented the industry funded observer program, the Council intends to consider and implement measures that are consistent with that action. Due to the timing constraints, inclusion of measures that are considerably different than the program implemented

by NMFS through emergency action would likely delay this amendment beyond the time when observer coverage is necessary. As a result, the observer coverage levels recommended by the FMP would not be achieved, compromising the effectiveness of the FMP.

### **3.0 MANAGEMENT ALTERNATIVES UNDER CONSIDERATION**

#### **3.1 NO ACTION**

If no action is taken in this amendment, the regulations implemented through Emergency Action, or a similar regulatory mechanism to reactivate the observer set-aside program, will not be established as part of the scallop regulations. Specifically, the regulations that are currently in place for the observer service provider certification mechanism would not exist (Section 648.11 paragraphs (a) (3), (g), (h) and (i)). The Scallop FMP would still set a percentage of available harvest aside to help defray costs of an industry-funded observer program, but there would be no mechanism to implement the program.

If there is no mechanism to administer the program, then it is likely that the level of observer coverage recommended in the Scallop FMP cannot be met. Some funding within the Observer Program may be able to cover some trips but not at the level recommended to monitor finfish bycatch and interactions with endangered and threatened species. The scallop industry could develop an arrangement with observers that does not require agency involvement and may be able to use the FMP set-aside program. However, independent industry arrangements with observers, without NMFS control, may not provide sufficient quality control and accountability and may introduce a high level of observer bias.

#### **3.2 ATLANTIC SEA SCALLOP OBSERVER PROGRAM AS IMPLEMENTED BY EMERGENCY ACTION**

If this section is approved a new mechanism to administer the industry funded scallop observer program would be implemented similar to the one implemented under the emergency action. The specific measures include: 1) general provisions of the observer program; 2) observer service provider approval and responsibilities; and 3) observer certification procedures. The measures are summarized below and the specific regulations as implemented by emergency action on June 16, 2006 and continued on November 29, 2006 for an additional 180 days are included in Attachment A.

##### **Atlantic Sea Scallop Observer Program**

Section 648.11 (g) of the current regulations includes specific requirements for the scallop observer program. Included in this section are general requirements for scallop vessels in terms of notification procedures and requirements of the vessel if it is selected to carry an observer. If a vessel is required to carry an observer they are responsible for contacting a certified observer provider at least 72 hours in advance of a fishing trip. Vessels are responsible for paying the cost of the observer regardless of whether the vessel lands or sells scallop on that trip and regardless of the availability of set-aside for an increased possession limit or reduced DAS accrual rate. Observer service providers are responsible for setting the daily rate of coverage on a vessel and NMFS is responsible for determining the reduced DAS accrual rate and increased possession limit for the set-aside program. Additional requirements are detailed in Attachment A.

### **Observer service provider approval and responsibilities**

This program allows any entity to become an observer service provider if it meets the approval process and all the responsibilities described in Section 648.11 (h) of the current regulations. An application is required which contains detailed information such as contact information, description of past experience with placing individuals in remote field and/or marine environments, evidence of adequate insurance to cover injury, liability and accidental death for observers during employment, and proof of compensation for observers while employed that meet or exceed Department of Labor guidelines. NMFS shall review and evaluate each application and if approved, the observer service providers name is added to this list of approved observer service providers. An approved observer service provider must maintain at least 8 certified observers that have passed the NMFS/NEFOP Sea Scallop Fisheries Observer Training course. The observer service provider is responsible for all necessary transportation, lodging expenses and necessary equipment for the observer. An observer service provider must be available for access by industry 24 hours a day 7 days a week. Specific reporting requirements are detailed in Section 648.11 (h) (5) (vii) including when certain reports are due to NMFS. Additional requirements are detailed in Attachment A.

### **Observer Certification**

Section 648.11 (i) of the current regulations includes specific standards set by NMFS that an observer service provider must meet in order to be certified. Employees of observer service providers must meet the NMFS National Minimum Eligibility Standards available at <http://www.st.nmfs.gov/st4/nop/>. All observers must pass the NMFS training course, be physically and mentally capable of carrying out the responsibilities of an observer, and hold a current CPR/first aid certification. NMFS has the authority to review observer certifications and issue observer certification probation and/or decertification if warranted. Additional requirements are detailed in Attachment A.

### ***Rationale:***

This alternative is necessary to re-activate the industry-funded observer program implemented under the Scallop FMP. This program has been re-activated by two consecutive emergency actions for 180 days each, but this alternative is necessary to implement this program indefinitely in regulation. The process used for the scallop set-aside observer program from 1999 to 2004 had issues related to potential conflicts with augmentation of appropriations law and policy. Therefore, the program detailed in this alternative uses non-contracted vendors with a certification process, which maintains quality control of the data collected, but does not have potential conflicts with augmentation of appropriations law and policy. This observer service provider program has been in place since June 2006 and NMFS has been able to maintain sufficient standards and data quality control.

### **3.3 ADDITION OF “ADJUSTMENTS TO THE SCALLOP OBSERVER PROGRAM” AS A MEASURE THAT CAN BE IMPLEMENTED THROUGH FRAMEWORK ADJUSTMENT TO THE SCALLOP FMP**

If this measure is adopted, adjustments to the scallop observer program can be implemented through a framework adjustment to the Scallop FMP. Currently, an amendment would have to



be initiated to make a change to the observer program. This measure would include general language in the regulations that would allow an adjustment to the scallop observer program to be implemented by framework rather than amendment.

**Adjustments to the scallop observer program:**

An adjustment to the scallop observer program could be implemented by framework action. Adjustments could include measures such as changing the percent set-aside amount from 1%, changing how the set-aside is allocated per vessel that is required to carry an observer, revisions to the overall observer service provider program (if adopted in this action), or even changing how funds are collected and administered from the industry to cover the cost of observer coverage.

***Rationale:***

The Council discussed several potential alternatives to improve the current scallop observer program during development of this action, but it was determined that including them would require further analyses and delay the potential implementation of this action. Since the Council is interested in submitting this action so that it can be implemented before or soon after the current emergency rule expires, this measure was developed so that improvements to the current program could be considered in a future framework, if necessary. Since major amendments to the Scallop FMP are not made frequently, allowing a procedure for implementing adjustments to the observer program by framework allows more flexibility to improve the overall program. Below are several examples that were discussed during development of Amendment 13. There are still unresolved issues related to each example, but the Council may revisit these ideas in a future framework if this alternative is approved.

*Examples of potential adjustments to the observer program are:*

1. *Differential possession limit and DAS accrual rate calculation by scallop permit type*  
This type of measure may change the reduced DAS accrual rate for open area trips or additional scallop catch per day in access areas for different scallop permit types to make the current program more equitable. Specifically, higher possession limits and DAS accrual rates would be considered for vessels with smaller permit categories (i.e. small dredge) because there has been feedback that the current program is not effective for monitoring all sector of the scallop fleet. The Scallop Plan Development Team (PDT) could develop a specific alternative that would include different possession limits and/or DAS accrual rates to make the program more equitable for vessels with different efficiencies and reduce the potential risk for biased sampling.

2. *Fleetwide observer cost sharing program*  
Rather than removing 1% of the total scallop TAC to help defray the cost of observers, the set-aside amount would be allocated to the fishery (in additional DAS or higher access area possession limits per vessel). All vessels would instead pay a portion of their gross stock from every trip to a trust managed by the industry. Funds from those trips would be held and used to fund observers directly rather than an individual vessel being responsible for funding an observer if required to carry one. However, if there are insufficient funds in the industry managed trust to pay for an observer, that vessel would be responsible for paying the observer directly. This

program would share the cost of observer coverage across the fleet and would eliminate the responsibility for an individual vessel to pay for an observer directly if required to carry one (and funds were available in the fund). One aspect of this program that needs more development is related to the fact that this alternative requires full participation across the fishery. NMFS is not authorized to collect a fee unless the fishery is managed under an individual fishing quota program. Therefore, it would have to be voluntary, and there may be data confidentiality issues concerning individual trip information and the risk of “free-riders” (vessels not opting to participate in the “fleetwide” program).

### 3. *Observer cost sharing sector*

A group of vessels would be permitted to form a sector for the sole purpose of sharing the cost of observer coverage. Rather than an individual vessel being responsible to pay for an observer, that vessel can voluntarily join a sector that has agreed to share the costs associated with carrying an observer. Vessels would not be permitted to pool any other aspects of their permit such as DAS allocations, access area trips etc. NMFS would still set-aside a fixed percentage of the total scallop TAC to help defray the cost of observers, but that TAC would further be divided proportionally between the self-selecting sector and vessels outside the sector (common pool). Therefore, a sector would have to be approved before the start of each fishing year so NMFS would be able to divide the total TAC set-aside for observer coverage. It may even be possible to have several observer cost sharing sectors.

For example, if 30 of the 300 limited access scallop vessels (rounded estimated values) voluntarily joined a sector to share the costs of observer coverage, they would be awarded 10% of the available set-aside (ignoring general category effort for the example). The remaining 90% of the available TAC would be available for vessels outside the observer cost sharing sector and those vessels would pay for observer coverage (if required to carry an observer) on an individual basis as it is currently administered. On the other hand, the sector would be allocated 10% of the set-aside and the compensation DAS and additional poundage for access area trips would be divided equally among the vessels in the sector. As the fishing year progresses each vessel in the sector would pay a percentage of their gross stock from each trip to a trust managed by the sector. If a vessel in the sector was required to carry an observer, monies from the trust would be used to pay that observer, rather than one vessel within the sector paying for the coverage directly. This concept, or something like it is intended to share the cost of carrying an observer among a group of vessels and reduce the potential for vessels to change behavior if required to carry an observer (i.e. make a shorter trip so the cost of the observer for the trip is reduced). The current system does provide some way of defraying the cost of having to carry an observer, but it does not always cover the cost of the observer and can be uneven among vessels with different efficiencies. The details of this type of system need more development in order for NMFS to be able to implement such a system. Furthermore, depending on the specifics of this type of program it may or may not require an amendment to allow the formation of voluntarily sectors for the sole purpose of sharing the cost of observer coverage.

## **4.0 REQUIRED ANALYSES UNDER MAGNUSON ACT AND NEPA**

The impacts of the set-aside program to defray the cost of observer coverage have been analyzed in previous scallop actions (Amendment 10, Framework 16 and Framework 18). The emergency

rule implemented on June 16, 2006, and continued for a second 180-day period on November 29, 2006, did not change any aspect of the program; it simply re-activated it by developing a mechanism for non-contractual observer service providers. Since this action proposes the same measures as previously analyzed, no further National Environmental Policy Act (NEPA) analyses are required. Participation by potential observer service providers is voluntary and since no federal action is requiring participation, further assessment of the potential impacts on these entities is not required. While a NEPA document is not required, there are required analyses under the Magnuson Act that still apply and they are summarized below.

#### **4.1 REGULATORY FLEXIBILITY ACT (RFA)**

To be completed after final measures are selected in February 2007.

#### **4.2 EXECUTIVE ORDER 12866 (REGULATORY PLANNING AND REVIEW)**

To be completed after final measures are selected in February 2007.

### **5.0 PUBLIC HEARING ON AMENDMENT 13**

The Council held one public hearing on Amendment 13 on February 7 in Portsmouth, NH in conjunction with the February 2007 Council meeting. Staff presented this document and approximately ??? public comments were received. ??? written comments were submitted at the public hearing as well. Copies of those comments are available upon request. A summary of the oral comments received at the public hearing is below.