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**NEW ENGLAND FISHERY MANAGEMENT COUNCIL
MID-ATLANTIC FISHERY MANAGEMENT COUNCIL**

FINAL REPORT

NEFMC Herring Plan Development Team (PDT)
MAFMC Mackerel Fishery Management Action Team (FMAT)

May 22, 2012

Radisson Airport Hotel, Warwick RI

The New England Council's Herring Plan Development Team (PDT) met jointly with the Mid-Atlantic Council's Mackerel Fishery Management Action Team (FMAT) on May 22, 2012 in Warwick, RI to:

- Review the Draft Environmental Impact Statements (DEISs) for Amendment 5 to the NEFMC Herring Fishery Management Plan (FMP) and Amendment 14 to the MAFMC Mackerel FMP and provide technical recommendations for both Councils to consider during the selection of final management measures for these amendments (June Council meetings)
- Discuss/develop recommendations for industry-funded monitoring programs in Amendments 5 and 14
- Discuss issues associated with river herring bycatch and develop recommendations related to Amendments 5 and 14
- Discuss the overlap between the herring and mackerel fisheries and develop related recommendations for both Councils to consider during the selection of final management measures for Amendments 5 and 14

Meeting Attendance: Lori Steele, Herring PDT Chairman; Jason Didden, Mackerel FMAT Chairman; Rachel Neild, NEFMC Staff; Matt Cieri, Jon Deroba, Tim Cardiasmenos, Sara Weeks, Micah Dean, Jamie Cournane, Min-Yang Lee, Madeleine Hall-Arber, Carrie Nordeen, Lindsey Feldman, Aja Szumylo, Jamie Cournane; Chris Vonderweidt (ASMFC), Steve Correia (via Webinar) (Herring PDT Members); Kate Taylor (ASMFC), Lisa Hendrickson, Drew Kitts, (additional Mackerel FMAT Members); Rob Vincent (NMFS NERO), Dave Ellenton (Cape Seafoods), Jeff Kaelin (Lund's Fisheries), Pamela Lyons Gromen, Jud Crawford (Pew), and several other interested parties.

The meeting audio and presentations, where applicable, are available at:
http://www.mafmc.org/fmp/msb_files/msbAm14current.htm.

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After a brief round of introductions, Ms. Steele provided an update to the Herring PDT regarding the status of the Draft Amendment 5 document, the DEIS, public hearing process, and the timeline for final decision-making by the Council (June 19-21, 2012 NEFMC Meeting). Mr. Didden provided a similar update for Amendment 14 to the Mid-Atlantic Council’s Mackerel FMP, also scheduled for final-decision making at the June 12-14, 2012 MAFMC Meeting.

1.0 FMP ADJUSTMENTS

The PDT and FMAT discussed several components of Amendments 5 and 14, using the table provided in both DEIS documents, which identifies overlapping measures and outstanding consistency issues (see table in Amendment 5, *Overlap Between Amendment 14 to the Squid/Mackerel/Butterfish FMP (MAFMC) and Amendment 5 to the Herring FMP (NEFMC)*).

1.1 VESSEL REPORTING MEASURES

The overlapping vessel reporting measures include VTR/VMS reporting requirements and trip notification requirements. Many of the existing requirements for the herring fishery were implemented by NMFS through rulemaking in 2011, and the NERO supports implementation of consistent measures in the mackerel amendment. Several consistency issues were identified by the PDT and FMAT for consideration during final decision-making:

- Lead times for pre-trip notifications should be consistent across both the herring and mackerel fisheries. A 72-hour lead time was originally proposed for fleets that had previously very little observer coverage, so additional time was provided to address the geographical range of the fishery and uncertainty about the number of trips and the number of available observers (from service providers). As the programs have grown, more observers are available in more ports for more timely departures. Therefore, the PDT/FMAT recommends that the Councils consider adopting a 48-hour lead time for pre-trip notifications in both amendments.
- If the Councils adopt pre-trip notification requirements (for observer deployment), the language in the final amendment referring to a “pre-trip notification system” should be interpreted generally and not necessarily to mean the existing pre-trip notification system (PTNS) for the groundfish fishery. It may ultimately be more efficient to develop a new (more flexible/adaptable) pre-trip notification system.
- A pre-trip notification system can be costly (time, manpower, resources) and should only apply to the vessels targeted for observer coverage. The current pre-trip notification system includes two full-time staff members with others who fill in during evenings, weekends, and holidays. The system has to be available 24 hours a day, seven days a week. Currently, over 1,000 vessels call-in over 20,000 pre-trip notifications every year. While the notification system is helpful to the observer program in deploying observers more efficiently and reducing costs associated with dock tours and sending selection letters, it becomes inefficient and more costly (for the industry and government) if vessels that are not subject to observer coverage requirements are utilizing the system. The language in Amendment 5 should acknowledge that the notification system should link directly to the observer coverage requirements in the fishery as well as provide some flexibility to allow NMFS to notify vessels (perhaps annually) when there is a need to participate in the pre-trip notification program.

- Current pre-trip notification requirements for the herring fishery (72 hours) apply to Category A/B/C/D vessels fishing with midwater trawl gear in Areas 1A, 1B, and 3. These requirements were implemented as part of the haddock catch cap provisions in Framework 43/46 to the Groundfish FMP and may require modification for consistency purposes, depending on which notification requirements are adopted in Amendment 5 and to which vessels they apply.
- One outstanding issue that the PDT/FMAT identified relates to notification and reporting requirements for mixed herring/mackerel trips. Currently, there are VMS declarations for the herring fishery and Amendment 14 considers them for the mackerel fishery, but not for mixed trips. There is no pre-trip gear declaration proposed in the mackerel amendment, but there is one proposed in the herring amendment. The mackerel amendment is proposing daily VMS reporting, which is already required in the herring fishery. Implementing the same requirements for both fisheries may improve consistency. The Herring PDT/FMAT suggests that further consideration of a pre-trip “pelagic” or “herring/mackerel” mixed trip VMS declaration may be useful to streamline requirements for the industry, improve compliance, and enhance enforcement of regulations in both fisheries.

1.2 DEALER REPORTING MEASURES

The Dealer Reporting Measures in Amendment 5 and Amendment 14 include a requirement for dealers to accurately weigh all fish and several sub-options to clarify that requirement and possibly provide an additional cross check between VTR and dealer data. NERO staff expressed support for Option 2C, which would utilize the Fish Online system to allow vessel operators to verify their sales with the corresponding dealer reports. ACL/sub-ACL monitoring in the herring fishery relies on multiple data streams, and providing a cross-check between the dealers and the vessels at the first point of sale could reduce mis-matches between VTR and dealer data. This, in turn, could enhance real-time quota management as well as the end-of-the-year data reconciliation process. NERO staff noted that the Agency’s long-term goal is to make Fish Online more user-friendly and helpful for the industry to access catch data.

1.3 OTHER PROPOSED FMP ADJUSTMENTS

Before moving on, Ms. Steele asked the Herring PDT members for additional comments/discussion on the elements of the Amendment 5 catch monitoring program that do not overlap with the mackerel amendment. The PDT and FMAT briefly discussed measures to address transfers of herring at sea and agreed that issues related to reporting/monitoring of herring transferred at sea have largely been clarified between NMFS and the industry in recent years and that the amount of herring affected by this activity is minimal. The Herring PDT also agreed to update the permit numbers for the limited access mackerel program, for the Council to consider when selecting measures to (possibly) allow some limited access mackerel vessels with open access herring permits to fish under a possession limit higher than the current 3 mt.

Table 1 describes the anticipated mackerel limited access vessels and the Atlantic herring permits which are held (based on 2011 data – note that the application period for a limited access mackerel permit does not end until February 2013). The shaded cells represent the number of projected limited access mackerel vessels (by tier) that possess either a Category D (open access) herring permit or no herring permit. Currently, there are a total of 64 vessels with Herring Category D (open access) permits which are projected to qualify for a Limited Access mackerel permit; most of these vessels would qualify for a Tier 3 Mackerel permit. While many vessels may qualify, these vessels account for only a small amount of herring catch.

In recent years, about 95% of all Atlantic mackerel landed has been landed by vessels that are expected to qualify for a Tier 1 mackerel limited access permit. Based on the updated analysis of limited access qualifier, there are expected to be one Tier 1 mackerel vessel with a Category D herring permit (no expected Tier 1 mackerel vessels are without a herring permit of some kind) and 12 Tier 2 mackerel vessels with a Category D herring permit (no expected Tier 2 mackerel vessels are without a herring permit of some kind).

Table 1 Herring Permits Held by Anticipated Vessels Qualifying for Mackerel Limited Access Permits

		Herring Permit Category				
		A	B	C	D	None
Mackerel Tier	1	18	0	4	1	0
	2	0	1	4	12	0
	3	2	1	7	51	2
	4	14	2	26	1,392	319
	None	2	0	4	316	

Note: Data are preliminary; implementation of the mackerel limited access program is pending.

2.0 MEASURES TO MAXIMIZE SAMPLING AND ADDRESS NET SLIPPAGE

The Herring PDT/Mackerel FMAT discussed the measures under consideration in both amendments to maximize sampling at-sea and address net slippage.

- Under each of the measures selected to improve/maximize sampling at-sea (Section 3.2.2), language should be added/modified to clarify requirements for each gear type subject to the provisions (midwater trawl, purse seine, bottom trawl).
- The Herring PDT/Mackerel FMAT does not support the options under consideration in Amendment 5 to address net slippage that include a *catch deduction* for reasons previously discussed (may increase inconsistencies between data sets and complicate catch monitoring, not consistent with the goals and objectives of Amendment 5; potential consequence of closing a management area/triggering accountability measures and affecting vessels that may not have slipped catch; see February 24, 2011 Herring PDT Report for additional discussion).
- Overall, the PDT/FMAT noted that the options under consideration to address net slippage are somewhat ad hoc and reflect a general lack of understanding about the extent of problems related to net slippage. The PDT/FMAT support improved data collection and efforts to minimize unsampled/unobserved catch; many of the measures to address net slippage may not improve catch monitoring by minimizing unsampled catch or increasing the observers' ability to estimate the content and species composition of a bag, depending on how participants respond to the various measures. The PDT/FMAT reiterated its concerns about safety-at-sea and suggested that the Council consider issues related to National Standard 10 (Safety) when selecting final measures and providing its rationale. Moreover, there may be other reasons that the Council supports a trip termination measure to address net slippage; the Council should identify these reasons when selecting final management measures. The PDT/FMAT reiterated the importance of ensuring that observers are not placed in situations where they are perceived to be serving as enforcement agents.
- Requiring a Released Catch Affidavit may provide some additional information to evaluate the frequency and nature of slippage events in the fishery. The Council may want to consider implementing this requirement on all trips, not just trips with an observer on board. While it is not clear how effective enforcement of this requirement could be, it still could provide a low gain (in terms of additional information) for a relatively low burden. Although this information is already required to be reported on VTRs, an affidavit would create a separate, perhaps more detailed source of information to evaluate slippage.

2.1 CLOSED AREA I INFORMATION

- Only one slippage event has been observed in Closed Area I since the implementation of the rules in November 2009. The PDT/FMAT recognized that interpretation of this information needs further consideration, for example to understand the nature of slippage outside of Closed Area I and whether “Closed Area I Rules” have been successful in reducing slippage events. To do so, the PDT/FMAT briefly reviewed preliminary observer data summarizing “catch not brought on board” in the herring fishery during 2011 (see below).
- NEFOP staff on the Herring PDT investigated recent observer data more closely to evaluate the occurrence of slippage events outside of Closed Area I.

According to the Amendment 5 DEIS, there were 99 hauls observed in Closed Area I during 2010, under the new provisions for sampling catch, implemented in November 2009. There were no slippage events observed in these 99 hauls, and consequently no Released Catch Affidavits were submitted from the Closed Area I fishery in 2010. There appears to have been one released catch event (estimated 1,500 pounds) on a haul that ended (but did not begin) in Closed Area I.

In 2011, there were 28 hauls observed in the Closed Area I from vessels on declared Atlantic herring trips. These hauls represent less than three (3) vessels fishing, and therefore, the specific details cannot be released due to confidentiality restrictions. There were no partial or full slippage events documented in Closed Area I during 2011. There were 313 observed trips in all Atlantic Herring Management areas (trips defined by gear type and include purse seine and paired/single midwater trawl) in 2011, resulting in a total of 723 associated observed hauls.

2.2 PRELIMINARY 2011 OBSERVER DATA (INCLUDING CATCH NOT BROUGHT ON BOARD)

The following information was provided by NEFOP staff on the Herring PDT and updates some information provided in the Amendment 5 Draft EIS.

Table 2 summarizes coverage rates from the NEFOP for the 2007-2011 calendar years (also the herring fishing years) by gear type for all trips that landed greater than 2,000 pounds of Atlantic herring and updates Table 142 in the Amendment 5 DEIS. Forty six percent (46%) of total herring landings were observed during 2010. During the 2011 fishing year, the Northeast Fisheries Observer Program covered trips for about 55% of all midwater trawl Atlantic herring landings, 45% of pair trawl landings, 25% of purse seine landings, and 13% of bottom trawl herring landings.

Observer coverage of mackerel catch has generally been less in recent years, partially because the observer program used to select away from trips that target mackerel but still notified for herring (this was due to coverage needs for herring related to groundfish).

Table 2 Observer Program Coverage Rates for Trips Landing Greater than 2,000 pounds of Herring, 2007-2011

Year	Gear Type	Total Trips	Total Days	Total Herring Landed (lbs.)	Obs Trips	Obs Days	Obs Herring Kept (lbs.)	% trips obs	% days obs	% herring obs
2007	OTF	397	569	10,518,575	12	15	411,751	3%	3%	4%
2007	OTM	138	451	17,491,210	10	40	1,918,285	7%	9%	11%
2007	PTM	240	849	74,405,385	14	58	6,880,147	6%	7%	9%
2007	PUR	346	743	70,088,194	10	23	2,122,267	3%	3%	3%
2008	OTF	100	234	4,588,190	4	4	70,409	4%	2%	2%
2008	OTM	28	107	8,816,600	16	59	3,163,763	57%	55%	36%
2008	PTM	269	1044	110,453,766	46	176	27,211,668	17%	17%	25%
2008	PUR	232	550	59,211,542	27	64	6,941,134	12%	12%	12%
2009	OTF	180	306	9,647,215	11	15	554,579	6%	5%	6%
2009	OTM	50	242	13,875,075	16	69	3,747,316	32%	29%	27%
2009	PTM	356	1321	153,345,903	98	350	49,596,367	28%	26%	32%
2009	PUR	223	596	49,706,514	42	130	9,943,521	19%	22%	20%
2010	OTF	185	343	8,452,546	9	22	298,691	5%	6%	4%
2010	OTM	58	230	19,851,018	32	122	10,190,452	55%	53%	51%
2010	PTM	290	1129	98,165,321	128	545	47,528,352	44%	48%	48%
2011	OTF	175	368	9,449,163	24	59	1,208,293	14%	16%	13%
2011	OTM	61	165	17,647,500	27	91	9,758,411	44%	55%	55%
2011	PTM	295	1071	115,321,409	123	452	51,562,629	42%	42%	45%
2011	PUR	271	603	37,908,770	79	172	9,506,794	29%	29%	25%

OTF – small mesh bottom trawl; OTM – single midwater trawl; PTM – paired midwater trawl; PUR – purse seine

Herring is Atl Herring or Unk Herring

Day defined as (date land - date sail) + 1

Landings data from Vessel Trip Reports

Table 3, Figure 1, and Figure 2 on the following pages summarize data for the observer records (1140 unique hauls) in 2011 on limited access declared herring trips that included fish not brought on board. About 198 of these hauls were documented with “not enough fish to pump,” i.e., operational discards. Observers document operational discards as *Herring NK* if they are able to see the fish that are not pumped and confirm that the discards are all herring-bodied fish. Otherwise, the discards are documented as *Fish NK*. Data were pulled similar to the 2010 released catch/slippage data provided in the Draft Amendment 5 EIS (see Section 5.3.2.1, p. 413 of Amendment 5 DEIS for comparable 2010 data).

The total weight of fish not brought on board estimated by observers in 2011 was 1,041,211 pounds; this includes operational discards, which, although more frequent, generally represent very small amounts of fish.

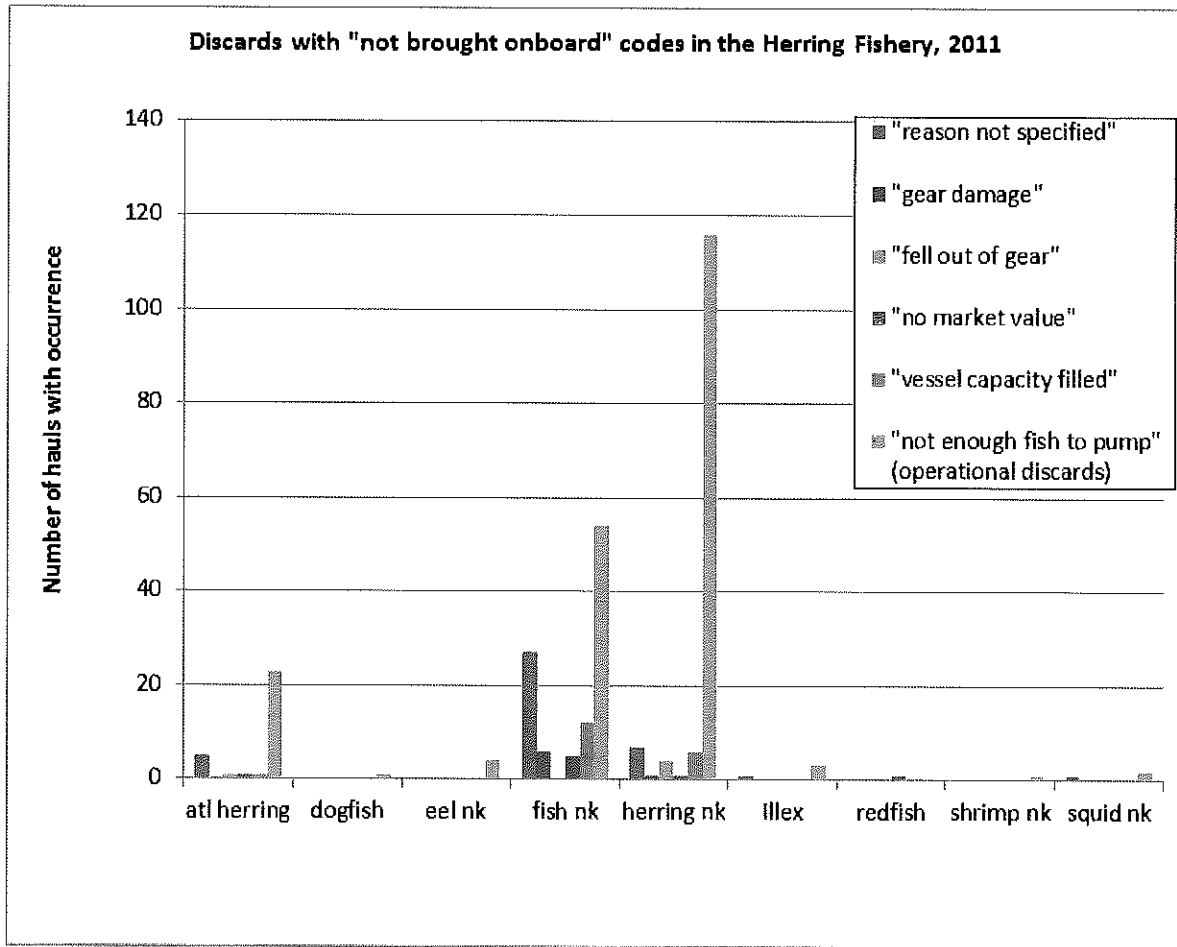
A review of the observer data indicate that in 2011, **78 out of 1,140 hauls** were observed on limited access declared herring trips to have experienced full or partial slippage events (catch not brought on board, not including operational discards). The ratio of total estimated catch not brought on board compared to the total observed catch on these vessels in 2011 was about 1.4% (this does not include fish that were brought on board and then discarded). By gear type, this ratio translates to 0.16% for bottom otter trawl (all areas), 5.31% for purse seine (Area 1A), 2.19% single midwater trawl (all areas), 0.11% pair trawl (Area 1A), 0.53% pair trawl (Area 3), and 0.48% pair trawl (Area 2).

Table 3 Summary of 2011 Observed Events on Limited Access Herring Vessels – Declared Herring Trips (by Number and Estimated Weight of Fish in lbs.) with “Fish Not Brought on Board” Codes

	species	"reason not specified"	"gear damage"	"fell out of gear"	"no market value"	"vessel capacity filled"	"not enough fish to pump" (operational discards)
Number of hauls with occurrence	atl herring	5	0	1	1	1	23
	dogfish	0	0	0	0	0	1
	eel nk	0	0	0	0	0	4
	fish nk	27	6	0	5	12	54
	herring nk	7	1	4	1	6	116
	lllex	1	0	0	0	0	3
	redfish	0	0	0	1	0	0
	shrimp nk	0	0	0	0	0	1
	squid nk	1	0	0	0	0	2
Estimated weight (lbs)	atl herring	2,754	0	10	10,000	500	1,947
	dogfish	0	0	0	0	0	80
	eel nk	0	0	0	0	0	860
	fish nk	339,170	394,000	0	68,400	108,500	11,398
	herring nk	43,700	300	170	10,000	32,700	16,248
	lllex	3	0	0	0	0	30
	redfish	0	0	0	400	0	0
	shrimp nk	0	0	0	0	0	1
	squid nk	10	0	0	0	0	30

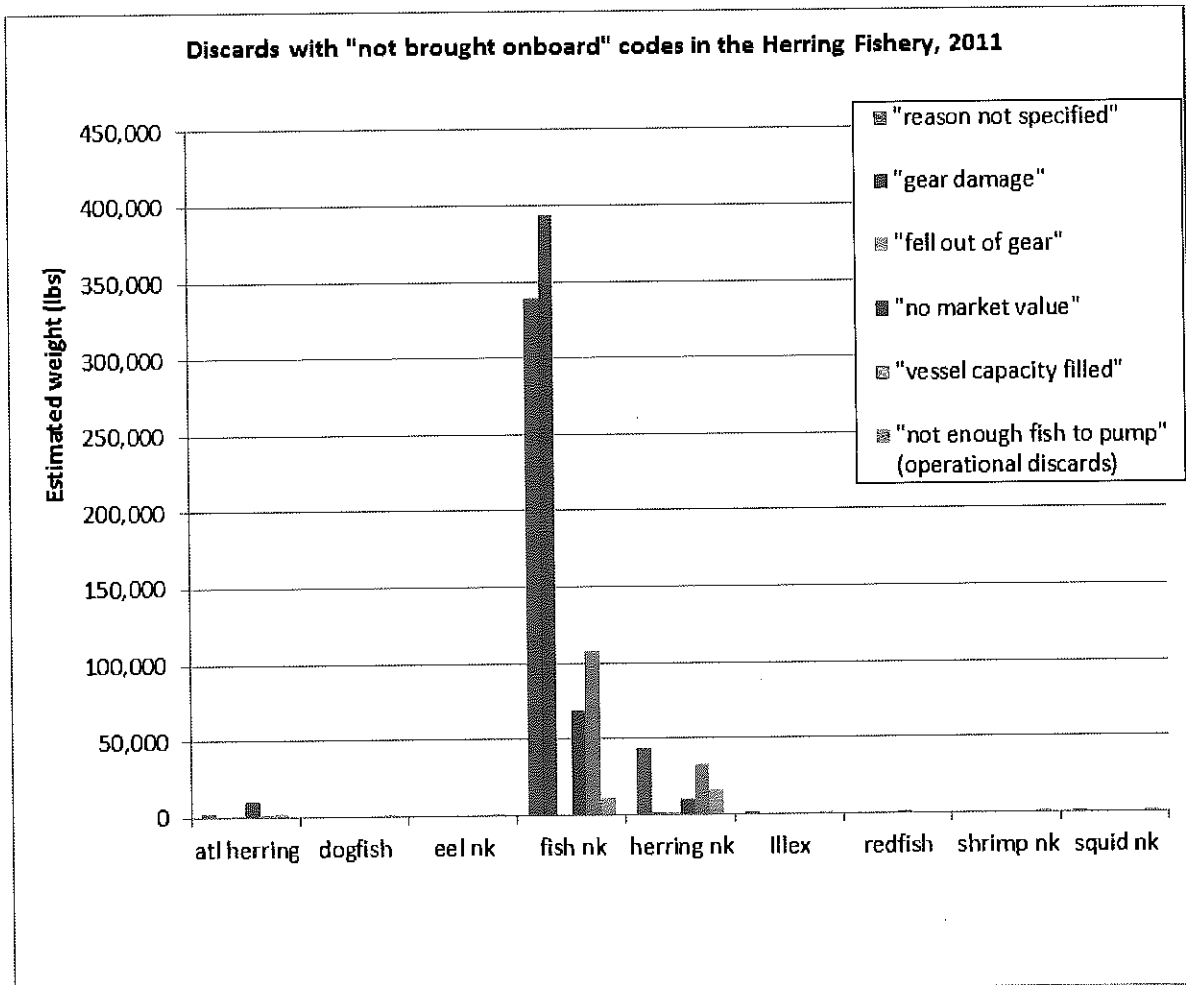
Note: Information in all columns except for the far right (“not enough fish to pump” (operational discards)) represents partial/full slippage events.

Figure 1 Observed Events on Limited Access Herring Vessels – Declared Herring Trips in 2011 with “Fish Not Brought on Board” Codes (by Species and Number of Hauls)



Note: All columns except for “not enough fish to pump” (operational discards) represent partial/full slippage events.

Figure 2 Observed Events on Limited Access Herring Vessels – Declared Herring Trips in 2011 with “Fish Not Brought on Board” Codes (By Species and Estimated Weight of Fish in Pounds)



Note: All columns except for “not enough fish to pump’ (operational discards)” represent partial/full slippage events.

There was almost no mackerel fishery in 2011, but in 2010 there were eight (8) observed mackerel trips (50% mackerel or over 100,000 pounds mackerel) that caught about 5.5 million pounds of fish (about 2 million pounds of mackerel and 3.3 million pound of herring) and had about 12,000 pounds of unobserved fish (“not brought on board”), some of which was specified by species but mostly consisted of “Fish, NK.”

3.0 ALTERNATIVES TO ALLOCATE OBSERVER COVERAGE AND OPTIONS FOR INDUSTRY-FUNDED CATCH MONITORING

Amy Van Atten from the Northeast Fisheries Observer Program (NEFOP) presented an overview of updated information about the NEFOP Fisheries Sampling Program and costs associated with both observer coverage and at-sea monitoring programs (which utilize service providers). The PDT and FMAT discussed cost issues associated with observers and at-sea monitors. Ms. Van Atten noted that the Atlantic herring fishery is the most complicated fishery in the Northeast Region to sample.

Observer costs throughout the Northeast region are higher than costs in other parts of the country for many reasons, including more complicated trip logistics, high levels of training required, and a high rate of trip cancellation. Observers on the west coast, for example, are often deployed for 30 days at a time, resulting in reduced travel expenses and less down time. Northeast region fisheries include many single and small boat day trips, which are spread across multiple states and remote ports. Frequent trip cancellations (due to poor weather or fishing conditions) also increase costs. Depending on how the program is structured, the per-day costs of an industry-funded catch monitoring program are not likely to be significantly less than the per-day costs of the NEFOP program.

It is possible that program costs can be lowered with adequate planning and design time. However, a successful industry-funded monitoring program will probably take a significant amount of time to develop and incorporate into the current management system. Careful attention must be paid to designing the program properly to ensure data quality, reduce troubleshooting with industry and service providers, increase efficiency, and reduce costs. While this should not delay the selection of final management measures and the completion of Amendments 5 and 14, it should be recognized by all parties that this element of the amendments may require more time for implementation than others. Ms. Van Atten's presentation explores several ways to reduce costs and compares costs between utilizing NEFOP observers and at-sea monitors; this information will be presented to the Herring Committee at its June 6 meeting.

Mr. Didden also presented a preliminary vessel by vessel analysis that appears to show that while over 2008-2010 vessels that have over 500 pounds of river herring observed caught in one year may have over 500 pounds caught in another, the vessels varied considerably from year to year in terms of both the absolute quantity of river herring caught and in terms of the ratio of river herring caught to retained catch. This analysis was in response to a comment submitted on April 3 by Jim Ruhle. Due to the limited time available for new analysis the findings would have to be categorized as very preliminary. In addition, targeting of individual "problem" vessels might be out of the scope of alternatives considered in Amendments 5 and 14. Additional work on this issue may suggest measures that could be appropriate for future consideration.

3.1 MONITORING PROGRAM – GOALS AND OBJECTIVES

The New England Council identified the following goals (numbered) and objectives (bulleted) of the catch monitoring program established in Amendment 5 to the Herring FMP:

1. **To create a cost effective and administratively feasible program for provision of accurate and timely records of catch of all species caught in the herring fishery;**
 - Review federal notification and reporting requirements for the herring fishery to clarify, streamline, and simplify protocols;
2. **Develop a program providing catch of herring and bycatch species that will foster support by the herring industry and others concerned about accurate accounts of catch and bycatch, i.e., a well-designed, credible program;**
 - Avoid prohibitive and unrealistic demands and requirements for those involved in the fishery, i.e., processors and fishermen using single and paired midwater trawls, bottom trawls, purse seines, weirs, stop seines, and any other gear capable of directing on herring;
 - Improve communication and collaboration with sea herring vessels and processors to promote constructive dialogue, trust, better understanding of bycatch issues, and ways to reduce discards;
 - Eliminate reliance on self-reported catch estimates;
3. **Design a robust program for adaptive management decisions;**
4. **Determine if at-sea sampling provides bycatch estimates similar to dockside monitoring estimates;**
 - Assure at-sea sampling of at-sea processors' catches is at least equal to shoreside sampling;
 - Reconcile differences in federal and states' protocols for dockside sampling, and implement consistent dockside protocols to increase sample size and enhance trip sampling resolution.

The Mid-Atlantic Council's goals in terms of monitoring are:

"Implement Effective RH/S Catch Monitoring" – Purpose A is to consider alternatives that would implement monitoring programs for the Mackerel, Squid, and Butterfish (MSB) fisheries that are sensitive enough and robust enough to the spatial and temporal variability of River Herring/Shad (RH/S) distributions so that good RH/S catch estimates can be generated.

In 2008, two researchers from the Archipelago organization in British Columbia authored a paper evaluating monitoring and reporting needs for sectors in New England (McElderry and Turriss 2008). In the paper, they urged that, “the design of an effective and comprehensive monitoring program is guided by having a clear understanding of the objectives for the program.” Objectives were broken into categories based on whether they were objectives of managers or industry participants, and some were considered to be shared while others were distinct between the two groups. The objectives for managers included TAC management, quantifying total mortality, species and area management, timely information, improved stock assessment, and improved compliance. Industry’s monitoring objectives were listed as timely and accurate data, a level playing field, affordability, and economic benefits.

Once program goals and minimum data needs are determined, calculations can be done to determine the most cost-effective way to achieve the desired outcomes.

3.2 NEFOP SEA SAMPLING VS. AT-SEA MONITORING

The goals and objectives for the New England catch monitoring program (above) are relatively broad in scope. Identifying a narrower set of goals and objectives for an industry-funded monitoring program and reducing sampling requirements could reduce costs and enhance the program’s effectiveness in the earlier years. Data generated by a more simplified at-sea monitoring (ASM) program may not be comparable/additive to NEFOP observer data, but may still provide some critical information to enhance catch monitoring and address the goals and objectives identified by the Councils. Moreover, while NEFOP and ASM data may not be additive, they could still be utilized for the same purposes because they should meet the same data quality standards (i.e. quota monitoring, estimating bycatch, stock assessment, depending on the goals and objectives). Developing a more simplified ASM program funded by the industry could be an intermediate step towards a more comprehensive long-term program that can evolve adapt to meet the monitoring and data collection needs of management, science, and the industry.

After the implementation of Amendment 5 (and Amendment 14), Federally-funded observer coverage would continue through the NEFOP at a baseline level (currently defined by the SBRM process), so an industry-funded program could be developed separately and focused, at least at first, on a more narrow set of sampling objectives. Biological sampling could be eliminated for ASMs, reducing training and gear costs. ASMs could be tasked with documenting and providing detailed information on slippage events in the fishery (as one objective, for example). However, the PDT and FMAT recognize that “data creep” (data collection needs, which continue to increase) and multiple priorities will likely make it more challenging shave costs in this area.

Table 4 provides perspective on some example goals for a monitoring program; these examples have been gleaned from a literature review (background work for the groundfish program) and include some goals that were identified through the NEFMC sector workshop (2011). Some additional examples that relate directly to the herring fishery have been provided for consideration relative to an at-sea monitoring (ASM) program versus the NEFOP observer program. All of the example goals provided in the table below are currently being addressed by the NEFOP sea sampling program.

Table 4 Example Goals for Monitoring Programs

Category	Goal
Science	Determine total catch and effort of target or regulated species
Science	Determine total catch and effort of non-target or non-regulated species
Science	Biological sampling
Science	Environmental parameters
Science	Protected species monitoring/sampling
Science	Determine discard rate
Science	Quantify total mortality including discards
Science	Determine catch by area
Science	Obtain accurate catch and effort information
Compliance	Area and gear restrictions
Compliance	Illegal discarding
Compliance	Prohibited species
Compliance	Monitor overall ACL
Other	Reduce management and/or biological uncertainty
Herring	Document slippage
Herring	Document at-sea discards
Herring	XXX

Table 5 generally describes the differences between Northeast Fisheries At-Sea Monitoring Program Monitors (ASM) and Northeast Fisheries Observer Program (NEFOP) Observers (or NMFS-approved observers). Both programs are developed and overseen by NMFS Fisheries Sampling Branch at the Northeast Fisheries Science Center (NEFSC). The main difference between the two is that monitors collect a reduced set of data, thereby reducing training time, gear requirements, and internal support resources. NEFOP observers and ASM monitors are trained by the NEFSC. Data collected by both programs are processed by the NEFSC. Observers and monitors identify and record all species caught, are trained in sub-sampling methodology, and receive advanced training in vessel safety.

Table 5 Differences Between NMFS-Approved Observers and At-Sea Monitors

TASKS/ REQUIREMENTS	ASM MONITOR	NEFOP OBSERVER/NMFS-APPROVED OBSERVER
BACHELOR'S DEGREE	NO (High School diploma or equivalency)	YES
NMFS TRAINING DURATION	11 days	15 days
DATA COLLECTION	Basic	Advanced Ex: sighting logs
BIOLOGICAL SAMPLING	None	Mammals, turtles, birds, fish, and crustaceans
AMOUNT OF GEAR ISSUED	44 items	83 items
GEAR CHARACTERISTICS INFORMATION	Basic	Advanced Ex: record intricate gear configurations
PERFORMANCE-BASED BONUS PROGRAM	No	Yes (Discontinued)
SUPPLEMENTAL RESEARCH PROJECTS	No	Yes
RECORDING DATA	Paper + Electronic (Paper worksheets, iPaq)	Paper + Electronic (Paper Logs, iPaq, Rugged laptops)
TRAINING TRIP REQUIREMENTS	Not required, however added to training and shadow trip program	Yes, 4 are required
TRAINING PROVIDER	NEFSC	NEFSC
DATA PROCESSING	NEFSC Data availability = ~7 days	NEFSC Data availability = ~90 days

The costs of the monitoring program may be reduced through ASMs in several ways: (1) ASMs can be contracted for shorter time frames (2 years versus 5 years); (2) the duties of ASMs can be more narrowly defined geographically, temporally, or through selection of vessels/gear types; (3) the multi-vendor contract model may encourage competition and result in reduced program costs; (4) ASMs do not have defined meal reimbursement policies or monetary data quality bonus incentives; and (5) training and gear requirements/costs may be reduced by removing biological sampling requirements and/or other sampling depending on the goals/objectives.

3.3 MONITORING PROGRAM – POTENTIAL COSTS

The costs of an industry-funded monitoring program will depend on the details – scale, number of vessels, goals and objectives. Analysis in the Draft Amendment 5 EIS evaluates the costs of observer coverage and impacts of industry-funded at-sea monitoring based on an assumed rate of \$1,200 per sea day. This could be considered an upper bound on costs and is based on the objective of sampling the fishery to generate data that mirror the NEFOP observer data (i.e., to generate accurate accounts of catch and bycatch in the fishery).

The Herring PDT and Mackerel FMAT agree that the dockside monitoring program proposed in Amendment 14 to the Mackerel FMP is likely to provide a significant cost savings for collecting catch information for the mackerel fishery. The PDT/FMAT support future reconsideration of a dockside monitoring program for the herring fishery.

Currently, NMFS does not have legislative authority to collect funds to support government-contracted observer coverage, with very limited exceptions (North Pacific). A mix of government and industry funding is utilized by some programs in the U.S., including the North Pacific Groundfish Observer Program (NPGOP), Northeast Fisheries Observer Program (NEFOP), and At-Sea Hake Observer Program (A-SHOP).

North Pacific Groundfish Observer Program (NPGOP)

- Largest industry-funded program, est. 1989
- Groundfish vessels 60-125 feet (30%), groundfish vessels greater than 125 feet (100%), shoreside processors 500-1000 mt groundfish per month (30%), shoreside processors more than 1000 mt groundfish per month (100%)
- NMFS – operational oversight, certification training, identification of observer duties and sampling methods, observer debriefing, data management, observer program management
- Industry (vessel owners, processing plant owners) – observer costs (wages)
- In 2009, the industry provided approx. \$13M to support observer deployment and data collection, and NMFS provided about \$4.7M to support the program.

At-Sea Hake Observer Program (A-SHOP)

- Est. 2004
- 100% coverage catcher-processors and motherships (2 observers on vessels 125 feet or greater)
- NMFS – operational oversight, certification training, identification of observer duties and sampling methods, observer debriefing, data management, observer program management

Atlantic Sea Scallop Observer Program

- Est. 2006 through Emergency Rule and permanently implemented in A13 to monitor bycatch of yellowtail flounder in Scallop Access Areas, and interactions with sea turtles
- 10% of all scallop trips in Access Areas and limited access trips in open areas
- Current service providers – AIS (70 observers), EWTS (26 observers), Fathoms Research (8 observers)

Northeast Multispecies (Groundfish) Monitoring Program (Work in Progress)

- Regulations pertaining to an industry-funded monitoring program for the multispecies (groundfish) fishery were implemented in Amendment 16 to the Northeast Multispecies (Groundfish) FMP.
- NEFOP funds increased in FY2010 for groundfish sector monitoring; funding limited for future years, and shifting towards industry-funded program
- Current service providers (paid directly by NEFOP through contracts) – AIS (43 observers), EWTS (26 observers), and MRAG (28 observers)

Based on Groundfish Fishing Year 2010, the overall cost at-sea monitoring sea day cost is \$917.95 (see Table 6). The costs for an at-sea monitor can be separated into two components: at-sea and infrastructure. At-sea monitors are paid a sea day rate and an hourly rate when they're on land or extended travel. They use an average of 12 hours per day for at sea time. The average at-sea monitor sea day wages, insurance, and benefits comprise the highest percentage of costs at 68.68% (\$630.44). Travel and training are smaller components at 3.52% (\$32.28) and 4.08% (37.46) respectively. Infrastructure and support costs account for the remainder. These include coordination of trip logistics, gear and equipment, communication and shipping, business fees and taxes. Sector contract labor including training and data processing costs \$114.17 (12.44%). Support contracts for expert trainers, vessel training trips, freezers and facilities cost \$37.88 (4.13%). Gear costs another \$8.85 (0.96%). FSB FTE labor costs \$50.86 (5.54%) and travel is \$6.00 (0.65%).

Table 6 NEFOP and ASM Cost Comparison for Groundfish Fishing Year 2010

CALCULATION OF SEADAY COSTS FOR ASM AND NEFOP (Based on Groundfish Fishing Year 2010)							
ASM COSTS	ESTIMATED TOTAL COST PER SEADAY	AT-SEA PORTION OF SEADAY COST	Percentages	NEFOP COSTS	ESTIMATED TOTAL COST PER SEADAY	AT-SEA PORTION OF NEFOP SEADAY COST	Percentages
ASM Seaday (avg)	\$630.44	\$700.19	68.68%	NEFOP Seaday	\$741.88		49.88%
ASM Travel (avg)	\$32.28		3.52%	NEFOP Travel	\$59.38		3.99%
ASM Training (avg)	\$37.46		4.08%	NEFOP Training	\$39.70		2.67%
Sector Contract Labor (Training and Data Processing)	\$114.17	INFRASTRUCTURE PORTION OF ASM SEADAY COST	12.44%	NEFOP Meals	\$12.55	\$896.14	0.84%
Support Contracts (Expert Trainers, Vessel Training Trips, Freezers, Facility)	\$37.88		4.13%	NEFOP Data Quality Rewards	\$41.22		2.77%
ASM Gear	\$8.85		0.96%	NEFOP Land Hours	\$1.41		0.09%
FSB FTE Labor	\$50.85		5.54%	NEFOP Contract Labor	\$165.98		11.16%
FSB FTE Travel	\$6.00		0.65%	Support Contracts	\$37.88		2.55%
Center Overhead	\$0.00		0.00%	NEFOP Gear	\$13.65		0.92%
*SUPER LOADED ASM SEADAY		\$917.95		FSB FTE Labor	\$170.06		11.43%
				FSB FTE Travel	\$6.00		0.40%
				Center Overhead	\$197.51	\$393.57	13.28%
				*SUPER LOADED NEFOP SEADAY		\$1,487.22	

3.4 ATLANTIC HERRING VESSELS (BACKGROUND INFORMATION)

Table 7 summarizes the number of federally permitted Atlantic herring vessels by Amendment 1 permit category and length. There were 101 vessels with limited access permits during the 2010 fishing year. The majority of participants in the directed Atlantic herring fishery are Category A and B vessels. There was a reduction of three vessels (from 49 to 46) in the limited access directed fishery (Categories A and B) in 2010 from the previous year, possibly due to substantial cuts in herring catch limits in the 2010-2012 specifications (see following subsections for more information). There are 55 limited access incidental catch permit holders in the fishery, and over 2,000 open access permit holders.

Table 7 Number of Vessels by Atlantic Herring Permit Category, 2008-2010

Herring Permit Category	Year		
	2008	2009	2010
A	45	45	42
B	5	4	4
C	58	55	55
D	2,409	2,394	2,258

Source: NMFS Permit databases, May 2011

As Table 8 demonstrates, in 2010, 30 out of the 46 vessels (65%) that held a Category A or B herring permit (limited access directed fishery) were “active,” meaning they landed herring within that year. Twenty seven percent (27%) of Category C vessels (limited access incidental catch) landed herring in 2010, while only 4% of Category D permits landed herring in 2010. However, the number of Category D permits that landed herring increased significantly in 2010 to 94, up from 67/68 in 2009/2008 respectively.

Table 8 “Active” vs. “Latent” Vessels by Category, 2008-2010

Category	2008			2009			2010		
	Total # of Vessels	Active Vessels	Difference	Total # of Vessels	Active Vessels	Difference	Total # of Vessels	Active Vessels	Difference
A/B	50	30	20	49	31	18	46	30	16
C	58	10	48	55	13	42	55	15	40
D	2,409	68	2,341	2,394	67	2,327	2,258	94	2,164

Note: Active is defined in the above table as having landed one pound or more Atlantic herring during that fishing year.

3.5 IMPORTANT CONSIDERATIONS

The Herring PDT and Mackerel FMAT discussed various elements of a draft discussion paper identifying issues associated with developing an industry-funded monitoring program, which would provide information about costs associated with observer coverage and at-sea monitoring and will discuss some possible approaches to developing an industry-funded program for the herring fishery. Following the meeting, it was agreed that the elements of the discussion paper would be incorporated into this report.

The Herring PDT and Mackerel FMAT note the following important considerations:

- Because of the need for an industry-funded catch monitoring program to evolve and change to meet the needs of science, management, and the industry, it will be important to structure an industry-funded program such that it can be modified to incorporate various monitoring approaches, possibly including dockside monitoring and electronic monitoring in the future. Evaluation of the existing/evolving monitoring program and continued research into new technologies enhances industry participation in the program and allows for a more bottom-up approach to catch monitoring. The PDT and FMAT also suggest consideration of a “Pelagic Industry-Funded Monitoring Program” to further align long-term management of the herring and mackerel fisheries. This program could incorporate the at-sea monitoring components of both amendments and the shoreside monitoring component of Amendment 14, to improve coordination and allow monitoring to advance in the most cost-effective and efficient manner for both fisheries.
- An industry-funded catch monitoring program, if developed for the herring fishery, should be “**adaptable**,” i.e., structured so that additional elements like shoreside and electronic monitoring may be incorporated in the future.
- The **delineation of duties** for each party in a monitoring program needs to be considered carefully in order to ensure accuracy of data, elimination of redundancy, and cost reduction.
- It may be prudent to consider a more **comprehensive approach** to developing industry-funded monitoring programs for all fisheries in the Northeast Region.
- **Communication networks** are important, and notification requirements are essential.
 - For 100% coverage, the sampling frame can be determined through vessel permits. For less than 100% coverage, the PTNS or similar system would be utilized to allow NMFS/NEFOP to select trips to cover and deploy observers
 - Within Agency – permit information and adjustments to coverage levels and vessels subject to monitoring requirements
 - NMFS and Industry – requirements for coverage, notifications, observer health and safety regulations, issuance of waivers
 - NMFS and Service Providers – roles and responsibilities clearly defined, coverage levels and priorities, vessels subject to requirements, how/when information will be transmitted
 - Industry and Service Providers – fees to be charged per trip, what costs are included, billing and payment procedures, how late payments will be handled.

- **Nonpayment issues** may be a concern. Observer service providers may refuse to deploy observers on a particular vessel if that vessel has outstanding balances due. Regulations may be implemented to protect observer service providers from fishermen who refuse to pay their observer service charges.
- A close working relationship between NMFS Office of Law Enforcement (OLE) and the observer program is critical to ensure that vessels comply with observer requirements, and to maximize the **safety** of observers.

Potential Provisions/Requirements

There are several potential provisions/requirements that the Council could consider implementing as part of an industry-funded monitoring program, to try to address some of the challenges (administration, communication, sampling, observer certification, training, conflict of interest, safety, equipment, data quality) that have been experienced with other industry-funded programs.

- Requirement for the observer service provider to report observer deployments daily to NMFS to allow monitoring of pre-determined coverage levels
- Requirement for observer service provider to report to NMFS the failure to respond to an industry request for observer coverage due to lack of available observers
- NMFS could provide an estimated number of observer sea days for the fishing year to all service providers
- NMFS could maintain a list of certified service providers and distribute this list to all vessels participating in the fishery
- Requirement for observer service provider to submit to NMFS, if requested, a copy of each type of signed and valid contract between the provider and the vessel
- Requirement for observer service provider to submit observer deployment and logistics reports to NMFS on a weekly basis
- Requirement for service providers to sign, under penalty of perjury, a conflict of interest statement
- Daily reports by the providers to NMFS – summary trip data must be reported back to NMFS within 24 hours of landing; raw data must be provided to NMFS within a certain period of time after landing; observer must be available to NMFS for debriefing for a certain period of time following any observed trip
- Prohibition on service providers from deploying the same observer consecutively on the same vessel for more than a certain number of days/trips per month
- Requirements to share information with NMFS re. vessels with outstanding payments due

4.0 MANAGEMENT MEASURES TO ADDRESS RIVER HERRING BYCATCH

The Herring PDT and Mackerel FMAT discussed the measures under consideration in both amendments to address river herring bycatch and noted the following:

- Coordination between the herring and mackerel fisheries would be essential under a river herring catch cap, to improve the effectiveness of the cap and potentially reduce impacts on the industry.
- During the development of these amendments, the Mackerel FMAT generally supported a management approach based on river herring catch caps, while the Herring PDT generally supported a spatially-based management approach (the mackerel amendment also considers large-scale area closures). The PDT and FMAT noted, however, that both groups have identified challenges associated with any of the approaches under consideration, and overall, the technical opinions of the two groups are not widely disparate.

At this meeting, the PDT/FMAT jointly discussed the alternatives under consideration. Table 9 summarizes some important factors that both Councils should consider when selecting measures to address river herring/shad (RH/S) bycatch. Several common themes that apply to all alternatives include:

- The statuses of RH/S are “depleted” so mitigation of impacts should be considered.
- The degree of beneficial overall impacts related to RH/S from any measure are uncertain because of the lack of assessment reference points and uncertain contribution from various sources of mortality. Related to a cap, minimal information exists on what would be an appropriate amount for a catch cap.

Table 9 Overview of Measures to Address River Herring/Shad Bycatch in Herring Amendment 5/Mackerel Amendment 14

Measure	Effectiveness in Controlling or Reducing River Herring and/or Shad (RH/S) Catch	Implementation Difficulty	Enforcement Difficulty	Monitoring Needs	Economic Effects
Mortality Caps	While precision is dependent on observer coverage, caps are the only measure that directly control the amount of RH/S catch in a given fishery (though impacts of doing that are uncertain); however, no ability to index a catch cap to the RH/S population size	Requires certain infrastructure and NERO-NEFSC cooperation adjustments but such infrastructure is in place for other fisheries (ex., butterfish, haddock catch cap)	Closures are relatively easy to enforce but assessing compliance with observer call-in requirements is more difficult.	Similar catch and bycatch caps already exist and are monitored on a weekly basis by NERO. Depending on how precise an estimate the Council wants to be using when closing a fishery, may need high level of observer coverage. Programmatic reviews of effectiveness are required for adaptive management.	Difficult to predict but could be significant; If a cap is set high, or low bycatch is observed, then perhaps minimal impacts on fishery. Major impacts are possible if a cap is set low, or high bycatch is observed.
Small Area Management (hotspots)	Reduces catch in the area(s) if in a given year RH/S are present and fishery would have otherwise operated there in such a year. Overall catch impact uncertain since may displace fishing effort and create new bycatch hotspots.	Area-based management is widely used in other fisheries.	Area-based management is relatively easy if all vessels have VMS reporting requirements but harder otherwise. Smaller, shifting areas are harder to enforce.	Easier if all vessels have VMS requirements. All herring vessels have VMS, but not all squid/mackerel/butterfish vessels	Low impacts given the small size of the areas.

Table 9 Overview of Measures to Address River Herring/Shad Bycatch in Herring Amendment 5/Mackerel Amendment 14 (continued)

Measure	Effectiveness in Controlling or Reducing River Herring and/or Shad (RH/S) Catch	Implementation Difficulty	Enforcement Difficulty	Monitoring Needs	Economic Effects
Large Area Management	More likely to reduce RH/S catch than small areas because severe restriction would likely reduce overall effort.	Area-based management is widely used in other fisheries.	Area-based management is relatively easy if all vessels have VMS reporting requirements but harder otherwise.	Easier if all vessels have VMS requirements. All herring vessels have VMS, but not all squid/mackerel/butterfish vessels	Major impacts due to large areas involved.

5.0 ATTACHMENT (FOR INFORMATION/REFERENCE): SERVICE PROVIDER REGULATIONS/REQUIREMENTS

Current regulations pertaining to service providers in the sea scallop fishery – approval, responsibilities, and observer certification – are provided below for reference during discussions regarding industry-funded monitoring programs and utilization of independent service providers. If service providers are utilized for catch monitoring in the Atlantic herring fishery, the Council intends for the regulations pertaining to approval, responsibility, and observer certification to be consistent with those for the scallop and other fisheries in the Northeast Region. When finalizing Amendment 5, Council staff will meet with NMFS, NEFSC, and NEFOP staff to review existing regulations (below) and draft the appropriate modifications to apply to the herring fishery.

Provisions for Utilizing Observer Service Providers and Authorizing Waivers

(Language below from Amendment 5 to the Herring FMP)

For alternatives that would require industry funding, provisions would be included that authorize the use of non-government service providers for sea sampling in the event that Federal funds are not sufficient to provide coverage and/or the fishing industry is required to fund some/all of the sea sampling.

Prior to any trip when declared into the herring fishery (declared “HER”), limited access herring vessel owners, operators, and/or representatives would be required to provide notice to NMFS and request an observer through the pre-trip notification system, consistent with the provisions described in the Amendment 5 document. If observer coverage must be procured through an independent service provider, NMFS would notify the vessel owner, operator, and/or representative of the requirement within 24 hours of the vessels’ notification to NMFS of the prospective herring trip. The vessel would be prohibited from fishing for, taking, possessing, or landing any Atlantic herring without carrying an observer for that trip unless the vessel has been issued a waiver. Any requirement to carry an observer on a particular trip may be waived by NMFS. All waivers for observer coverage will be issued to the vessel by VMS so as to have on-board verification of the waiver (see more information about waivers below).

Observer Service Provider Certification, Approval, Responsibilities

Regulations specifying the use of observer service providers are provided in 50 CFR 648.11(h) and (i) – *Observer service provider approval and responsibilities* and *Observer certification* and would apply to service providers utilized by Atlantic herring vessels for sea sampling if/when federally funded observers cannot be made available. These provisions are consistent with those for service providers in other Federal fisheries in the Northeast region (ex., sea scallops).

****Option Under Consideration: State Agencies as Service Providers for Observer Coverage****

In Amendment 5, the Council is considering an option to authorize State agencies to be service providers for catch monitoring (sea sampling/observer coverage).

Option 1: No Action. Under the no action option, States would not be authorized in Amendment 5 as service providers for observer coverage. If a State Agency intends to provide sea sampling services for Atlantic herring vessels, it would apply to NMFS to become an

authorized service provider, consistent with the provisions specified in 50 CFR 648.11(h) and (i)– *Observer service provider approval and responsibilities* and *Observer certification*.

Option 2: States Authorized as Service Providers. Under this option, Amendment 5 would authorize all States in the Northeast Region as service providers for sea sampling on limited access Atlantic herring vessels. States would not be required to apply to NMFS for an authorization and comply with the provisions specified in 50 CFR 648.11(h) and (i) – *Observer service provider approval and responsibilities* and *Observer certification*. To ensure data compatibility, States that are authorized as service providers must ensure that data collection standards and methods are consistent with NEFOP standards and methods for the herring fishery.

Currently, the States are not providing observer services (i.e. are not acting as observer service providers for the federally funded observer program). The State of Maine does have an employee that collects data at sea in the Atlantic herring fishery, but the other states do not cover the herring fleet, although to a limited degree cover other fisheries. If State Agencies are interested in becoming a certified observer service provider, under the no action option, the States would need to acquire NMFS approval and follow the same procedures as any other service providers. The approval process would be very similar to that of non-state observer service providers as it asks for general standards and operational details for hiring and deploying observers, which need to be clear regardless of who is applying.

Under Option 2, the States would be grandfathered in, and would not be required to apply for approval. This option would limit the amount of information that is obtained and pre-defined, and the State Agencies’ operational details would be unknown. NEFOP personnel have expressed support for Option 1 (no action) to ensure that State Agencies adhere to the same requirements as other service providers, should service providers be utilized for sea sampling in the herring fishery. It remains unclear what qualifications, insurance, and observer support would be offered under Option 2. It is possible that the type of data required in this fishery or the costs of coverage could be higher or lower per day than the \$1200 based on the rates set by service providers and level of funding acquired once the proposed action is identified. These details are important in the development of an observer program and will affect successful data collection.

Issuance of Waivers If/When Observers Cannot be Deployed

In the event that an observer is required for a particular fishing trip but cannot be provided by the NEFOP, NMFS would notify the vessel within 24 hours of the vessel’s notification of the prospective herring trip. If this amendment does not require the industry to pay for observer sea days that cannot be funded using Federal resources, then either the vessel would be prohibited from fishing for, taking, possessing, or landing any Atlantic herring without carrying an observer for that trip, or NMFS would issue a waiver for the trip within 24 hours.

As part of the selection of final management measures for Amendment 5, the Council may specify instances and/or identify specific fishing trips that would not be authorized for waivers by NMFS regardless of whether an observer can be deployed. The Council is seeking public comment on this issue.

If this amendment requires the industry to pay for observer sea days that cannot be funded using Federal resources, the vessel owner/operator/manager would be required to arrange for carrying an observer from one of the service providers approved by NMFS (50 CFR 648.11(h) and (i)).

The owner/operator/manager of a vessel selected to carry an observer must contact the observer service provider and must provide at least 48 hours' notice in advance of the fishing trip for the provider to arrange for observer deployment for the specified herring trip. A list of approved service providers will be published on the NMFS/NEFOP website. If a certified observer cannot be procured within 24 hours of the advanced notification due to the unavailability of an observer, the vessel owner/operator/manager may request a waiver from NMFS/NEFOP from the requirement for observer coverage on that trip, but only if all of the available service providers have been contacted in an attempt to secure observer coverage, and no observer is available. In this case, if a waiver is to be issued by NMFS, consistent with the provisions in this amendment, then it will be issued within 12 hours.

50 CFR 648.11(h) and (i)

Observer service provider approval and responsibilities and Observer certification

(h) Observer service provider approval and responsibilities.

(1) ***General.*** An entity seeking to provide observer services 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 vessel owners and shall be posted on the NMFS/NEFOP website at <http://www.nefsc.noaa.gov/femad/fsb/>.

(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 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 U.S. 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 an appropriate NMFS/NEFOP Observer Training class. The NEFOP training has a minimum class size of eight individuals, which may be split among multiple vendors requesting training. Requests for training classes with less than eight individuals will be delayed until further requests make up the full training class size. Requests for training classes must be made 30 days in advance of the requested date and must have a complete roster of trainees at that time.

(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 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 business 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 the NMFS/NEFOP website specified in paragraph (h)(1) 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 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 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 does not have an available observer within 48 hr of receiving a request for an observer from a vessel owner, operator, and/or manager, or refuses to deploy an observer on a requesting vessel for any of the reasons specified at paragraph (h)(5)(viii) of this section. An observer's first three deployments and the resulting data shall be immediately edited and approved after each trip, by NMFS/NEFOP, prior to any further deployments by that observer. If data quality is considered acceptable, the observer would be certified.

(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 fishing vessel or to attend an appropriate NMFS/NEFOP Observer Training class;

(C) The required observer equipment, in accordance with equipment requirements listed on the NMFS/NEFOP website specified in paragraph (h)(1) of this section, 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 appropriate 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 more than two consecutive multi-day trips, and not more than twice in any given month for multi-day deployments.

(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/NEFOP at least 7 days prior to the beginning of the proposed training class: A list of observer candidates; 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 end 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/NEFOP Minimum Eligibility Standards for observers as described on the NMFS/NEFOP Web site.

(vii) *Reports.*

(A) *Observer deployment reports.* The observer service provider must report to NMFS/NEFOP when, where, to whom, and to what fishery (open or closed area) an observer has been deployed, within 24 hr of the observer's 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 24 hr 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 hr, which should be within 4 business days 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, sea 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 2 weeks following any observed trip. If requested by NMFS, an observer that is at sea during the 2-week period must contact NMFS upon his or her return.

(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 by 5 p.m., 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 hours of learning of the event.

(G) *Observer status report.* Providers must provide NMFS/NEFOP with an updated list of contact information for all observers that includes the observer identification number, observer's name, mailing address, e-mail address, phone numbers, homeports or fisheries/trip types assigned, and must include whether or not the observer is "in service," indicating when the observer has requested leave and/or is not currently working for the industry funded program.

(H) Providers must submit to NMFS/NEFOP, if requested, a copy of each type of signed and valid contract (including all attachments, appendices, addendums, and exhibits incorporated into the contract) between the observer provider and those entities requiring observer services.

(I) Providers must submit to NMFS/NEFOP, if requested, a copy of each type of signed and valid contract (including all attachments, appendices, addendums, and exhibits incorporated into the contract) between the observer provider and specific observers.

(J) Providers must submit to NMFS/NEFOP, if requested, copies of any information developed and used by the observer providers distributed to vessels, such as informational pamphlets, payment notification, description of observer duties, etc.

(viii) *Refusal to deploy an observer.*

(A) An observer service provider may refuse to deploy an observer on a requesting fishing 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 fishing 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 fishing 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 fishing 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.

(i) 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 fishing vessel, a candidate observer must have passed an appropriate NMFS/NEFOP 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, as part of the observer's training, aboard a fishing vessel with a trainer. A certified observer's first deployment 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 fishing vessels, pursuant to standards established by NMFS. Such standards are available from NMFS/NEFOP website specified in paragraph (h)(1) of this section and shall be provided to each approved observer service provider;

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

(iv) Hold a current Red Cross (or equivalence) CPR/first aid certification.

(v) Observers must accurately record their sampling data, write complete reports, and report accurately any observations relevant to conservation of marine resources or their environment.

(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 NMFS/NEFOP website specified in paragraph (h)(1) of this section.

(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.

