

DRAFT
Amendment 13 to the Atlantic Sea Scallop FMP

[Not developed through the Scallop Committee]

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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1.0 BACKGROUND AND PURPOSE

1.1 BACKGROUND

Since 1999 observer coverage in the scallop fishery has been funded through the Scallop RSA program. A percentage of the 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. 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 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 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 reactivate 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.

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 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 reactivate the industry funded observer program under the Scallop FMP. 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 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 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.

1.2 PURPOSE AND NEED

The purpose of this action is to reactivate the industry funded observer program for the scallop fishery. Observer coverage is necessary in the scallop fishery to monitor bycatch of finfish and to monitor 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 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 the Service 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 it is critical that 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 then the regulations implemented through Emergency Action, or a similar regulatory mechanism to reactivate the observer set-aside program, will not be established as a permanent Scallop FMP provision. Specifically, the regulations that implement 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 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 VMS NOTIFICATION REQUIREMENTS

Three elements of VMS notification requirements were suspended under the Emergency Rule implemented in June 2006. These provisions would suspend automatically after the Emergency rule expires, and measures selected under this action would replace them (Section 648.10, paragraphs (b)(4)(ii) through (iv)). Thus the provision to submit a monthly report to NMFS including when a vessel intends to fish and providing notice to NMFS at least 72 hours in advance of when and where a trip is leaving would no longer be required. If this alternative were selected then the only requirement under VMS notifications would be (b)(4)(i), less than 1 hour prior to leaving port, the owner or authorized representative must notify NMFS by VMS code what type of trip is being taken. Paragraphs (b)(4)(ii) through (iv) would be suspended whether this alternative were selected or not because they expire under the Emergency rule. The text of the regulations is provided below.

(4) Atlantic sea scallop vessel VMS notification requirements.

(i) Less than 1 hour prior to leaving port, the owner or authorized representative of a scallop vessel that is required to use VMS as specified in paragraph (b)(1) of this section must notify the Regional Administrator by entering the appropriate VMS code that the vessel will be participating in the scallop DAS program, Area Access Program, or general category scallop fishery. VMS codes and instructions are available from the Regional Administrator upon request.

(ii) [**Suspended 6/16/06–12/13/06**] To facilitate the deployment of at-sea observers, all sea scallop vessels issued limited access permits fishing in open areas or Sea Scallop Access Areas, and general category vessels fishing under the Sea Scallop Access Area program specified in §648.60, are required to comply with the additional VMS notification requirements specified in paragraphs (b)(4)(iii) and (iv) of this section, except that scallop vessels issued Occasional scallop permits not participating in the Area Access Program specified in §648.60 may provide the specified information to NMFS by calling NMFS. All sea scallop vessels issued a VMS general category or Non-VMS general scallop permit that are participating in the Area Access Program specified in §648.60 are required to comply with the additional VMS notification requirements specified in paragraphs (b)(4)(iii) and (iv) of this section.

(iii) [**Suspended 6/16/06–12/13/06**] Prior to the 25th day of the month preceding the month in which fishing is to take place, the vessel must submit a monthly report, through the VMS e-mail messaging system, of its intention to fish for scallops, along with the following information: Vessel name and permit number, owner and operator's name, owner and operator's phone numbers, and number of trips anticipated for open areas and each Sea Scallop Access Area in which it intends to fish. The Regional Administrator may waive this notification period if it is determined that there is insufficient time to provide such notification prior to a Sea Scallop Access Area opening or beginning of the fishing year. Notification of this waiver of a portion of the notification period shall be provided to the vessel through a permit holder letter issued by the Regional Administrator.

(iv) [~~Suspended 6/16/06–12/13/06~~] In addition to the information required under paragraph (b)(4)(iii) of this section, and for the purpose of selecting vessels for observer deployment, each participating vessel owner or operator shall provide notice to NMFS of the time, port of departure, and open area or specific Sea Scallop Access Area to be fished, at least 72 hr, unless otherwise notified by the Regional Administrator, prior to the beginning of any scallop trip.

3.3 AT-SEA SEA SAMPLER/OBSERVER COVERAGE

Several elements of Section 648.11 (At-sea sea sampler/observer coverage) were suspended under the Emergency Action, and several new sections were added. This section will include similar revisions to reflect the same provisions as implemented under the Emergency Rule; specifically suspending sections 648.11 paragraphs (a)(1) and (a)(2) and adding paragraphs (a)(3), (g), (h) and (i).

3.3.1 Suspension of responsibility for paying observers

Vessel owners would not be responsible for paying the cost of observers as described in Section (a)(1) below, rather the details of the observer program requirements are described in Section 3.3.2 of this document, or Section 648.11 paragraph (a)(3)(g) of the current regulations. The text of the suspended provision is below, (a)(1). This requirement for vessels to pay for observers would still be part of the program under consideration in this action; the regulation here would expire and be replaced with Section 648.11 paragraph (g)(5) if adopted in this amendment.

(a) The Regional Administrator may request any vessel holding a permit for Atlantic sea scallops, NE multispecies, monkfish, skates, Atlantic mackerel, squid, butterfly, scup, black sea bass, bluefish, spiny dogfish, Atlantic herring, tilefish, or Atlantic deep-sea red crab; or a moratorium permit for summer flounder; to carry a NMFS-approved sea sampler/observer.

(1) [~~Suspended 6/16/06–12/13/06~~] For the purpose of deploying at-sea observers, sea scallop vessels are required to notify NMFS of scallop trips as specified in §648.10(b)(4). Unless otherwise notified by the Regional Administrator, owners of scallop vessels shall be responsible for paying the cost of the observer for all scallop fishing trips on which an observer is carried onboard the vessel, regardless of whether the vessel lands or sells sea scallops on that trip, and regardless of the availability of set-aside for an increased possession limit, or reduced accrual rate of DAS.

(2) [~~Suspended 6/16/06–12/13/06~~] [Reserved]

(3) [Effective 6/16/06–12/13/06] The Regional Administrator may request any vessel holding a permit for Atlantic sea scallops, NE multispecies, monkfish, skates, Atlantic mackerel, squid, butterfly, scup, black sea bass, bluefish, spiny dogfish, Atlantic herring, tilefish, or Atlantic deep-sea red crab; or a moratorium permit for summer flounder; to carry a NMFS certified fisheries observer. A vessel holding a permit for Atlantic sea scallops is subject to the additional requirements specified in paragraph (g) of this section.

3.3.2 Atlantic sea scallop observer program

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 program description below includes general provisions, notification procedures, and details about funding observers.

(g) [Effective 6/16/06–12/13/06] *Atlantic sea scallop observer program.*

(1) *General.* Unless otherwise specified, owners, operators, and/or managers of vessels issued a Federal scallop permit under §648.4(a)(2), and specified in paragraph (b) of this section, must comply with this section and are jointly and severally responsible for their vessel's compliance with this section. To facilitate the deployment of at-sea observers, all sea scallop vessels issued limited access permits fishing in open areas or Sea Scallop Access

Areas, and general category vessels fishing under the Sea Scallop Access Area program specified in §648.60, are required to comply with the additional notification requirements specified in paragraphs (g)(2) of this section, except that scallop vessels issued Occasional scallop permits not participating in the Area Access Program specified in §648.60 may provide the specified information to NMFS by calling NMFS. All sea scallop vessels issued a VMS general category or Non-VMS general scallop permit that are participating in the Area Access Program specified in §648.60 are required to comply with the additional VMS notification requirements specified in paragraph (g)(2) of this section. When NMFS notifies the vessel owner, operator, or the vessel manager of any requirement to carry an observer on a specified trip in either an Access Area or Open Area as specified in paragraph (g)(2) of this section, the vessel may not fish for, take, retain, possess, or land any scallops without carrying an observer. Vessels may only embark on a scallop trip in open areas or Access Areas without an observer if the owner, operator, or vessel manager has been notified that the vessel has received a waiver of the observer requirement for that trip pursuant to paragraphs (g)(3) and (5) of this section.

(2) *Vessel notification procedures.* For the purpose of determining if an observer will be deployed on a vessel for a specific trip, a vessel issued a limited access permit fishing in open areas or in the Sea Scallop Area Access program specified in §648.60, or a vessel issued a general category scallop permit and fishing in the Sea Scallop Area Access program specified in §648.60, is required to comply with the following notification requirements:

(i) Prior to the 25th day of the month preceding the month in which fishing for scallops is to take place, the vessel owner or operator must submit, through the VMS e-mail messaging system, notice of its intention to fish for scallops, along with the following information: Vessel name and permit number, owner and operator's name, owner and operator's phone numbers, and number of trips anticipated for open areas and each Sea Scallop Access Area or open area in which it intends to fish. General category vessels are required to submit this information only for Sea Scallop Access Area trips. The e-mail address shall be provided to vessels in a Small Entity Compliance Guide issued by the Regional Administrator. The Regional Administrator may waive this notification period if it is determined that there is insufficient time to provide such notification prior to a Sea Scallop Access Area opening or beginning of the fishing year. Notification of this waiver of a portion of the notification period shall be provided to the vessel through a permit holder letter issued by the Regional Administrator.

(ii) For each scallop trip, the vessel owner, operator, or vessel manager shall notify NMFS by telephone, using the phone number provided by the Regional Administrator in the Small Entity Compliance Guide, and provide the following information: Vessel Name; contact name and number; date and time of departure; port of departure; area to be fished (either open areas or the specific Sea Scallop Access Area), and fishing as a scallop dredge, scallop trawl or general category vessel.

(3) *Selection of scallop fishing trips for observer coverage.* Based on predetermined coverage levels for various sectors of the scallop fishery that are provided by NMFS in writing to all observer service provider approved pursuant to paragraph (h) of this section, NMFS shall notify the vessel owner, operator, or vessel manager whether the vessel must carry an observer, or if a waiver has been granted, on the specified trip within 24 hours of the vessel owner's, operator's, or vessel manager's notification of the prospective trip as specified in paragraph (g)(2)(ii) of this section. Any request to carry an observer may be waived by NMFS. With the exception of vessels issued a non-VMS general category scallop permit that are fishing in an access area, all waivers for observer coverage shall be issued to the vessel by VMS so as to have on-board verification of the waiver. Waivers for vessels issued a non-VMS general category scallop permit will be issued by fax, if possible, or by phone if no fax number is available.

(4) *Procurement of observer services by scallop vessels.*

(i) An owner of a scallop vessel required to carry an observer under paragraph (g)(3) of this section must arrange for carrying an observer certified through the observer training class operated by the Northeast Fisheries Observer Program (herein after NMFS/NEFOP certified) from an observer service provider approved by NMFS under paragraph (h) of this section. A list of approved observer service providers shall be posted on the NOAA/NEFOP website at <http://www.nefsc.noaa.gov/femad/fsb/>. The owner, operator, or vessel manager of a vessel selected to carry an observer must contact the observer service provider and must provide at least 72 hours notice in advance of the fishing trip for the provider to arrange for observer deployment for the specified trip.

(ii) An owner, operator, or vessel manager of a vessel that cannot procure a certified observer within 72 hours of the advance notification to the provider due to the unavailability of an observer, may

request a waiver from NMFS from the requirement for observer coverage for that trip, but only if the owner, operator, or vessel manager has contacted all of the available observer service providers to secure observer coverage and no observer is available. NMFS shall issue such a waiver within 24 hours, if the conditions of this paragraph (g)(4)(ii) are met.

(5) Unless otherwise notified by the Regional Administrator, owners of scallop vessels shall be responsible for paying the cost of the observer for all scallop fishing trips on which an observer is carried onboard the vessel, regardless of whether the vessel lands or sells sea scallops on that trip, and regardless of the availability of set-aside for an increased possession limit or reduced DAS accrual rate. Vessels that carry an observer may be compensated with a reduced DAS accrual rate for open area trips or additional scallop catch per day in Access Areas in order to help defray the cost of the observer, under the program specified in §§648.53 and 648.60. Observer service providers are responsible for setting the daily rate for observer coverage on a vessel. NMFS shall determine the reduced DAS accrual rate and the amount of additional pounds of scallops per day fished in an access area for the applicable fishing year based on the economic conditions of the scallop fishery, as determined by best available information. Vessel owners and observer service providers shall be notified by Small Entity Compliance Guide of the DAS accrual rate and additional pounds of scallops determined by the Regional Administrator. The Regional Administrator may adjust the DAS accrual rate and additional pounds of scallops if necessary based on economic conditions of the scallop fishery. Vessel owners and observer providers shall be notified of any such adjustments through a letter.

(6) When the available DAS or TAC set-aside for observer coverage is exhausted, vessels shall still be required to carry an observer as specified in this section and shall be responsible for paying for the cost of the observer, unless otherwise waived by NMFS, but shall not be authorized to harvest additional pounds or fish at a reduced DAS accrual rate.

3.3.3 Observer service provider approval and responsibilities

If this section is adopted, it allows any entity to become an observer service provider if it meets the approval and responsibilities described in this section. The required application process is described as well as the observer deployment and report requirements. The text from the regulations is described below. Under the original program NMFS had a contract with one observer provider. This provision would allow any entity to voluntarily become a certified observer service provider if all requirements in this section were met.

(h) [Effective 6/16/06–12/13/06] *Observer service provider approval and responsibilities.*

(1) *General.* An entity seeking to provide observer services to the Atlantic sea scallop fishery must apply for and obtain approval from NMFS following submission of a complete application to The Observer Program Branch Chief, 25 Bernard St Jean Drive, East Falmouth, MA 02536. A list of approved observer service providers shall be distributed to scallop vessel owners and shall be posted on NMFS's web page as specified in paragraph (g)(4) of this section.

(2) *Existing observer service providers.* Observer service providers that currently deploy certified observers in the Northeast must submit an application containing the information specified in paragraph (h)(3) of this section, excluding any information specified in paragraph (h)(3) of this section that has already been submitted to NMFS.

(3) *Contents of application.* An application to become an approved observer service provider shall contain the following:

(i) Identification of the management, organizational structure, and ownership structure of the applicant's business, including identification by name and general function of all controlling management interests in the company, including but not limited to owners, board members, officers, authorized agents, and staff. If the applicant is a corporation, the articles of incorporation must be provided. If the applicant is a partnership, the partnership agreement must be provided.

(ii) The permanent mailing address, phone and fax numbers where the owner(s) can be contacted for official correspondence, and the current physical location, business mailing address, business telephone and fax numbers, and business e-mail address for each office.

(iii) A statement, signed under penalty of perjury, from each owner or owners, board members, and officers, if a corporation, that they are free from a conflict of interest as described under paragraph (h)(6) of this section.

(iv) A statement, signed under penalty of perjury, from each owner or owners, board members, and officers, if a corporation, describing any criminal convictions, Federal contracts they have had, and the performance rating they received on the contract, and previous decertification action while working as an observer or observer service provider.

(v) A description of any prior experience the applicant may have in placing individuals in remote field and/or marine work environments. This includes, but is not limited to, recruiting, hiring, deployment, and personnel administration.

(vi) A description of the applicant's ability to carry out the responsibilities and duties of a scallop fishery observer services provider as set out under paragraph (h)(2) of this section, and the arrangements to be used.

(vii) Evidence of holding adequate insurance to cover injury, liability, and accidental death for observers during their period of employment (including during training). Workers' Compensation and Maritime Employer's Liability insurance must be provided to cover the observer, vessel owner, and observer provider. The minimum coverage required is \$5 million. Observer service providers shall provide copies of the insurance policies to observers to display to the vessel owner, operator, or vessel manager, when requested.

(viii) Proof that its observers, either contracted or employed by the service provider, are compensated with salaries that meet or exceed the Department of Labor (DOL) guidelines for observers. Observers shall be compensated as a Fair Labor Standards Act (FLSA) non-exempt employees. Observer providers shall provide any other benefits and personnel services in accordance with the terms of each observer's contract or employment status.

(ix) The names of its fully equipped, NMFS/NEFOP certified observers on staff or a list of its training candidates (with resumes) and a request for a NMFS/NEFOP Sea Scallop Observer Training class (minimum class size of eight).

(x) An Emergency Action Plan (EAP) describing its response to an 'at sea' emergency with an observer, including, but not limited to, personal injury, death, harassment, or intimidation.

(4) Application evaluation.

(i) NMFS shall review and evaluate each application submitted under paragraphs (h)(2) and (h)(3) of this section. Issuance of approval as an observer provider shall be based on completeness of the application, and a determination of the applicant's ability to perform the duties and responsibilities of a sea scallop fishery observer service provider as demonstrated in the application information. A decision to approve or deny an application shall be made by NMFS within 15 days of receipt of the application by NMFS.

(ii) If NMFS approves the application, the observer service provider's name will be added to the list of approved observer service providers found on NMFS website specified in paragraph (g)(4) of this section and in any outreach information to the industry. Approved observer service providers shall be notified in writing and provided with any information pertinent to its participation in the sea scallop fishery observer program.

(iii) An application shall be denied if NMFS determines that the information provided in the application is not complete or the evaluation criteria are not met. NMFS shall notify the applicant in writing of any deficiencies in the application or information submitted in support of the application. An applicant who receives a denial of his or her application may present additional information to rectify the deficiencies specified in the written denial, provided such information is submitted to NMFS within 30 days of the applicant's receipt of the denial notification from NMFS. In the absence of additional information, and after 30 days from an applicant's receipt of a denial, an observer provider is required to resubmit an application containing all of the information required under the application process specified in paragraph (h)(3) of this section to be re-considered for being added to the list of approved observer service providers.

(5) Responsibilities of observer service providers.

(i) An observer service provider must provide observers certified by NMFS/NEFOP pursuant to paragraph (i) of this section for deployment in the sea scallop fishery when contacted and contracted by the owner, operator, or vessel manager of a vessel fishing in the scallop fishery unless the observer service provider refuses to deploy an observer on a requesting vessel for any of the reasons specified at paragraph (viii) of this section.

(ii) An observer service provider must provide to each of its observers:

(A) All necessary transportation, including arrangements and logistics, of observers to the initial location of deployment, to all subsequent vessel assignments, and to any debriefing locations, if necessary;

(B) Lodging, per diem, and any other services necessary for observers assigned to a scallop vessel or to attend a NMFS/NEFOP Sea Scallop Observer Training class;

(C) The required observer equipment, in accordance with equipment requirements listed on NMFS website specified in paragraph (g)(4) of this section under the Sea Scallop Program, prior to any deployment and/or prior to NMFS observer certification training; and

(D) Individually assigned communication equipment, in working order, such as a cell phone or pager, for all necessary communication. An observer service provider may alternatively compensate observers for the use of the observer's personal cell phone or pager for communications made in support of, or necessary for, the observer's duties.

(iii) *Observer deployment logistics.* Each approved observer service provider must assign an available certified observer to a vessel upon request. Each approved observer service provider must provide for access by industry 24 hours per day, 7 days per week, to enable an owner, operator, or manager of a vessel to secure observer coverage when requested. The telephone system must be monitored a minimum of four times daily to ensure rapid response to industry requests. Observer service providers approved under paragraph (h) of this section are required to report observer deployments to NMFS daily for the purpose of determining whether the predetermined coverage levels are being achieved in the scallop fishery.

(iv) *Observer deployment limitations.* Unless alternative arrangements are approved by NMFS, an observer provider must not deploy any observer on the same vessel for two or more consecutive deployments, and not more than twice in any given month. A certified observer's first deployment shall be on a scallop closed area trip and the resulting data shall be immediately edited, and approved, by NMFS prior to any further deployments of that observer.

(v) *Communications with observers.* An observer service provider must have an employee responsible for observer activities on call 24 hours a day to handle emergencies involving observers or problems concerning observer logistics, whenever observers are at sea, stationed shoreside, in transit, or in port awaiting vessel assignment.

(vi) *Observer training requirements.* The following information must be submitted to NMFS to request a certified observer training class at least 30 days prior to the beginning of the proposed training class: Date of requested training; a list of observer candidates, with a minimum of eight individuals; observer candidate resumes; and a statement signed by the candidate, under penalty of perjury, that discloses the candidate's criminal convictions, if any. All observer trainees must complete a basic cardiopulmonary resuscitation/first aid course prior to the beginning of a NMFS/NEFOP Sea Scallop Observer Training class. NMFS may reject a candidate for training if the candidate does not meet the minimum qualification requirements as outlined by NMFS National Minimum Eligibility Standards for observers as described in paragraph (i)(1) of this section.

(vii) *Reports.*

(A) *Observer deployment reports.* The observer service provider must report to NMFS when, where, to whom, and to what fishery (open or closed area) an observer has been deployed, within 24 hours of their departure. The observer service provider must ensure that the observer reports back to NMFS its Observer Contract (OBSCON) data, as described in the certified observer training, within 12 hours of landing. OBSCON data are to be submitted electronically or by other means as specified by NMFS. The observer service provider shall provide the raw (unedited) data collected by the observer to NMFS within 72 hours of the trip landing.

(B) *Safety refusals.* The observer service provider must report to NMFS any trip that has been refused due to safety issues, e.g., failure to hold a valid USCG Commercial Fishing Vessel Safety Examination Decal or to meet the safety requirements of the observer's pre-trip vessel safety checklist, within 24 hours of the refusal.

(C) *Biological samples.* The observer service provider must ensure that biological samples, including whole marine mammals, turtles and sea birds, are stored/handled properly and transported to NMFS within 7 days of landing.

(D) *Observer debriefing.* The observer service provider must ensure that the observer remains available to NMFS, including NMFS Office for Law Enforcement, for debriefing for at least two weeks following any observed trip. An observer that is at sea during the 2-week period must contact NMFS upon his or her return, if requested by NMFS.

(E) *Observer availability report.* The observer service provider must report to NMFS any occurrence of inability to respond to an industry request for observer coverage due to the lack of available observers on staff by 5 pm, Eastern Standard Time, of any day on which the provider is unable to respond to an industry request for observer coverage.

(F) *Other reports.* The observer provider must report possible observer harassment, discrimination, concerns about vessel safety or marine casualty, observer illness or injury, and any information, allegations, or reports regarding observer conflict of interest or breach of the standards of behavior must be submitted to NMFS within 24 hours of the event or within 24 of learning of the event.

(viii) *Refusal to deploy an observer.*

(A) An observer service provider may refuse to deploy an observer on a requesting scallop vessel if the observer service provider does not have an available observer within 72 hours of receiving a request for an observer from a vessel.

(B) An observer service provider may refuse to deploy an observer on a requesting scallop vessel if the observer service provider has determined that the requesting vessel is inadequate or unsafe pursuant to the reasons described at §600.746.

(C) The observer service provider may refuse to deploy an observer on a scallop vessel that is otherwise eligible to carry an observer for any other reason including failure to pay for previous observer deployments, provided the observer service provider has received prior written confirmation from NMFS authorizing such refusal.

(6) *Limitations on conflict of interest.* An observer service provider:

(i) Must not have a direct or indirect interest in a fishery managed under Federal regulations, including, but not limited to, a fishing vessel, fish dealer, fishery advocacy group, and/or fishery research;

(ii) Must assign observers without regard to any preference by representatives of vessels other than when an observer will be deployed; and

(iii) Must not solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value from anyone who conducts fishing or fishing related activities that are regulated by NMFS, or who has interests that may be substantially affected by the performance or nonperformance of the official duties of observer providers.

(7) *Removal of observer service provider from the list of approved observer service providers.* An observer provider that fails to meet the requirements, conditions, and responsibilities specified in paragraphs (h)(5) and (h)(6) of this section shall be notified by NMFS, in writing, that it is subject to removal from the list of approved observer service providers. Such notification shall specify the reasons for the pending removal. An observer service provider that has received notification that it is subject to removal from the list of approved observer service providers may submit information to rebut the reasons for removal from the list. Such rebuttal must be submitted within 30 days of notification received by the observer service provider that the observer service provider is subject to removal and must be accompanied by written evidence that clearly disproves the reasons for removal. NMFS shall review information rebutting the pending removal and shall notify the observer service provider within 15 days of receipt of the rebuttal whether or not the removal is warranted. If no response to a pending removal is received by NMFS, the observer service provider shall be automatically removed from the list of approved observer service providers. The

decision to remove the observer service provider from the list, either after reviewing a rebuttal, or if no rebuttal is submitted, shall be the final decision of NMFS and the Department of Commerce. Removal from the list of approved observer service providers does not necessarily prevent such observer service provider from obtaining an approval in the future if a new application is submitted that demonstrates that the reasons for removal are remedied. Certified observers under contract with an observer service provider that has been removed from the list of approved service providers must complete their assigned duties for any scallop trips on which the observers are deployed at the time the observer service provider is removed from the list of approved observer service providers. An observer service provider removed from the list of approved observer service providers is responsible for providing NMFS with the information required in paragraph (h)(5)(vii) of this section following completion of the trip. NMFS may consider, but is not limited to, the following in determining if an observer service provider may remain on the list of approved observer service providers:

- (i) Failure to meet the requirements, conditions, and responsibilities of observer service providers specified in paragraphs (h)(5) and (h)(6) of this section;
- (ii) Evidence of conflict of interest as defined under paragraph (h)(3) of this section;
- (iii) Evidence of criminal convictions related to:
 - (A) Embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements or receiving stolen property; or
 - (B) The commission of any other crimes of dishonesty, as defined by state law or Federal law that would seriously and directly affect the fitness of an applicant in providing observer services under this section;
- (iv) Unsatisfactory performance ratings on any Federal contracts held by the applicant; and
- (v) Evidence of any history of decertification as either an observer or observer provider.

3.3.4 Observer certification

If this section is adopted, an observer service must meet certain standards set by the NMFS Observer Program. The details of the certification process are described in the regulatory text below. The intent of this certification process is to maintain quality control of the data collected through non-contracted vendors. This provision allows NMFS to maintain standards and data quality control in a non-contractual way. NMFS still trains observers and would have the authority to decertify an observer provider if warranted.

(i) [Effective 6/16/06–12/13/06] *Observer certification.*

(1) To be certified, employees or sub-contractors operating as observers for observer service providers approved under paragraph (h) of this section must meet NMFS National Minimum Eligibility Standards for observers. NMFS National Minimum Eligibility Standards are available at the National Observer Program website: <http://www.st.nmfs.gov/st4/nop/>.

(2) *Observer training.* In order to be deployed on any scallop vessel, a candidate observer must have passed a NMFS/NEFOP Sea Scallop Fisheries Observer Training course. If a candidate fails training, the candidate shall be notified in writing on or before the last day of training. The notification will indicate the reasons the candidate failed the training. Observer training shall include an observer training trip, paid for as part of the observer's training, aboard a scallop vessel with a trainer. A certified observer's first deployment shall be on a scallop closed area trip and the resulting data shall be immediately edited, and approved, by NMFS prior to any further deployments of that observer.

(3) *Observer requirements.* All observers must:

- (i) Have a valid NMFS/NEFOP fisheries observer certification pursuant to paragraph (i)(1) of this section;
- (ii) Be physically and mentally capable of carrying out the responsibilities of an observer on board scallop vessels, pursuant to standards established by NMFS. Such standards are available from NMFS

website specified in paragraph (g)(4) of this section and shall be provided to each approved observer service provider; and

(iii) Have successfully completed all NMFS-required training and briefings for observers before deployment, pursuant to paragraph (i)(2) of this section.

(4) *Probation and decertification.* NMFS has the authority to review observer certifications and issue observer certification probation and/or decertification as described in NMFS policy found on the website at: <http://www.nefsc.noaa.gov/femad/fsb/>.

(5) *Issuance of decertification.* Upon determination that decertification is warranted under paragraph (i)(3) of this section, NMFS shall issue a written decision to decertify the observer to the observer and approved observer service providers via certified mail at the observer's most current address provided to NMFS. The decision shall identify whether a certification is revoked and shall identify the specific reasons for the action taken. Decertification is effective immediately as of the date of issuance, unless the decertification official notes a compelling reason for maintaining certification for a specified period and under specified conditions. Decertification is the final decision of NMFS and the Department of Commerce and may not be appealed.

3.4 ADDITIONAL MEASURES NOT INCLUDED IN THE EMERGENCY ACTION THAT WOULD IMPROVE THE PROGRAM

[The Council does not have to consider these at this point. These issues were discussed at the last PDT meeting as potential ways to improve the program implemented by Emergency Action – if it is determined that consideration of these measures will delay the amendment process they are not critical aspects of the program and can be considered in a later action, i.e. Amendment 14].

3.4.1 Differential possession limit and DAS calculation by scallop permit type

In an effort to improve the current industry funded observer program as implemented by the Emergency Action, this measure would change the reduced DAS accrual rate for open area trips or additional scallop catch per day in access areas for smaller vessels to make the current program more equitable. Specifically, higher possession limits and DAS accrual rates would be considered for vessels with smaller permit categories because there has been feedback that the current program is not effective for monitoring this sector of the scallop fleet. The PDT could develop a specific alternative that would include different possession limits and/or DAS accrual rates to make the program more equitable for smaller vessels.

Rationale: Feedback on the current program has been that the set aside in additional pounds in access areas, even more so, the DAS accrual rate for open area trips is not sufficient to cover the cost of an observer for smaller vessels. Fishing power for smaller vessels is less than larger vessels, so they may need a higher tradeoff to fund the cost of an observer. For example, all vessels in the current program are only charged 0.7 DAS if they carry an observer on an open area trip. Some have argued that the program does not work for smaller vessels because it takes them longer to land the poundage needed to cover the costs of an observer. In order to reduce the risk of biased sampling the Council may want to consider an alternative that would allocate different DAS accrual rates or possession limits per scallop permit category.

3.4.2 Permit the DAS accrual rate in open areas and/or possession limit in access areas to be adjusted by the Regional Administrator periodically throughout the year

This alternative would allow the Regional Administrator to adjust the DAS accrual rate and/or possession limits to be adjusted throughout the year to reflect changes in the market and fishery.

Rationale: If the rates adjust during the year they may be more responsive and potentially better reflect the actual cost of carrying an observer.

3.5 ADDITIONAL MEASURES THAT CAN BE IMPLEMENTED THROUGH FRAMEWORK ADJUSTMENT

3.5.1 Differential possession limit and DAS calculation by scallop permit type

If it is determined that considering this type of action (as described in Section 3.4.1) in this amendment will significantly slow down the process and prevent this amendment from being implemented in summer 2007, then this type of measure should be added to the list of frameworkable items so that a future framework could consider variable DAS accrual rates and/or possession limits for the industry funded observer program.