

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

Including an  
Initial Regulatory Flexibility Analysis

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

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Portsmouth, NH on February 7, 2007

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## Executive Summary

The scallop set-aside observer program was first implemented to allow for increased observer coverage on scallop vessels permitted to fish in access areas within the groundfish closed areas on Georges Bank. A higher level of observer coverage was recommended to monitor interactions with finfish within the areas. This set-aside program to help defray the cost of observer coverage was expanded in Amendment 10 to the Scallop FMP to include a set-aside of open area DAS in an effort to better monitor bycatch and interactions with endangered and threatened species from the scallop fishery overall. Although the set-aside provisions remained in effect in the Scallop FMP, NMFS was unable to require vessel owners to pay for observers as a result of unresolved legal issues concerning the use of a contract between NMFS and the observer service provider while requiring vessel owners to pay for the observers.

Through this action the Council proposes that in order to re-activate the industry-funded observer program for the scallop fishery it is necessary to implement a mechanism to certify non-contracted observer service providers. This mechanism will allow the scallop observer set-aside program implemented as part of the Scallop FMP since 1999 to be used again to help defray the cost of observer coverage, but it will include use of a non-contracted system. If a vessel is required to carry an observer it is permitted to land more than the possession limit from trips in access areas and in open areas vessels are charged at a reduced rate to help compensate for the cost of the observer. This portion of the total allowable catch for the fishery is removed from the total before annual allocations are awarded (i.e. 1% of the total TAC is set-aside to help defray the cost of observers). This action does not change aspects of the observer or set-aside program such as the total set-aside amount, general responsibilities of scallop vessels or observers, etc.; it only allows for a mechanism to certify non-contracted observer service providers. Similar to how it has been administered since 1999, a vessel that is required to carry an observer is responsible for paying the cost of the observer regardless of whether the vessel lands or sells scallops on that trip, and regardless of the availability of set-aside.

The primary difference between this action and how the scallop observer set-aside program was administered in the past is that NMFS used to have a contract with one observer service provider. Before a vessel left for a trip it was required to call NMFS, NMFS would notify the vessel if they were required to carry an observer, and if so NMFS would arrange for the observer to meet the vessel before the trip. However, it was determined that NMFS could not require a vessel to pay for an observer when NMFS also had a contract with the observer service provider. Therefore, this action will implement a mechanism that will certify non-contracted observer service providers. Any entity may be an observer service provider if they are certified by NMFS and have met all standards included in this action. A vessel is still required to call NMFS before they leave on a trip, but if NMFS notifies the vessel that they are required to carry an observer, it is the vessel's responsibility to contact and arrange for an observer directly with an observer service provider that has been certified by NMFS.

This action also includes measures for the observer service provider in terms of responsibilities and standards associated with being a certified observer service provider. Currently there are two vendors that have been certified under this program.

The proposed action of this amendment is intended to be the same as the observer service provider mechanism first implemented by emergency action in June 2006. The Council approved this action at the February 2007 Council meeting hopeful that it could be implemented before the access areas are scheduled to re-open in June 2007. The impacts of this proposed action have been analyzed in previous scallop actions (Amendment 10, Framework 16 and Framework 18). Section 4.0 describes the analyses required under Magnuson, and in summary there are no significant impacts expected on small businesses as a result of this action. Overall, the observer program is expected to have positive economic impacts on the vessels participating in the sea scallop fishery by improving information, thus management of the scallop resource. The Council recognizes that there are issues with the current observer set-aside program and adjustments could be made to improve the program. Therefore, this action also includes an alternative that would allow for adjustments to the scallop observer program to be made through framework adjustment (Alternative 3.3).

## **1.0 BACKGROUND AND PURPOSE**

### **1.1 BACKGROUND**

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

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

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

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

It should be noted that the Council is currently developing a Standardized Bycatch Reporting Methodology Amendment (SRRM Amendment) to all FMPs in this region. Section 303(a)(11) of the Magnuson-Stevens Fishery Conservation and Management Act requires that all FMPs include “a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery.” The SBRM Omnibus Amendment will ensure that all FMPs fully comply with the act. Amendment 10 and Framework 16 to the Scallop FMP were submitted to NMFS several years ago, and in 2004 Oceana, an environmental organization filed suit in the U.S. District Court challenging the SBRM elements of the FMP. The Court found the actions did not fully evaluate reporting methodologies, did not sufficiently address potentially important scientific evidence, and did not mandate a methodology for bycatch monitoring. Therefore, the Court remanded that the Secretary of Commerce take further action on the SBRM aspects of the Scallop FMP.

SBRM is the combination of sampling design, data collection procedures, and analyses used to estimate bycatch and to determine the most appropriate allocation of observers across the relevant fishery modes. The Council has worked with NMFS in development of the SBRM Omnibus Amendment since 2005 and final action is expected in 2007. Once the Council makes a final recommendation about this action and the SBRM Amendment is approved by NMFS the Scallop FMP will be in compliance with the standardized bycatch reporting methodology required by the Magnuson-Stevens Fishery Conservation and Management Act.

## **1.2 PURPOSE AND NEED**

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

## **2.0 GOALS AND OBJECTIVES**

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

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

It is the intent of the Council to consider and implement regulations in this action that would mirror the mechanism adopted under the Emergency Action. In order for the scallop fishery to operate as it has been it is critical for this observer provider service certification mechanism to be in place. Since NMFS has identified a solution to the problems identified with the original mechanism that implemented the industry funded observer program, the Council intends to consider and implement measures that are consistent with that action. Due to the timing constraints, inclusion of measures that are considerably different than the program implemented by NMFS through emergency action would likely delay this amendment beyond the time when observer coverage is necessary. As a result, the observer coverage levels recommended by the FMP would not be achieved, compromising the effectiveness of the FMP.

## **3.0 MANAGEMENT ALTERNATIVES UNDER CONSIDERATION**

### **3.1 NO ACTION**

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

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

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

If this section is approved a new mechanism to administer the industry funded scallop observer program would be implemented similar to the one implemented under the emergency action.

The specific measures include: 1) general provisions of the observer program; 2) observer service provider approval and responsibilities; and 3) observer certification procedures. The measures are summarized below and the specific regulations as implemented by emergency action on June 16, 2006 and continued on November 29, 2006 for an additional 180 days are included in Attachment A.

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

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

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

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

### **Observer Certification**

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

***Rationale:***

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

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

If this measure is adopted, adjustments to the scallop observer program can be implemented through a framework adjustment to the Scallop FMP. Currently, an amendment would have to be initiated to make a change to the observer program. This measure would include general language in the regulations that would allow an adjustment to the scallop observer program to be implemented by framework rather than amendment.

**Adjustments to the scallop observer program:**

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

***Rationale:***

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

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

1. *Differential possession limit and DAS accrual rate calculation by scallop permit type*

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

## 2. *Fleetwide observer cost sharing program*

Rather than removing 1% of the total scallop TAC to help defray the cost of observers, the set-aside amount would be allocated to the fishery (in additional DAS or higher access area possession limits per vessel). All vessels would instead pay a portion of their gross stock from every trip to a trust managed by the industry. Funds from those trips would be held and used to fund observers directly rather than an individual vessel being responsible for funding an observer if required to carry one. However, if there are insufficient funds in the industry managed trust to pay for an observer, that vessel would be responsible for paying the observer directly. This program would share the cost of observer coverage across the fleet and would eliminate the responsibility for an individual vessel to pay for an observer directly if required to carry one (and funds were available in the fund). One aspect of this program that needs more development is related to the fact that this alternative requires full participation across the fishery. NMFS is not authorized to collect a fee unless the fishery is managed under an individual fishing quota program. Therefore, it would have to be voluntary, and there may be data confidentiality issues concerning individual trip information and the risk of “free-riders” (vessels not opting to participate in the “fleetwide” program).

## 3. *Observer cost sharing sector*

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

For example, if 30 of the 300 limited access scallop vessels (rounded estimated values) voluntarily joined a sector to share the costs of observer coverage, they would be awarded 10% of the available set-aside (ignoring general category effort for the example). The remaining 90% of the available TAC would be available for vessels outside the observer cost sharing sector and those vessels would pay for observer coverage (if required to carry an observer) on an individual basis as it is currently administered. On the other hand, the sector would be allocated 10% of the set-aside and the compensation DAS and additional poundage for access area trips would be divided equally among the vessels in the sector. As the fishing year progresses each vessel in the

sector would pay a percentage of their gross stock from each trip to a trust managed by the sector. If a vessel in the sector was required to carry an observer, monies from the trust would be used to pay that observer, rather than one vessel within the sector paying for the coverage directly. This concept, or something like it is intended to share the cost of carrying an observer among a group of vessels and reduce the potential for vessels to change behavior if required to carry an observer (i.e. make a shorter trip so the cost of the observer for the trip is reduced). The current system does provide some way of defraying the cost of having to carry an observer, but it does not always cover the cost of the observer and can be uneven among vessels with different efficiencies. The details of this type of system need more development in order for NMFS to be able to implement such a system. Furthermore, depending on the specifics of this type of program it may or may not require an amendment to allow the formation of voluntarily sectors for the sole purpose of sharing the cost of observer coverage.

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

The proposed action is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement because the action will not have any impacts not already assessed, and the impacts would not have the potential to pose significant effects to the quality of the human environment. Participation by potential observer service providers is voluntary and since no federal action is requiring participation, further assessment of the potential impacts on these entities is not required. While a National Environmental Policy Act (NEPA) document is not required, there are required analyses under the Magnuson Act that still apply and they are summarized below.

##### **4.1 NATIONAL STANDARDS**

Section 301 of the Magnuson-Stevens Fishery Conservation and Management Act requires that fishery management plans (FMPs) contain conservation and management measures that are consistent with the ten National Standards:

*(1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.*

This action does not propose changes to the Scallop FMP that would affect overfishing or achieving optimum yield. In fact, without a mechanism to use the observer set-aside program to help defray the cost of observers in the scallop fishery the ability of this FMP to achieve optimum yield could be jeopardized (i.e. maintaining recommended levels of observer coverage in the access areas within the groundfish closed areas).

For background, the biological reference points and control rule for Atlantic sea scallops was revised and updated in Amendment 10 to the FMP. The scallop biomass is above the MSY biomass target and is expected to remain above the biomass target in the foreseeable future under measures in place by Framework 18 and the emergency rule to reduce effort in the Elephant Trunk Area (71 FR 76945).

*(2) Conservation and management measures shall be based upon the best scientific information available.*

This document uses information of known quality from sources acceptable to the relevant scientific and technical communities. Several sources of data were used in the development of this document. These data sources include, but are not limited to: permit data, landings data from vessel trip reports, data from the dealer weighout purchase reports, and data from at-sea observers. Although there are some limitations to the data used in the analysis, these data are considered to be the best available.

*(3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.*

Under the Atlantic Sea Scallop FMP, the target fishing mortality rate and stock biomass are applied to the scallop resource from NC to the US/Canada boundary. This encompasses the entire range of scallop stocks under Federal jurisdiction.

*(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.*

The management measures proposed in this amendment do not discriminate between residents of different States. This action does not allocate or assign fishing privileges. The selection of a vessel that is required to carry an observer is a random selection process. Ideally, observers are placed on a wide range of vessels from different areas, permit types, gear types, vessel size, etc. to get a distribution of coverage across the entire scallop fishery.

*(5) Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.*

The Proposed Action should promote efficiency in the utilization of fishery resources by implementing a mechanism that will allow revenue from the resource to be used to defray costs of observing the scallop fishery. The set-aside is available to all vessels required to carry an observer and the proposed action does not allocate catch or fishing opportunity.

*(6) Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.*

The Proposed Action takes into account variations among, and contingencies in, fisheries, fishery resources and catches. By implementing this mechanism, a portion of the total scallop TAC each year is available to all vessels that are required to carry an observer (unless the set-aside runs out during the fishing year), regardless of what area the vessel is from, size of the vessel, which fishery or component of the resource they are harvesting, etc. Different poundage and DAS accrual rates are determined each year based on the overall scallop TAC and recommended levels of coverage. Ideally, the compensations rates are set to allow for appropriate compensation per trip to cover the cost of carrying an observer, but also to allow the 1% set-aside to be available over the course of the fishing year. For example, a reduced compensation amount would allow for more coverage; however, if the compensation level is too

low it may not provide a sufficient buffer for vessels and crews to cover the cost of carrying an observer. And a rate set too high may benefit the vessels that are required to carry an observer early in the fishing year, but the set-aside would run out faster and vessels required to carry an observer later in the fishing year would not be permitted to land additional scallops to cover the cost of carrying an observer.

*(7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.*

The Council considered the costs and benefits associated with the Proposed Action when developing this amendment. The Proposed Action is intended to minimize costs and avoid unnecessary duplication, to the extent possible. Any costs incurred as a result of the Proposed Action are considered to be necessary in order to achieve the goals and objectives of this management program. NMFS provides compensation to vessels through the set-aside program to minimize these costs. The economic impacts of the observer coverage on scallop vessels and crew will depend on what extent NMFS will be able to cover some cost of observer coverage and if the compensation rate is appropriate to cover costs over the fishing year. Section 4.3 and 4.4 describe the potential costs of this action in detail. By implementing this action, it reduces the risk of potential budgetary constraints within NMFS that could prevent the scallop fishery from having recommended levels of observer coverage.

The management measures proposed in this amendment are not duplicative and were developed in close coordination with NMFS and the Mid-Atlantic Fishery Management Council. A similar action was implemented by emergency action, but those regulations will expire, thus implementing this mechanism under the Scallop FMP is necessary.

*(8) Conservation and management measures shall, consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities by utilizing economic and social data that meet the requirements of paragraph (2), in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.*

The proposed actions increases the sustained participation of fishing communities by providing a mechanism for scallop boats to fund observers needed for them to fish in controlled access areas. These areas contain a major portion of the harvestable scallop resource.

The participants and communities involved in the scallop fishery were described in Section 7.1 of Amendment 10 and Section 4.0 of Framework 18. The economic impacts on fishing communities and individual small businesses are described in Section 4.4 of this document. Overall, the estimated costs of observer coverage for the limited access fleet were about \$2.1 million at it highest level (2004) and were about \$0.3 million for the general category fleet (2005). The net costs for the vessels participated in the program were lower, however, due to the compensation they received through the set-aside program. Costs of observer coverage were minimized by the set-aside program and this action will implement a mechanism to allow compensation to vessels required to carry an observer.

- (9) *Conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.*

This action will not directly affect bycatch levels and bycatch mortality. However, by implementing this mechanism the ability of observer coverage to reach recommended levels for the scallop fishery are improved. Appropriate levels of bycatch data could increase knowledge about bycatch interactions in the scallop fishery and ultimately reduce bycatch mortality associated with this fishery. Comprehensive information related to bycatch in the Atlantic sea scallop fishery was included in Amendment 10 (Section 7.2.4) and Framework 18 (Section 4.2) to the Scallop FMP. Furthermore, the Council and NMFS initiated the development of an omnibus amendment to Northeast Region FMPs to address Standardized Bycatch Reporting Methodology (SBRM) across all fisheries. This action will discuss in more detail bycatch and observer coverage for the scallop fishery.

- (10) *Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea.*

The proposed action enables scallop vessels to fund observer coverage and does not change any other management measures in the Scallop FMP or impose any restrictions on fishing vessel operations. Therefore it has no impacts on safety-at sea.

#### **4.2 OTHER REQUIRED PROVISIONS OF THE M-S ACT**

Section 303 of the Magnuson-Stevens Fishery Conservation and Management Act contains 14 additional required provisions for FMPs, which are discussed below. Any FMP prepared by any Council, or by the Secretary, with respect to any fishery, shall:

- (1) *contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States, which are-- (A) necessary and appropriate for the conservation and management of the fishery to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery; (B) described in this subsection or subsection (b), or both; and (C) consistent with the National Standards, the other provisions of this Act, regulations implementing recommendations by international organizations in which the United States participates (including but not limited to closed areas, quotas, and size limits), and any other applicable law;*

Since the domestic scallop fishery is capable of catching and processing the allowable biological catch (ABC), there is no total allowable level of foreign fishing (TALFF) and foreign fishing on sea scallops is not permissible at this time.

- (2) *contain a description of the fishery, including, but not limited to, the number of vessels involved, the type and quantity of fishing gear used, the species of fish involved and their location, the cost likely to be incurred in management, actual and potential revenues from the fishery, any recreational interest in the fishery, and the nature and extent of foreign fishing and Indian treaty fishing rights, if any;*

The fishery and fishery participants are described in detail in Section 7.1 of Amendment 10 to the Scallop FMP. Table 9 in this document describes the scallop permits by category and Table

2 describes the active scallop vessels by permit type that could be affected by this action. The number of trips and average scallops landed per category are included as well.

- (3) *assess and specify the present and probable future condition of, and the maximum sustainable yield and optimum yield from, the fishery, and include a summary of the information utilized in making such specification;*

The present and probable future condition of the resource and estimates of MSY and OY are given in Section 8.2.2.2 of Amendment 10 to the Scallop FMP. Current domestic landings and processing capabilities are around 50 million lbs., while OY is around 45 million lbs. Total landings in 2004 were about 62 million pounds and about 52 million pounds in 2005, based on NMFS dealer weighout data.

- (4) *assess and specify-- (A) the capacity and the extent to which fishing vessels of the United States, on an annual basis, will harvest the optimum yield specified under paragraph (3); (B) the portion of such optimum yield which, on an annual basis, will not be harvested by fishing vessels of the United States and can be made available for foreign fishing; and (C) the capacity and extent to which United States fish processors, on an annual basis, will process that portion of such optimum yield that will be harvested by fishing vessels of the United States;*

The US fishery is expected to harvest 100% of OY and domestic processors are expected to be able to process 100% of OY.

- (5) *specify the pertinent data which shall be submitted to the Secretary with respect to commercial, recreational, charter fishing, and fish processing in the fishery, including, but not limited to, information regarding the type and quantity of fishing gear used, catch by species in numbers of fish or weight thereof, areas in which fishing was engaged in, time of fishing, number of hauls, economic information necessary to meet the requirement and the estimated processing capacity of, and the actual processing capacity utilized by, United States fish processors;*

The FMP and existing regulations specify the type of reports and information that scallop vessel owners and scallop dealers must submit to NMFS. These data include, but are not limited to, the weight of target species and incidental catch which is landed, characteristics about the vessel and gear in use, the number of crew aboard the vessel, when and where the vessel fished, and other pertinent information about a scallop fishing trip. Dealers must report the weight of species landed by the vessel, the date of landing, and the ex-vessel price for each species and/or size grade. Important information about vessel characteristics, ownership, and location of operation is also required on scallop permit applications. Dealers are also surveyed for information about their processing capabilities.

All limited access scallop vessels and 1B general category scallop vessels are also required to operate vessel monitoring system (VMS) equipment to record the location of the vessel for monitoring compliance with DAS regulations. An at-sea observer is also placed on scallop vessels at random to record more detailed information about the catch, including size frequency data, the quantity of discards by species, detailed gear data, and interactions with protected species.

- (6) *consider and provide for temporary adjustments, after consultation with the Coast Guard and persons utilizing the fishery, regarding access to the fishery for vessels otherwise prevented from harvesting because of weather or other ocean conditions affecting the safe conduct of the fishery; except that the adjustment shall not adversely affect conservation efforts in other fisheries or discriminate among participants in the affected fishery;*

The action proposed in this amendment does not alter any adjustments made in the Scallop FMP that address opportunities for vessels that would otherwise be prevented from harvesting because of weather or other ocean conditions affecting the safe conduct of the fisheries. No consultation with the Coast Guard is required relative to this issue.

- (7) *describe and identify essential fish habitat for the fishery based on the guidelines established by the Secretary under section 305(b)(1)(A), minimize to the extent practicable adverse effects on such habitat caused by fishing, and identify other actions to encourage the conservation and enhancement of such habitat;*

Essential fish habitat was defined in earlier scallop actions. This amendment does not further address or modify those EFH definitions. There are no additional impacts to the physical environment or EFH expected from the action proposed in this amendment.

- (8) *in the case of a fishery management plan that, after January 1, 1991, is submitted to the Secretary for review under section 304(a) (including any plan for which an amendment is submitted to the Secretary for such review) or is prepared by the Secretary, assess and specify the nature and extent of scientific data which is needed for effective implementation of the plan;*

Data and research needs relative to Atlantic sea scallop and its associated fisheries are described in Section 5.1.8 of Amendment 10. Other data, already collected include fishery dependent data described in Section 6.2.4 of Amendment 10 and fishery-independent resource surveys that provide an index of scallop abundance and biomass.

- (9) *include a fishery impact statement for the plan or amendment (in the case of a plan or amendment thereto submitted to or prepared by the Secretary after October 1, 1990) which shall assess, specify, and describe the likely effects, if any, of the conservation and management measures on-- (A) participants in the fisheries and fishing communities affected by the plan or amendment; (B) participants in the fisheries conducted in adjacent areas under the authority of another Council, after consultation with such Council and representatives of those participants; and (C) the safety of human life at sea, including weather and to what extent such measures may affect the safety of participants in the fishery;*

The impacts of the set-aside program to defray the cost of observer coverage have been analyzed in previous scallop actions (Amendment 10, Framework 16 and Framework 18). The emergency rule implemented on June 16, 2006, and continued for a second 180-day period on November 29, 2006, did not change any aspect of the program; it simply re-activated it by developing a mechanism for non-contractual observer service providers. Since this action proposes the same measures as previously analyzed, no further analyses are required except what is included in

Section 4.0. Participation by potential observer service providers is voluntary and since no federal action is requiring participation, further assessment of the potential impacts on these entities is not required. Safety in the scallop fishery was described in Section 8.1.5.6 of Amendment 10 and nothing proposed in this action will affect safety of human life at sea.

- (10) *specify objective and measurable criteria for identifying when the fishery to which the plan applies is overfished (with an analysis of how the criteria were determined and the relationship of the criteria to the reproductive potential of stocks of fish in that fishery) and, in the case of a fishery which the Council or the Secretary has determined is approaching an overfished condition or is overfished, contain conservation and management measures to prevent overfishing or end overfishing and rebuild the fishery;*

Overfishing reference points describing targets and thresholds for biomass and fishing mortality are presented and explained in Section 5.1.1 of Amendment 10. These reference points were chosen as a proxy for our best estimate of levels that will produce MSY and prevent an overfished condition (that will threaten spawning potential) from developing. These reference points were derived based on median recruitment data from 1982 – 2002 and yield-per-recruit analyses conducted by SARC 32 (NMFS 2000).

- (11) *establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery, and include conservation and management measures that, to the extent practicable and in the following priority-- (A) minimize bycatch; and (B) minimize the mortality of bycatch which cannot be avoided;*

The FMP relies on a standard data collection program, the Sea Sampling Observer Program, and provides a funding mechanism to increase the level of sampling – 1% set-aside. These data will improve and be used for assessing the amount and type of bycatch occurring in the scallop fishery. The Council and NMFS initiated the development of an omnibus amendment to Northeast Region FMPs to address Standardized Bycatch Reporting Methodology (SBRM) across all fisheries. This action will discuss in more detail bycatch and observer coverage for the scallop fishery.

- (12) *assess the type and amount of fish caught and released alive during recreational fishing under catch and release fishery management programs and the mortality of such fish, and include conservation and management measures that, to the extent practicable, minimize mortality and ensure the extended survival of such fish;*

This Proposed Action does not address recreational fishing regulations.

- (13) *include a description of the commercial, recreational, and charter fishing sectors which participate in the fishery, including its economic impact, and, to the extent practicable, quantify trends in landings of the managed fishery resource by the commercial, recreational, and charter fishing sectors;*

A detailed description of the scallop fishery is included in Section 7.1 of Amendment 10 and Section 4.0 of Framework 18. These sections provide information relative to scallop vessels, processors, and dealers. Table 9 in this document describes the scallop permits by category and Table 2 describes the active scallop vessels by permit type that could be affected by this action. The number of trips and average scallops landed per category are included as well.

(14) *to the extent that rebuilding plans or other conservation and management measures which reduce the overall harvest in a fishery are necessary, allocate, taking into consideration the economic impact of the harvest restrictions or recovery benefits on the fishery participants in each sector, any harvest restrictions or recovery benefits fairly and equitably among the commercial, recreational, and charter fishing sectors in the fishery and;*

The action proposed in this amendment does not reduce the overall harvest from the Atlantic sea scallop fishery. Harvest from the Atlantic sea scallop fishery will continue to be reviewed, established, and analyzed through the biennial framework process. For example, Framework 19 will be developed this year and it will include management measures for FY2008 and FY2009. That action will consider fairness and equity as it relates to a reduction in the overall harvest of sea scallops, should such a reduction occur in the future. Recreational fishing for sea scallops is rare and does not affect the success of the FMP.

(15) *establish a mechanism for specifying annual catch limits in the plan (including a multiyear plan), implementing regulations, or annual specifications, at a level such that overfishing does not occur in the fishery, including measures to ensure accountability.*

The proposed action does not implement any changes to the annual catch limits or specifications, it is limited to implementing a mechanism to use the observer set-aside program to defray the cost of industry funded observer coverage.

### **4.3 EXECUTIVE ORDER 12866 (REGULATORY IMPACT REVIEW)**

#### **4.3.1 Introduction**

The Regulatory Impact Review (RIR) provides an assessment of the costs and benefits of proposed actions and other alternatives in accordance with the guidelines established by Executive Order 12866. The regulatory philosophy of Executive Order 12866 stresses that in deciding whether and how to regulate, agencies should assess all costs and benefits of all regulatory alternatives and choose those approaches that maximize the net benefits to the society.

The RIR also serves as a basis for determining whether any proposed regulations are a “significant regulatory action” under the criteria provided in Executive Order 12866 and whether the proposed regulations will have a significant economic impact on a substantial number of small entities in compliance with the Regulatory Flexibility Act of 1980 (RFA).

This RIR summarizes the effects of the proposed observer program and other alternatives considered in this Amendment 13. The Amendment 13 document contains all the elements of the RIR/RFA, and the relevant sections are identified by reference to the document.

The purpose of and the need for action are described in Section 1.2. The description of the each selected alternative including the no action alternative is provided in Section 3.0.

## **4.3.2 Economic Impacts of the Observer Program**

### **4.3.2.1 No Action**

This amendment will have no impact on the TAC set-aside since that program will continue as required by Amendment 10. The impacts of the TAC set-aside were already discussed in Amendment 10 (Section 5.1.8). Observer coverage is needed to improve the estimated amount of finfish bycatch and to determine the level of sea turtle takes in the scallop fishery. Although TAC set-asides reduce part of the scallop revenue available to the scallop vessels, these funds also reduce the compliance costs for vessels by providing compensation for observer coverage.

Under no action, a percentage of available harvest will be still set aside to fund costs of an industry-funded observer program. But if no action is taken, there would be no mechanism to implement the observer program. Even though some funding within the Observer Program may be able to cover some trips, this level may not be sufficient 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 accuracy of the results. As a result, more conservative actions could be implemented to reduce finfish bycatch or interactions with endangered and threatened species with adverse impacts on the small businesses in scallop industry.

### **4.3.2.2 Impacts of the proposed action**

#### **4.3.2.2.1 Overall Impacts**

Amendment 13 proposal include a new mechanism to administer the industry funded scallop observer program similar to the one implemented under the emergency action. These provisions regarding the observer provider approval and responsibilities were already implemented by the Emergency Action. Similarly, the regulations regarding observer certification were already implemented by the Emergency Action, and no new eligibility standards are established by this Amendment. Training costs of observers are borne by the government. Participation by potential observer service providers is voluntary and since no federal action is requiring participation, further assessment of the potential impacts on these entities is not required. This action is not expected to have any economic burdens and/or negative impacts on the profitability of these businesses given also that no significant changes are proposed to establish such businesses. In fact, the economic impacts on the observer service providers are expected to be positive because more of these services will be used if the observer program is implemented.

Amendment 13 will still require vessels with sea scallop fishing permits to carry an observer onboard in accordance with the Section 648.11(g) of the current regulations. If a vessel is selected to carry an observer they are responsible for contacting a certified observer provider and for paying the cost of the observer. However, depending on the availability of the set-aside, NMFS will reduce DAS accrual rate if the observed trip takes place in the open areas and increase the possession limit if it takes place in an access area. Although Amendment 13 proposal is not different from the current requirements in this aspect, under no action, there will be no mechanism to implement the observer program. Therefore, vessels may not be required

carry an observer and pay for observer costs. Some trips may have observer coverage using the available funds within the observer program, or the scallop industry may make some arrangements with the private contractors using the TAC set-up, but such arrangements are outside the scope of this Amendment requiring no regulatory flexibility analysis. The analysis below examines, however, the economic impacts of the proposed action on vessels that will be required to carry an observer onboard when the observer program is reinstated with Amendment 13.

Table 1 shows the number and characteristics of the vessels that participated in the observer program during the 2004, 2005 and 2006 fishing years. Assuming that observer costs amounted to \$800 per day-at-sea (or \$33.30 per hour --slightly higher than \$775, what most vessels were charged in 2006 fishing year), average observer costs per general category vessel was estimated to be about \$1,440 in 2006 corresponding to an average trip length of 1.8 days-at-sea, and lower than this amount during the previous fishing years. Similarly, the observer costs paid by a limited access vessel averaged about \$6,560 in 2006. These are the amounts paid to the observer and does not include the compensation provided to the vessels by NMFS. Therefore, compliance costs on scallop vessels are expected to be considerably less than these amounts under most circumstances. If there are no funds left in the TAC set-up program, however, to help pay for the observer coverage; however, the vessels will be responsible for paying the observer regardless of whether the vessel lands or sells scallops on that trip. This has been the process since the observer set-aside program was implemented in 1999. However, in order to prevent such an occurrence, NMFS usually distributes funds such that the majority, if not all trips with observer onboard are at least partially compensated. It is clear that, even without any compensation by NMFS, the observer costs would not constitute a significant proportion of the total revenue of an average vessel. Given that average revenue of general category vessels from all species was about over \$139,000 in the first 11 months of 2006 fishing year, and over \$200,000 in the 2004 and 2005 fishing years, a cost of \$1,400 per vessel that participated in the programs would amount to 1% or less of total revenue (assuming that each vessel carried observer only on one trip). When the compensation amounts are included, the costs would be less and some vessels would even gain from having an observer on board as discussed in the following section. Similarly for an average limited access vessel that participated in the program during one of its trips, the cost of observers wouldn't exceed 1% of the total annual revenue, and would even be less with the compensation provided by NMFS (either in pounds or in reduced DAS accrual rates).

Overall, the estimated costs of observer coverage for the limited access fleet were about \$2.1 million at its highest level (2004) and were about \$0.3 million for the general category fleet (2005) assuming that observer costs were \$800 per day-at-sea. Again, these compliance costs will be minimized through the TAC set-aside that will allow compensation to vessel owners and crews that have paid for observers. Observer coverage funded through these funds will improve information that could be used to reduce amount of finfish bycatch and the level of sea turtle takes in the scallop fishery. This could eliminate the need for more conservative actions with adverse impacts on the small businesses in scallop industry. The scallop industry will also benefit from improved management made possible through research and surveys. The benefits are expected to outweigh the costs of observer program.

In short, observer program is expected to have positive economic impacts on the vessels participating in the sea scallop fishery by improving information, thus management of the scallop resource. This is expected to increase the producer benefits for the scallop industry. No significant quantifiable impacts on scallop prices and change in benefits to the consumers are expected from this action since observer program is not expected to impact scallop landings in a significant way. If the observer coverage helps to reduce the finfish bycatch and the level of sea turtle takes in the scallop fishery, however, the consumers will benefit as well. Therefore, net economic benefits of this action are expected to be positive.

**Table 1. The number of trips, vessel characteristics and observer costs (before compensation applied) for vessels that had observer coverage during the last three fishing years. (Observer costs are assumed to be \$800 per day-at-sea).**

Permit Plan	Data	2004	2005	2006
General Category	Number of vessels	42	87	18
	Number of Trips	95	238	21
	Average GRT	60	75	68
	Average HP	418	442	442
	Average number of crew	3.0	3.2	3.1
	Average DA per trip	1.6	1.7	1.8
	Average observer costs per vessel	1,280	1,360	1,440
	Total observer costs for general category	121,600	323,680	30,240
Limited Access	Number of vessels	190	155	67
	Number of Trips	298	210	71
	Average GRT	153	150	154
	Average HP	822	812	844
	Average number of crew	6.6	6.2	7.0
	Average DA per trip	9.0	8.6	8.2
	Average observer costs per vessel	7,200	6,880	6,560
	Total observer costs for limited access	2,145,600	1,444,800	465,760
Total number of vessels		232	242	85

**Table 2. Active scallop vessels by permit category (Dealer data)**

Permit Plan	Data	2004	2005	2006*
General Category	Number of vessels	419	598	529
	Total number of trips	8,808	21,497	12,281
	Scallop pounds per vessel	6,721	11,656	9,592
	Average scallop revenue per vessel	35,090	88,702	58,158
	Average total revenue per vessel	249,167	260,942	139,755
	Total scallop landings	2,816,279	6,900,578	5,045,262
Limited Access	Number of vessels	323	334	323
	Total number of trips	4,521	5,292	2,758
	Scallop pounds per vessel	184,194	134,442	127,001
	Average scallop revenue per vessel	940,065	1,038,976	772,914
	Average total revenue per vessel	988,401	1,072,991	803,873
	Total scallop landings	59,494,630	44,903,637	41,021,231
Total number of vessels		742	932	852

\*Preliminary estimates including January 2007. Fishing year February 28, 2007.

#### 4.3.2.2.2 Economic impacts on vessels

The economic impacts of the observer coverage on the vessel owners and the crew will depend to what extent compensation provided by NMFS will cover cost of observers. Although compensation will reduce the observer costs, landing extra pounds either through increased possession limit or reduced DAS accrual will also extend the trip and increase the trip costs and hours worked by the crew. Therefore the fishing costs should be taken into account in assessing potential impacts of observer coverage. Scallop prices will also affect the costs of observer coverage since the amount of revenue that could be obtained from the compensation pounds will depend on prices. The scenario analyses presented below show that the economic impacts of observer coverage will vary according to the trip costs, trip length, scallop prices, compensation amounts, and fishing power of a vessel or scallop productivity as indicated by LPUE per day-at-sea. In the majority of circumstances, however, compensation provided through the TAC set-aside program will reduce the costs of observer coverage for vessels and help pay a significant proportion of these costs.

Table 3 shows the projected landings, LPUE and price corresponding to the recent biological simulations estimated for the Emergency Action. The prices are estimated using the price model presented in Amendment 13, and assuming that there will be no change in consumer preferences for scallops, in import prices and exports compared to the present levels. With these assumptions, Table 3 shows that the prices could range from about \$5.90 to \$7.66 during the next eleven years. The prices will be higher than shown in the Table if scallop landings are lower than estimated by the biological model, or if there is an increase in import prices, in scallop exports or in the demand for scallops by consumers. The increase in scallop prices since January 2007 also exhibits a high variability from one season to another.

**Table 3. Estimated Scallop Landings, Prices and Revenues (in 2006 prices, alternative 2 projections)**

Fishing year	Total Landings	LPUE	Price	Total Revenue
2007	61	1,810	6.76	429
2008	56	2,279	7.66	428
2009	61	2,366	6.90	419
2010	64	2,449	6.41	411
2011	66	2,437	6.09	405
2012	67	2,394	5.94	400
2013	66	2,353	6.16	405
2014	67	2,341	5.92	399
2015	68	2,327	5.90	398
2016	64	2,301	6.38	410
2017	67	2,315	6.04	402

Scallop revenue corresponding to different levels of compensation pounds per trip is estimated in Table 4 for scallop prices ranging from \$5.00 to \$8.50. Although a price range of \$6.00 to \$7.60 is more in line with the estimates given in Table 3, in order to examine the sensitivity of economic impacts, a lower (\$5.00) and a higher price value (\$8.50) was also included in this Table. These results show that, about 200 pounds allowance per DAS would cover observer costs in the access areas, even at a price of \$5.00 per pound of scallops and at a \$1000 observer cost per day, given that there was no change in fishing costs. However, landing extra pounds will extend the trip and increase the trip costs and hours worked by the crew (Table 5). As a result, more than 200 pounds per DAS will be required to compensate the vessel owner and the crew for the increase in trip expenses and crew time.

**Table 4. Estimated revenue for compensation pounds per day-at-sea.**

Compensation lb. per trip	Scallop price per pound				
	\$5.00	\$6.00	\$6.75	\$7.60	\$8.50
200 lb.	1,000	1,200	1,350	1,520	1,700
300 lb.	1,500	1,800	2,025	2,280	2,550
400 lb.	2,000	2,400	2,700	3,040	3,400
500 lb.	2,500	3,000	3,375	3,800	4,250
600 lb.	3,000	3,600	4,050	4,560	5,100

**Table 5. Compensation pounds and increase in trip length required to land these pounds for a day boat.**

Compensation Pounds	LPUE				
	800	1,800	2,000	2,300	2,500
200 lb.	0.250	0.111	0.100	0.087	0.080
300 lb.	0.375	0.167	0.150	0.130	0.120
400 lb.	0.500	0.222	0.200	0.174	0.160
500 lb.	0.625	0.278	0.250	0.217	0.200
600 lb.	0.750	0.333	0.300	0.261	0.240

The increase in the trip length necessary to land the compensation pounds will vary with average trip length of a vessel and with scallop pounds per day-at-sea (LPUE) a vessel lands. The recent biological projections show that LPUE could range from an average of 1,810 lb. in 2007 fishing

year to 2,449 lb. in 2010. The LPUE in any specific fishing area and time will be lower or higher from these averages, however, depending on the resource conditions in that area. Landings per day-at-sea will also change with the vessel characteristics including gross tonnage and horse power as well as with the number of crew on board. Clearly, the lower the fishing power a vessel has, the higher will be the increase in trip length to land the compensation pounds. For these reasons, the analyses shown in Table 5 include scenarios with LPUE ranging from 800 lb. to 1800 lb. per day-at-sea. Obviously, if vessels could land more scallop pounds than these amounts, the costs of observer coverage net of trip expenses will be less than estimated in Table 6 and Table 7.

**Table 6. Average trip duration, LPUE, and scallop landings in 2004 by full-time limited access holders**

Permit Category	Trip duration	Average trip duration by trip	Average LPUE	Number of trips	Percentage of total scallop landings	Average gross tonnage
Full-time	4 days or less	2.90	2005	304	2.80%	145
	5 to 8 days	6.87	2318	1302	35.38%	158
	9 to 12 days	10.16	1953	862	29.13%	157
	13 to 15 days	13.85	2013	325	15.49%	171
	16 to 18 days	16.51	1894	51	2.73%	158
Full-time total		8.41	2132	2844	85.52%	158
Full-time small dredge	4 days or less	2.87	1258	101	0.53%	94
	5 to 8 days	6.53	1172	162	2.15%	100
	9 to 12 days	10.44	1353	214	5.14%	108
	13 to 15 days	13.66	1092	62	1.58%	109
	16 to 18 days	16.60	779	5	0.11%	86
Full-time small dredge total		8.29	1246	544	9.51%	103
Full-time trawl	4 days or less	3.23	1910	40	0.43%	118
	5 to 8 days	6.46	2047	83	1.87%	117
	9 to 12 days	10.05	1851	76	2.40%	118
	13 to 15 days	13.25	1453	8	0.26%	141
Full-time trawl Total		7.42	1926	207	4.97%	118
Grand total		8.34	1986	3595	100.00%	147

In addition to LPUE, the economic impacts of observer coverage will depend on the duration of the trip. If a vessel takes an 8 day trip, the observer will be required to be present for 8 days costing the vessel \$6,400 assuming an observer cost of \$800 per day-at-sea. As with LPUE, trip length will also vary from vessel to vessel according to the vessel size (i.e., gross tonnage, horse power), number of crew on board, and the proximity of the fishing grounds to the port the where vessel is located. The average trip length for limited access vessels declined from 9 day-at-sea in 2004 to 8.2 day-at-sea in 2006, but for general category vessels, trip length increased from an average of 1.6 days in 2004 to 1.8 days in 2006 for the general category vessels (Table 10). Average trip length for full-time scallop vessels was approximately 8.4 days in 2004, and was slightly shorter of full-time small dredge and full-time trawl vessels (Table 6). There were a considerable number of trips, however, that took more than 9 days, and some that took longer than 16 days. Probably the trips to the controlled access areas were the shorter trips since landings from these trips were constrained by the trip limits. The trips by general category vessels could take shorter since many of these vessels are small boats that do not take long trips. The average length of the trips with observers on board is shown in Table 10 by permit category.

Potential economic impacts of observer coverage are analyzed in Table 7 and Table 8 for different levels of trip length, LPUE, price and compensation amounts. Table 7 shows the impacts for limited access vessels, most of which could take longer trips whereas the scenarios shown in Table 8 are more suitable for general category vessels or for small vessels that usually take shorter trips. These analyses are based on the following assumptions:

- Cost of an observer is assumed to be \$800 per day-at-sea although actual costs were slightly lower than this for many vessels during the recent fishing year. It is also assumed that a vessel pays the fraction of this cost if it fished only half day or 1.5 day-at-sea since observers charge vessels on an hourly basis. These costs could, of course, change in the future. Clearly, if costs of observers decline, economic impacts on the vessels will decrease compared to the levels shown in the Tables below.
- Average trip costs per day-at-sea were \$1094 for limited access vessels and were about \$328 for general category vessels in 2005 according to the observer cost data for scallop vessels. The cost estimates are adjusted for the increase in prices in 2006 using the change in the producer price index relative to 2005 (increased by 6.7%). With this adjustment, average trip costs per day-at-sea are estimated to be \$1,170 for limited access vessels and \$350 for general category vessels. Actual trip costs will vary from these averages for each vessel according to the vessel gross tonnage, horsepower, number of crew, the fuel costs, length of trip, area and season fished.
- The scallop revenue from each trip is estimated either using a price of \$6.00 per lb. or \$7.60 per pound corresponding to the range of prices estimated in Table 3. If the prices are higher (lower) than \$7.60 (\$6.00), costs of observer coverage will be lower (higher) since the vessels will get more revenue from the compensation pounds or reduced DAS accrual rate.
- Only lower end of LPUE estimates projected for the next 11 years are used in these Tables. LPUE used in these scenarios ranges from 800 lb. to 1800 lb. per day-at-sea, and shows the magnitude of impacts with either relatively low productivity of the scallop resource or for vessels that have a lower catch rate than average catch rate estimated for the fleet as a whole. It is clear that the costs of observer coverage will be lower if LPUE is higher than these estimates. This is because the same amount of scallops could be harvested in a shorter period of time reducing the trip length and the costs.
- The observer costs are deducted from the gross stock before it is divided among the crew and the vessel owner. Crew incomes are assumed to equal to 55% of the gross stock net of observer costs minus the trip costs. Vessel share is 45% of the gross stock net of observer costs. The lay system could vary from one vessel to another, however, and there could be other costs that are paid by crew or the vessel owner not accounted for in these estimates. Therefore, the absolute values for the estimated crew and vessel incomes should be interpreted with caution and should be used in comparing the results of one scenario versus another.
- First part of each table shows the revenues, costs, crew and vessel income assuming that there is no observer on board. Second part, however, shows the results with observer coverage. The costs of observer coverage are estimated for vessel owner and crew by comparing net revenues from a trip with no observer with a trip that has observer on board.

The results could be summarized as follows:

- Scenarios 1 to 4 in Table 7 assume that total pounds from each trip will equal to 18,000 lb., corresponding to the possession limit for access areas for the limited access vessels during the recent years. For these scenarios, it is assumed that compensation pounds will equal to 400 lb. per day-at-sea, equal to the compensation pounds NMFS awarded in the 2006 fishing year for the access areas. For open area trips, rather than awarding pounds, NMFS reduces DAS accrual rate, which in turn, translates into scallop pounds when vessel fishes the extra time it earned by having observer onboard. During the 2006 fishing year, DAS accrual rate was equal to 0.15, which translates into 270 lb. if LPUE was 1800 pounds per day-at-sea.
- Scenario-1 is estimated assuming that compensation pounds per day-at-sea at 400 lb. If a vessel crew and owner decided to earn an extra 400 per day-at-sea for each of the 10 days of the trip they would normally take without observer coverage, they need to extend the trip by an additional 2.2 day-at-sea if LPUE is 1800 lb. This would increase both the trip and the observer costs. The net income on the crew and vessel income would be positive, however, with an increase in crew shares by \$5,222 and vessel income by \$6,400. The actual gains could be less than these amounts since having a longer trip could also result in higher expenses not included here, such for repairs, maintenance and insurance. Although, total income for the crew and vessel owner could increase, income per day-at-sea will decline since they still need to pay for the observer for the trip. If there was no TAC set-aside left to apply for observer costs, thus no compensation was provided, total costs of observer coverage will equal to \$8000, with crew paying \$4,400 and vessel owner paying \$3,600 of this cost. This is because, without the compensation pounds, the trip length would stay at 10 day-at-sea since the vessel could not land more than 18,000 lb. from the access area.
- Scenario 1 assumed a relatively low price of \$6.00 per pounds of scallops. If the price were higher, the losses due to the observer coverage will be lower and gains from compensation pounds will be higher. Scenario 2 shows that if the price of scallops is \$7.60, the gains from the compensation will be higher for both the crew and the vessel owner. The vessel owner and the crew could also choose to fish less days, just enough to cover the observer costs rather than increase their income by landing ore compensation pounds.
- Scenarios 3 and 4 show the impacts on vessels if the LPUE was lower, 1,500 lb. (instead of 1,800 lb. per day-at-sea for scenarios 1 and 2). In this case, it would take 12 day-at-sea for the vessel to land 18,000 lb, and 15.2 days if the crew and the owner wanted to land another 400 lb. for each of these first 12 days. The total income to crew and the vessel owner would be close to what they would get if they only fished 12.2 days when the LPUE is 1800 lb. as in Scenario 1. And if they fished only 12.2 days as before, they could only land 18,400 lb. (1500 lb.\*12.2 day-at-sea) from the trip, that is an only 300 lb. extra, which would not be enough ( $\$7.60 \times 400 = \$3,040$ ) to pay for the observer costs ( $12.2 \times 800 = \$9,760$ ). Therefore, observer coverage could be more costly for some smaller vessels with lower catch rates compared to the others with high catch rates per day-at-sea.
- Scenarios 4 to 6 show the results with a higher price, \$7.60 per pound of scallops, but with varying LPUE and trip lengths. Scenario 4 is similar to Scenario 4 except that it assumed that maximum trip length is 13 day-at-sea because of vessel capacity, weather conditions or fishing traditions of some vessels. In that case, total crew income will be

lower with the observer coverage, by \$620, even though everyone will fish one extra day than they would fish without observer coverage, and even though the price per pound of scallops is higher compared to Scenario 3. For vessel owner, there could be a slight increase in income, by \$450 in this example, because the owner does not pay for the higher trip costs with the extended trip. As mentioned, however, there could be other costs for the owner from a longer trip, such as repairs and maintenance, which are not taken into account in these estimates.

- Scenarios 5 and 6 show the results with a lower LPUE rates, 1200 lb. and 800 lb. respectively, and assuming a 0.15 reduced accrual rate for observer coverage in the open areas. This would translate into 180 extra pounds per day-at-sea for Scenario 5 and into 120 lb. for Scenario 6. It is also assumed this vessel would fish no more than 9 days if there was no observer on board. Extending the trip to 10.4 day-at-sea, this vessel will cover the total observer costs and increase crew income (\$638 for the whole trip for all crew) and vessel share (\$1,814 for the trip) slightly. If however, LPUE was 800 lb. per day-at-sea as in Scenario 6, even with the extended trip, this vessel would not cover the observer costs completely, and the crew income would decline by \$1,619 (for all crew) and vessel share would decline by \$32 for the trip.
- Therefore, the impacts of the observer program could vary from one vessel to another depending on the vessel capacity and the catch-rate per day-at-sea. Carrying an observer during winter months or when the scallop productivity is low could thus impose higher costs compared to fishing in better weather and resource conditions.

**Table 7. Impacts of observer coverage on crew and vessel income (Assumptions: Cost of observers=\$800 per day-at-sea, Compensation pounds=400 lb. per day-at-sea, day-at-sea accrual=0.15 for Scenarios 5 and 6).**

Observer allowance	Scenario 1	Scenario 2	Scenario 3	Scenario 4	Scenario 5	Scenario 6
LPUE (lb. per day-at-sea)	1,800	1,800	1,500	1,500	1,200	800
Scallop price (\$)	6.00	7.60	6.00	7.60	7.60	7.60
<b>No observer coverage</b>						
Trip length (no comp. pounds)	10	10	12	12	9	9
Total scallop pounds from trip	18,000	18,000	18,000	18,000	10,800	7,200
Scallop revenue (\$)	108,000	136,800	108,000	136,800	82,080	54,720
Trip cost per DAS (\$)	1,170	1,170	1,170	1,170	1,170	1,170
Total trip costs (\$)	11,700	11,700	14,040	14,040	10,530	10,530
Crew income net of trip costs (\$)	47,700	63,540	45,360	61,200	34,614	19,566
Crew income per day-at-sea (\$)	4,770	6,354	3,780	5,100	3,846	2,174
Vessel share (\$)	48,600	61,560	48,600	61,560	36,936	24,624
Vessel share per day-at-sea (\$)	4,860	6,156	4,050	5,130	4,104	2,736
<b>Observer coverage</b>						
Increase in trip length with observer	2.2	2.2	3.2	3.2	1.35	1.35
Trip length with observer coverage	12.2	12.2	15.2	13.0	10.4	10.4
Total scallop pounds from trip	22,000	22,000	22,800	19,500	12,420	8,280
Scallop Revenue (\$)	132,000	167,200	136,800	148,200	94,392	62,928
Observer costs (\$)	9,778	9,778	12,160	10,400	8,280	8,280
Scallop revenue net of observer costs (\$)	122,222	157,422	124,640	137,800	86,112	54,648
Total trip costs (\$)	14,300	14,300	17,784	15,210	12,110	12,110
Crew income net of trip costs (\$)	52,922	72,282	50,768	60,580	35,252	17,947
Crew income per day-at-sea (\$)	4,330	5,914	3,340	4,660	3,406	1,734
Change in crew income per day-at-sea (\$)	-440	-440	-440	-440	-440	-440

Total costs of (or gain from) observer coverage for crew (\$)	5,222	8,742	5,408	-620	638	-1,619
Vessel share (\$)	55,000	70,840	56,088	62,010	38,750	24,592
Vessel share per day-at-sea (\$)	4,500	5,796	3,690	4,770	3,744	2,376
Change in vessel share per day-at-sea (\$)	-360	-360	-360	-360	-360	-360
Total costs of (or gain from) observer coverage for vessel-owner (\$)	6,400	9,280	7,488	450	1,814	-32
Total cost to crew and vessel-owner (\$)	11,622	18,022	12,896	-170	2,453	-1,652

The scenarios in Table 8 are more suitable for the analysis of the observer costs for general category vessels that can only land 400 lb. per trip. General category vessels are required to carry observers only in the access areas and receive compensation in pounds per calendar day fished, even though they fished less than 24 hours in a day. The observers charge by hour, however. The results are summarized as follows:

- Scenarios 1 to 4 assume that LPUE is 800 lb. per day-at-sea so that a vessel can land 400 lb. possession limit in half a day. For the purposes of the analysis it is also assumed that with steaming or fishing for other species, it would take one day-at-sea for a vessel to land 400 lb.
- If the compensation pounds were set to 400 lb. per day-at-sea, this vessel will cover observer costs of \$1,600 by fishing two days and landing 1,200 lb. of scallops, 800 lb. as compensation pounds plus 400 lb. from the trip. At a price of \$6 (Scenario 1), this would generate \$7,200 revenue from scallops, and would increase total crew income by \$1,410 and vessel share by \$1,440 after paying observer costs and trip expenses. Scenario 2 shows that if the price of scallops were \$7.60 per pound, this vessel would gain carrying observers on board even if the compensation pounds were set at 200 lb. per day-at-sea.
- Scenarios 3 and 4 show that a vessel could increase its gains by carrying an observer on board and taking a longer trip. For example, by fishing 3.5 day-at-sea and receiving 1,600 lb. in compensation for the observer coverage, and another 400 lb. from the trip, total scallop revenue could increase to \$15,200 at a price of \$7.60, and both crew and the vessel income could increase by over \$4,000 (Scenario 4).
- If the trip costs per day-at-sea were higher, the prices were lower or if compensation pounds were smaller than assumed in this Table, the gains for all the scenarios will be smaller. On the other hand, the gains from the observer coverage would increase if LPUE is higher, because a vessel could land the same amount of pounds by taking a shorter trip.
- These positive impacts on vessels is due to the fact that general category vessels are not allowed to land more than 400 lb. from regular trips, and even at a price of \$6, a compensation amount 400 lb. could bring \$2400 in revenue, far exceeding the cost of observer (assuming \$800) and the trip cost (assuming \$350), if that amount could be landed in a short period of time. If the compensation pounds are lower, prices decline or trip costs increase, the gains from observer coverage could decline. For example, a compensation of \$100 lb. per day-at-sea would bring only \$760 revenue at a price of \$7.60, which is less than the cost of observer.

**Table 8. Costs of observer coverage for general category vessels or for small vessels (Cost of observer=\$800)**

<b>Observer allowance</b>	<b>Scenario 1</b>	<b>Scenario 2</b>	<b>Scenario 3</b>	<b>Scenario 4</b>
LPUE (lb. per day-at-sea)	800	800	800	800
Scallop price (\$)	6.00	7.60	7.60	7.60
<b>No observer coverage</b>				
Trip length (no comp. pounds)	1.00	1.00	1.00	1.00
Total scallop pounds from trip	400	400	400	400
Scallop revenue (\$)	2,400	3,040	3,040	3,040
Trip cost per DAS (\$)	350	350	350	350
Total trip costs (\$)	350	350	350	350
Crew income net of trip costs (\$)	970	1,322	1,322	1,322
Crew income per day-at-sea (\$)	970	1,322	1,322	1,322
Vessel share (\$)	1,080	1,368	1,368	1,368
Vessel share per day-at-sea (\$)	1,080	1,368	1,368	1,368
<b>Observer coverage</b>				
Compensation pounds per day-at-sea	400	200	400	400
Trip length with observer coverage	2.0	1.25	2.0	3.5
Total scallop pounds from trip	1,200	800	1,200	2,000
Scallop Revenue (\$)	7,200	6,080	9,120	15,200
Observer costs (\$)	1,600	1,000	1,600	2,800
Scallop revenue net of observer costs (\$)	5,600	5,080	7,520	12,400
Trip costs (\$)	700	438	700	1,225
Crew income net of trip costs (\$)	2,380	2,357	3,436	5,595
Crew income per day-at-sea (\$)	1,190	1,885	1,718	1,599
Change in crew income per day-at-sea (\$)	220	563	396	277
Total costs of (or gain from) observer coverage for crew (\$)	1,410	1,035	2,114	4,273
Vessel share (\$)	2,520	2,286	3,384	5,580
Vessel share per day-at-sea (\$)	1,260	1,829	1,692	1,594
Change in vessel share per day-at-sea (\$)	180	461	324	226
Total costs of (or gain from) observer coverage for vessel-owner(\$)	1,440	918	2,016	4,212
Total cost to crew and vessel-owner (\$)	2,850	1,953	4,130	8,485

### 4.3.3 Summary of Regulatory Impacts

The economic impacts of the no action and the proposed regulations on scallop fishery, consumers and on total economic benefits to the nation are analyzed in Section 4.3.2. A brief summary of these impacts as follows:

- Amendment 13 proposals regarding the observer provider approval and responsibilities were already implemented by the Emergency Action. Participation by potential observer service providers is voluntary and since no federal action is requiring participation, further assessment of the potential impacts on these entities is not required. This action is not expected, however, to have any economic burdens and/or negative impacts on the profitability of these businesses given also that no significant changes are proposed to establish such businesses and that more of these services will be used if the observer program is implemented.
- Overall, the estimated costs of observer coverage for the limited access fleet were about \$2.1 million at its highest level (2004) and were about \$0.3 million for the general

category fleet (2005) assuming that observer costs were \$800 per day-at-sea. These compliance costs will be minimized through the TAC set-aside program which is implemented by Amendment 10. This program will allow compensation to vessel owners and crews that have paid for observers. The implications of the TAC set-aside and observer program in terms of enforcement cost and benefits were discussed in Amendment 10 (section 8.9.5).

- The proposed adjustment to the observer program through framework is expected to have positive impacts by providing more flexibility to the program in determining the percent of TAC set-aside, compensation amounts or reduced DAS accrual rates and the way the observer costs are shared among the vessels in the scallop fleet. Even with the compensation, observer coverage could have differential impacts on the vessel costs and incomes, making it harder for some vessels with small catch rate to land the compensation pounds unless they extend their trips significantly. Framework action could be used in the future to reduce or eliminated these differential impacts.
- Observer coverage funded through these funds will improve information that could be used to reduce amount of finfish bycatch and the level of sea turtle takes in the scallop fishery. This could eliminate the need for more conservative actions in the future with adverse impacts on the small businesses in scallop industry.
- Overall, the observer program is expected to have positive economic impacts on the vessels participating in the sea scallop fishery by improving information, thus management of the scallop resource. These benefits are expected to outweigh the costs of observer coverage and increase the producer benefits for the scallop industry. No significant quantifiable impacts on scallop prices and change in benefits to the consumers are expected from this action since observer program is not expected to impact scallop landings in a significant way. If the observer coverage helps to reduce the finfish bycatch and the level of sea turtle takes in the scallop fishery, however, the consumers could benefit as well. Therefore, net benefits of this action are expected to be positive.

#### **4.3.4 Determination of Significant Regulatory Action**

Executive order 12866 defines a “significant regulatory action” as one that is likely to result in: a) an annual effect on the economy of \$100 million or more, or one which adversely affects in a material way the economy, a sector of the economy, productivity, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; b) a serious inconsistency or interference with an action taken or planned by another agency; c) a budgetary impact on entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; d) novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this executive order.

The preceding analysis shows that Amendment 13 would not constitute a “significant regulatory action” since it will not raise novel legal and policy issues, other than those that were already addressed and analyzed in Amendment 13. Overall impacts on net benefits for are expected to be positive although the proposed measures will slightly increase the costs for the scallop industry. Therefore, the proposed regulations may not have an annual impact on the economy of \$100 million or more. The proposed alternatives will not adversely affect in a material way the economy, productivity, competition, public health or safety, jobs or state, local, or tribal governments or communities in the long run. The proposed action also does not interfere with an

action planned by another agency, since no other agency regulates the level of scallop harvest. It does not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients.

#### **4.4 REGULATORY FLEXIBILITY ANALYSIS**

The purpose of the Regulatory Flexibility Analysis (RFA) is to reduce the impacts of burdensome regulations and record-keeping requirements on small businesses. To achieve this goal, the RFA requires government agencies to describe and analyze the effects of regulations and possible alternatives on small business entities. Based on this information, the Regulatory Flexibility Analysis determines whether the proposed action would have a “significant economic impact on a substantial number of small entities.”

##### **4.4.1 Problem Statement and Objectives**

The purpose of the action and need for management is described in Section 1.2 and goal and objectives in Section 2.0 of the Amendment 13 document.

##### **4.4.2 Management Alternatives and Rationale**

The proposed action and alternatives to the proposed action are described in Section 3.0.

##### **4.4.3 Determination of Significant Economic Impact on a Substantial Number of Small Entities**

###### **4.4.3.1 Description of the small business entities**

The RFA recognizes three kinds of small entities: small businesses, small organizations, and small governmental jurisdictions. It defines a small business in any fish-harvesting or hatchery business as a firm that is independently owned and operated and not dominant in its field of operation, with receipts of up to \$4.0 million annually. The vessels in the Atlantic sea scallop fishery could be considered small business entities because all of them grossed less than \$3 million according to the dealer’s data for 2004 to 2006 (up to the end of January 2007) fishing years (Table 2). According to this information, annual total revenue averaged about \$940,065 in 2004, and over a million in 2005 fishing year per limited access vessel. Total revenues per vessel, including revenues from species other than scallops, exceeded these amounts, but were less than \$3 million per vessel. Average scallop revenue per general category vessel was \$35,090 in 2004 and \$88,702 in 2005 fishing years. Average total revenue per general category vessel was higher, exceeding \$240,000 in 2004 and 2005 fishing years. According to the preliminary estimates average revenues per vessel were lower in 2006 fishing year for the first 11 months for all permit categories because of lower scallop landings and prices.

The proposed regulations of Amendment 13 would affect vessels with limited access scallop and general category permits. Section 7.1 (Description of the Fishery) of Amendment 10 document and Section 4.5 of Framework 18 provide extensive information on the number, the port, the state, and the size of vessels and small businesses that will be affected by the proposed regulations. The current information on the number of scallop permits for the years 1997 to 2006 are provided in Table 9. The characteristics of the vessels that participated in the observer coverage program, in terms of gross tonnage, crew size, horsepower and trip duration, is provided in Table 1 for the last three fishing years. Table 10 shows the number of vessels by

permit, gear and tonnage category. According to the recent permit data, there were 318 vessels that obtained full-time limited access permits in 2006, including 55 small-dredge and 14 scallop trawl permits. In the same year, there were also 32 part-time and 1 occasional limited access permit in the sea scallop fishery. In addition, 2,501 permits were issued to vessels in the open access General Category and over 500 of these vessels landed scallops during the last two years (Table 2). These numbers could increase as the fishing year progresses. Therefore, the proposed alternatives of Amendment 13 are expected to have impacts on a substantial number of small entities.

**Table 9. Scallop Permits by category**

Permit category	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006*
Full-time	204	203	213	220	224	234	238	242	247	249
Full-time small dredge	3	2	1	3	13	25	39	48	56	55
Full-time net boat	27	23	16	17	16	16	16	15	18	14
<b>Total full-time</b>	<b>234</b>	<b>228</b>	<b>230</b>	<b>240</b>	<b>253</b>	<b>275</b>	<b>293</b>	<b>305</b>	<b>321</b>	<b>318</b>
Part-time	16	11	12	16	14	14	10	4	3	2
Part-time small dredge	9	7	3	4	6	8	19	26	29	30
Part-time trawl	30	27	22	20	18	10	8	3		
<b>Total part-time</b>	<b>55</b>	<b>45</b>	<b>37</b>	<b>40</b>	<b>38</b>	<b>32</b>	<b>37</b>	<b>33</b>	<b>32</b>	<b>32</b>
Occasional	2	3	4	4	5	4	3	3	1	1
Occasional trawl	24	19	20	16	19	15	8	5	5	
<b>Total occasional</b>	<b>26</b>	<b>22</b>	<b>24</b>	<b>20</b>	<b>24</b>	<b>19</b>	<b>11</b>	<b>8</b>	<b>6</b>	<b>1</b>
<b>Total Limited access</b>	<b>315</b>	<b>295</b>	<b>291</b>	<b>300</b>	<b>315</b>	<b>326</b>	<b>342</b>	<b>346</b>	<b>359</b>	<b>351</b>
<b>General category</b>	<b>2002</b>	<b>1939</b>	<b>2096</b>	<b>2263</b>	<b>2378</b>	<b>2512</b>	<b>2574</b>	<b>2827</b>	<b>2950</b>	<b>2501</b>

\* Updated as of October 2006.

**Table 10. The number of scallop vessels that had observer coverage during 2004-2006 by gear type and gross tonnage**

Gear category	Permit Plan	<50 GRT	51-100 GRT	101-150 GRT	>150 GRT	Grand Total
Scallop Trawl	General Category	17	14	32	5	68
	Limited Access		1	5	2	8
Subtotal		17	15	37	7	76
Scallop Dredge	General Category	53	13	13	1	80
	Limited Access	6	29	141	226	402
Subtotal		59	42	154	227	482
Grand Total		76	57	191	234	558

#### 4.4.3.2 Determination of significant effects

The Office of Advocacy at the SBA suggests two criteria to consider in determining the significance of regulatory impacts, namely, disproportional and profitability.

The disproportionality criterion compares the effects of the regulatory action on small versus large entities (using the SBA-approved size definition of "small entity"), not the difference between segments of small entities. Amendment 13 is not expected to have significant regulatory impacts on the basis of the disproportionality criterion for the following reasons:

1. The majority of the permit holders in the sea scallop fishery are considered small business entities.
2. Any scallop vessel regardless of its permit category or size could be required to carry an observer on board. Cost of observers, and the compensation pounds or reduced rates for day-at-sea accrual will not vary from vessel to vessel. Although observer coverage could affect some vessels within the scallop fleet differently than others as discussed in Section 4.3.2.2.2, these differential impacts are not relevant for disproportionality criterion. The changes in profits, costs, and net revenues due to Amendment 13 are not expected to be disproportional for small versus large entities since all entities (that is all vessels participating in the scallop fishery) are considered small. As discussed below, however, Amendment 13 includes an adjustment mechanism through framework action that could be implemented to reduce differential impacts in the future/
3. The proposed action and the nonpreferred options are not expected to place a substantial number of small entities at a significant competitive disadvantage relative to large entities.

The profitability criterion will apply if the regulation significantly reduces profit for a substantial number of small entities. The proposed action is not expected to reduce significantly profit for a substantial number of small entities. The following section provides a summary of the economic impacts from the proposed observer coverage program, and discusses the mitigating factors. The relevant section of Amendment 13, which discusses the rationale and impacts of these measures is also identified.

#### **4.4.3.3 Economic impacts on vessels and the scallop fishery**

- **Rationale** for the observer program is provided in Section 3.2.
- **Economic Impacts** are analyzed in Section 4.3.2. Impacts of no action are analyzed in 4.3.2.1 and the impacts of the proposed action are analyzed in Section 4.3.2.2. The economic impacts on small business entities or on individual vessels are discussed in Section 4.3.2.2.2.
- **Summary of the impacts of the proposed option and mitigating factors:**

The observer program will impose some costs on vessels that participate in the program by requiring vessels to carry and pay for observers on some trips. The compliance costs associated with the observer coverage will be minimized, however, through the TAC set-aside that will allow compensation to vessel owners and crews that have paid for observers. The net impacts of observer program on the vessels that participate in the scallop fishery will depend on scallop prices, trip costs, observer costs, and the compensation pounds or reduced DAS accrual rate provided by NMFS. The analyses presented in 4.3.2.2.2 showed that in some circumstances

observer coverage could reduce crew and vessel income by extending the trip and increasing the trip costs especially for vessels with a lower catch rate per day-at-sea. But in the most cases, overall costs due to the observer coverage will be minimized due to the compensation that will be provided by NMFS. Even if a vessel were to be required to pay for the full costs of observers due to lack of TAC set-aside, this payment is not expected to reduce significantly the annual vessel revenues and profits as discussed in Section 4.3.2.2.1. In other cases, observer coverage could even have positive economic impacts on some vessels, for example, by allowing vessels to land above the 400 lb. possession limit per trip.

The proposed adjustment mechanism to the observer program through framework action could be used to reduce the differential impacts of this program on some vessels, such as by implementing different compensation amounts and DAS accrual rates for smaller vessels. The adjustments through framework could also provide more flexibility to the program in determining the percent of TAC set-aside or the way the observer costs are shared among the vessels in the scallop fleet.

Amendment 13 proposal include a new mechanism to administer the industry funded scallop observer program similar to the one implemented under the emergency action. .

These provisions regarding the observer provider approval and responsibilities were already implemented by the Emergency Action. Similarly, the regulations regarding observer certification were already implemented by the Emergency Action, and no new eligibility standards are established by this Amendment. Participation by potential observer service providers is voluntary and since no federal action is requiring participation, further assessment of the potential impacts on these entities is not required. This action is not expected, however, to have any negative economic impacts on the profitability of these businesses given that no significant changes are proposed to establish such businesses and that more of the observer services will be used if the observer program is implemented.

In general, the scallop industry will benefit from improved management made possible through research and surveys. Observer coverage financed through these funds will improve information that could be used to reduce amount of finfish bycatch and the level of sea turtle takes in the scallop fishery. This could eliminate the need for more conservative actions with adverse impacts on the small businesses in scallop industry. Therefore, the benefits from the observer coverage are expected to exceed the costs of this program and have positive economic impacts on the vessels participating in the sea scallop fishery.

- **Comparison of the impacts with the alternative options:**

There are no significant alternatives that would generate higher benefits for the scallop vessels. The only alternative is the no action option, which does not provide a mechanism for the observer program to be implemented.

#### **4.4.3.4 Indirectly affected industries**

Indirect impacts include the impacts on the sales, income, employment and value-added of industries that supply commercial harvesters, such as the impacts on marine service stations that sell gasoline and oil to scallop vessels. The induced impacts represent the sales, income and employment resulting from expenditures by crew and employees of the indirect sectors. Given

that overall impacts of the proposed measures on the fleet revenues and costs will be small, their indirect and induced impacts are not expected to be significant.

#### **4.4.3.5 Identification on Overlapping Regulations**

The proposed regulations do not create overlapping regulations with any state regulations or other federal laws.

#### **4.4.3.6 Conclusion**

The preceding Initial Regulatory Flexibility Analysis and the relevant sections of RIR indicate that the regulations proposed Amendment 13 will have not “significant impacts” on a substantial number of small businesses.

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

The Council held one public hearing on Amendment 13 on February 7 in Portsmouth, NH in conjunction with the February 2007 Council meeting. Staff presented this document and approximately 50 people were in the audience and about ten individuals gave oral comments. One written comment was submitted at the public hearing (Attachment B). A summary of the oral and written comments received at the public hearing is below.

The full Council had the benefit of being present for the public hearing. The Council considered these comments at length and discussed possible ways to integrate these comments into this action. Many of the comments received during the public hearing were focused on the set-aside program, which has been part of the Scallop FMP since 1999. Adjustments to the observer set-aside program were not considered in Amendment 13 because this action focused on approving a mechanism to allow the set-aside program to be used, not to adjust the program. However if this action is implemented as proposed, adjustments to the set-aside program could be made by framework action. Ultimately the Council approved Amendment 13 to implement a mechanism for non-contracted observer service providers under the scallop set-aside observer program, but a number of Council members were unsatisfied with the current system. The Council expressed interest in considering adjustments to the scallop set-aside observer program and/or revisiting the entire program in a future action.

#### ***David Frulla – Fisheries Survival Fund***

Commented that the set-aside program started under the first access area program in 1999 and at that time the industry volunteered to have more coverage. Since then it has slipped into the open areas as well, and this is the only fishery in this area that is in the position of funding observer coverage. He added that because of budget constraints NMFS said they cannot afford any coverage in the scallop fishery, so how will the access areas operate without funding? He argued that now the industry is in the position of having to support this action (Amendment 13) in order for the access area program to occur. The regulations in Attachment A say that a vessel is responsible to pay for observers for all scallop fishing trips, not necessarily just the ones required to carry an observer. It seems to be shifting so that all observer costs are on the scallop industry. He suggested that the system needs to be more flexible so that the industry could fund observers up to their set-aside, and once the set-aside is used up the scallop industry should be able to get

observers funded by the observer program budget, just like all trips are funded for all the other fisheries in this region.

Response: The section of Attachment A referred to in this comment (Section 648.11 (g)(5)) does say that “owners of scallop vessels shall be responsible for paying the cost of the observer for all scallop fishing trips” but it goes on to say “on which an observer is carried onboard the vessel.” The Council does not intend this action to require observer coverage on all scallop trips. The Council agrees with the commenter that a similar set-aside system should be considered for other fisheries in this region and recently passed a motion related to the Standardized Bycatch Reporting Methodology (SBRM) Amendment. The motion reads: *include in the SBRM provisions in each FMP that would allow set asides to be used to fund observers in order to implement or improve the effectiveness of management measures in all Council FMPs.* As for suggestions made by this commenter to improve the system to add flexibility, if Amendment 13 is approved and adjustments to the observer program can be made through framework, the Council may consider alternatives to improve the program in Scallop Framework 19, which would be implemented in 2008.

***Gib Brogan – Oceana***

He commented that this action is a rubber stamp of the emergency action without a hard look at the issues. The Council should not close the book on the scallop observer program and there should be some discussion about what is necessary. The document does not discuss what the SBRM document describes as the necessary level of coverage for the scallop fishery. He distributed a written comment including an example of what could be needed in the scallop fishery based on methods under consideration in the SBRM document. He suggested that 1% may not be the appropriate number; his written comments suggest that 4% may be more realistic based on the options explored in the SBRM document (See Attachment B for the written comment submitted at the public hearing). He suggested that Amendment 13 should look at alternative set-aside values. The Council should discuss where we are going, what is necessary and how we should get there. The scallop fishery is a good example of how the resource can be used to fund observers. Other fisheries in this region can't afford it, but the scallop fishery is different and it should be held up to a different set of standards.

Response: In response to this comment a section was added to the final submission document summarizing the SBRM Amendment. The Council is still developing the SBRM Amendment and it is too early in the process to include details of the final proposed action. In fact, the Council has delayed final approval of the action until later in 2007 after more work can be done on the amendment. Considering a different percent set-aside for the observer program was outside the scope of Amendment 13, but if Amendment 13 is approved and adjustments to the observer program can be made through framework, the Council may consider alternatives to improve the program in Scallop Framework 19, which would be implemented in 2008.

***Tony Alvernez, dredge vessel owner***

Runs a five man vessel. He had to carry an observer and it cost about 10% of total gross stock of the trip. He happened to have a good trip so it was not a big deal, but it is unfair for smaller, less efficient vessels. He voiced that the current system is totally unfair.

Response: If Amendment 13 is approved and adjustments to the observer program can be made through framework, the Council may consider alternatives to improve the program in Scallop Framework 19, which would be implemented in 2008.

***Dan Cohen – Atlantic Capes Fisheries***

In theory he is opposed to this amendment and believes it should not be approved. But he added that the impact is too great because the fishery needs observers to go into access areas in June. He added, that the Council has not thought about the public policy issues involved. He said that we are going down a path but there are serious public policy issues that should be thought about first. One, should it be the responsibility of the industry to fund 100% of observer costs? If the Council makes that decision fine, but he does not think they have agreed on that, and it has not been discussed that way for other fisheries. He added that if the Council makes that decision then it should be that way across the board, not just for the scallop fishery. He argued that this action implies that because the scallop fishery is doing well and there is a budget crisis in Washington, the scallop industry should pay for observers because they can. But the fisheries that are not making as much money do not have to fund observers. He added that crews are making less money now because trips are not great this time of year, come June when the access areas open then it will be better for crews, but that is not the way we should be funding observer. He voiced that we could increase the set-aside to fund more observers, but there are other costs associated with that set-aside and carrying observers. He added that if the industry is required to pay for observers or other administrative costs then there should at least be a cap.

He voiced that the Council is in a quandary with the decision to approve Amendment 13; you have to vote yes because we need observers to fish and there is nothing available that is better, but approving this action as it is sets up a precedent that does not make sense. This action implies that poor fisheries do not have to pay, and what happens when the scallop fishery is not doing well will they no longer have to pay? He does not agree the scallop fishery needs more observer coverage, the access areas were monitored effectively this year and closed relatively quickly based on coverage provided this year. He agrees we need observers, but the need is not as high as the SBRM describes. The level should provide an accurate description of bycatch in the fishery, additional amounts is excessive.

The commenter asked, what would happen if the action was voted down. Pat Kurkul, the Regional Administrator said she could not completely answer, but stated that funding issues within NMFS were not expected to improve and the Council would then have to decide if the access program could function without observers. In her opinion it could not. Therefore, the commenter argued that we have no choice. Congress funds what they think is important. There is funding for marine mammals, so they must think that is important. He added that by passing this action the Council is saying it is ok for the scallop industry to pay but the others get it for free. He voiced that he does not have a solution; we need observers but it is wrong to say that the industry should pay for 100%, this is the only fishery that has to pay, and we fund more coverage than is necessary in his opinion.

Response: The Council agrees with this commenter that the current program is not perfect and could be improved, but the risk of developing specific modifications now is too high because the system should be in place before the access areas open in June 2007. Developing and analyzing

alternatives that would improve the current set-aside program would delay implementation of this system, leaving no mechanism in place to help defray the cost of observer coverage in the scallop fishery. In response to the point that the scallop fishery should not be the only fishery required to partially fund observer coverage, the Council recently passed a motion related to the Standardized Bycatch Reporting Methodology (SBRM) Amendment that would consider a set aside program to fund observers in all Council FMPs. In response to the comments related to other ways the program could be improved, if Amendment 13 is approved and adjustments to the observer program can be made through framework, the Council may consider alternatives to improve the program in Scallop Framework 19, which would be implemented in 2008. In terms of the appropriate level of observer coverage, the Scallop Plan Development Team will continue to develop those recommended levels unless the SBRM Amendment modifies that process.

***James Kendall – New Bedford Seafood Consulting***

There is a great burden of cost associated with the observer program. The burden is getting worse. He described the “free rider” issue in this system as people who eat a nice meal at an expensive restaurant and get up when it is time to pay the bill. He suggested that some people are demanding high levels of coverage and have no interest in helping to pay for it; it is an unfunded mandate. The industry is harvesting a public resource so if the Council decides that it should pay something to do that the industry would probably be fine with that, but it has to be fair. The system in place is not fair. If we just keep approving this system we are never going to make it better. Maybe cameras could be used to reduce costs. We need to look into new ways to reduce costs of observers.

Response: Alternatives for other funding mechanisms are outside the scope of Amendment 13. If Amendment 13 is approved and adjustments to the observer program can be made through framework, the Council may consider alternatives to improve the program in Scallop Framework 19, which would be implemented in 2008.

***Ron Smolowitz – Fisheries Survival Fund***

He commented that the system is not working and it is probably illegal. NMFS is picking and choosing who has to pay. He suggested that because the Council is thinking about using a set-aside program in other fisheries it better think about this in more detail. He suggested that when the Council makes a motion to approve Amendment 13 it consider removing the sentence, “*that vessel is responsible for paying the cost of the observer regardless of whether the vessel lands or sells scallops on that trip and regardless of the availability of set-aside for an increased possession limit or reduced DAS accrual rate.*” He believes that sentence is bad policy. It suggests that if there is no money available or set-aside then the industry has to pay. He added that NMFS has identified what they can’t do to improve the scallop observer set-aside program, but there is no motivation to solve the problems. Others have mentioned good ideas about how to improve this document but he thinks that should wait until Framework 19.

Response: The observer set-aside program was implemented with the first access area program to monitor bycatch and ensure that access into the groundfish closed areas did not impact rebuilding groundfish stocks. In terms of the scallop fishery being the only fishery in this region that has this system the Council agrees that it should be considered in other FMPs and recently passed a motion related to the Standardized Bycatch Reporting Methodology (SBRM)

Amendment that would consider a set aside program to fund observers in all Council FMPs. And in terms of improvements to this system, if Amendment 13 is approved and adjustments to the observer program can be made through framework, the Council may consider alternatives to improve the program in Scallop Framework 19, which would be implemented in 2008.

***Kirk Larson – owns three full-time limited access scallop vessels, Barnegat Light, NJ***

He agrees we need observer coverage and supports paying for it, especially in access areas. However, in open areas this time of year he thinks it is too costly. He suggested that getting an observer changes how a captain will fish. He knows he needs to make enough money to cover the extra cost of carrying an observer so he will focus on areas with known high concentrations of scallops. When an observer costs \$700 a day you will only get coverage of those areas, you will not get the widely distributed effort that because behavior will change. Maybe the way to do this is to fund observers as a full TAC set-aside program like the research set-aside program. Then vessels could be contacted to take out observers in different areas, or keep it specific to closed areas only.

Response: Observer coverage is intended to describe normal fishing activities across the fleet, and the Council and NMFS are concerned if fishing behavior is modified when observers are present. It is possible under current regulations for a different compensation rate to be allocated for different seasons if that would help reduce the burden of the observer coverage cost and changes in fishing behavior.

***Ed Blaine – Provider Commercial Fisheries, Seaville, NJ***

Commenter is a day boat fishermen from NJ. Not sure what total coverage was in the scallop fishery, but he has been crunching numbers and he believes there are different ways to do this. If a vessel is charged for example ten cents a pound to fund observers there will be plenty of funds to cover the cost of carrying an observer. If all day boat vessels and limited access vessels were charged a small value per pound we would not have these problems. Another idea he suggested was to allow vessels to land legal bycatch they do not have a permit for that they catch while carrying an observer. For example, if legal sized yellowtail was caught on a scallop trip and the vessel was not authorized to land yellowtail allow that vessel to land the catch and require that all revenue be sent directly to NMFS to help fund the observer program. He suggested that the money should be put back in the system to help fund observer.

Response: Total observer coverage in the scallop fishery in 2005 was 8-10%, and so far for 2006 it is about 8% (Note: The observer set-aside program was not in place for FY2005 and the beginning of FY 2006, so the scallop industry was not required to fund observer through the set-aside program during this time period) . Currently, NMFS is not authorized to charge a fee to administer a fishery management program unless the program is under an individual fishing quota (IFQ) system. Landing bycatch of other species would require a regulatory change to other FMPs that manage those species; for example, allowing a general category scallop vessel to land yellowtail flounder to cover the cost of carrying an observer would have to be considered under the Multispecies FMP as well, and that concept is outside the scope of this action.

***Harriett Didriksen – vessel owner***

The cost of an observer is too high. Whoever gets it the money (the observer, the observer service provider, the insurance company etc.), it is coming from the stock and it is more than the crew is making. We need to look into how these costs can be reduced. Vessels are required to take observers, the vessels are taking a large responsibility to carry them and if this is for the betterment of the nation, then there should be funds from other places than just the industry to pay for it. She added that if the industry has to pay for observers, they should have access to all the data. She agreed that landing bycatch to help fund observers may improve the bycatch data you get and help fund the program.

Response: Neither the Council nor NMFS are involved in setting the cost of observer coverage. The observer service provider is responsible for setting the daily cost of carrying an observer. There are also other costs NMFS pays for related to the observer program that are not included in the daily observer coverage fee, including observer training, staffing a call-in coordinator, data editing and data entry, etc.. In response to the comment about access to data collected by observers, individual vessels that are required to carry an observer can request the observer data from that trip.