

contractor employees" includes the following individuals:

- (1) United States citizens or residents;
- (2) Individuals hired in the United States or its possessions, regardless of citizenship; and
- (3) Local nationals and third country nationals where contract performance takes place in a country where there are no local workers' compensation laws.

(b) In preparing the cost proposal, the bidder/offeree shall use the following rates in computing the cost for DBA insurance:

Services @[contracting officer insert current rate] of compensation; or

Construction @[contracting officer insert current rate] of compensation.

(c) Bidders/offerees shall compute the total compensation (direct salary plus differential, but excluding per diem, housing allowance and other miscellaneous allowances) to be paid to covered contractor employees and the cost of the DBA insurance in their bid/offer using the foregoing rate. Bidders/offerees shall include the estimated DBA insurance costs in their proposed total fixed price or estimated cost. However, the DBA insurance costs shall be identified in a separate line item in the bid/proposal.

(End of provision)

652.228-75 and 652.228-76 [Removed]

■ 13. Sections 652.228-75 and 652.228-76 are removed.

Dated: June 6, 2006.

Corey M. Rindner,

Procurement Executive, Bureau of Administration, Department of State.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 060608158-6158-01; I.D. 051806E]

RIN 0648-AU47

Fisheries of the Northeastern United States; Atlantic Sea Scallop Fishery; Emergency Rule

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; emergency interim rule and request for comments.

SUMMARY: NMFS is implementing an observer service provider program for the Atlantic sea scallop (scallop) fishery including criteria for becoming an approved observer service provider, observer certification criteria, decertification criteria, and observer

deployment logistics. Through this emergency rule, NMFS is re-activating the industry-funded observer program implemented under the Atlantic Sea Scallop Fishery Management Plan (FMP) through a scallop total allowable catch (TAC) and days-at-sea (DAS) set-aside program that helps vessel owners defray the cost of carrying observers. Under this emergency action, scallop vessel owners, operators, or vessel managers are required to procure certified fishery observers for specified scallop fishing trips from an approved observer service provider. This emergency rule maintains the existing requirements for scallop vessel owners to pay for observers whether or not scallop TAC or DAS set-aside is available.

DATES: Effective from June 16, 2006 through December 13, 2006. Comments must be received at the appropriate address or fax number (see **ADDRESSES**) by 5 p.m., local time, on July 17, 2006.

ADDRESSES: Written comments should be submitted by any of the following methods:

- Mail: Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, One Blackburn Drive, Gloucester, MA 01930. Mark the outside of the envelope, "Comments on Scallop Emergency Action."
- Email: ScallopAU47@noaa.gov
- Fax: (978) 281-9135
- Electronically through the Federal e-Rulemaking portal: <http://www.regulations.gov>.

Written comments regarding the burden-hour estimate or other aspects of the collection-of-information requirement contained in this proposed rule should be submitted to the Regional Administrator at the address above and by e-mail to David_Rostker@omb.eop.gov, or fax to (202) 395-7285.

FOR FURTHER INFORMATION CONTACT: Peter W. Christopher, Fishery Policy Analyst, 978-281-9288; fax 978-281-9135.

SUPPLEMENTARY INFORMATION: Since 1999, NMFS has required scallop vessels operating in Sea Scallop Access Areas (Access Areas) to pay for observer coverage. The Scallop FMP requires vessel owners to provide advance notification to NMFS of upcoming scallop trips. This information is used to select trips on which an at-sea observer will be deployed. Observers were deployed through a contractual arrangement between NMFS and an observer provider until June 2004. The contractual arrangement was not renewed at that time because of

unresolved concerns regarding use of a sole contractor to administer the industry-funded observer program. The prior contract arrangement had enabled vessel owners to pay the observer contractor directly for observer deployments, with details of the observer deployment requirements specified through the contract. The expiration of the contract arrangement eliminated the mechanism that allowed vessel owners to make these payments and, in the absence of this contractual program, NMFS did not require vessel owners to pay for the cost of observers. Thus, NMFS has not utilized the observer set-aside program since 2004.

Observer coverage in the scallop fishery is necessary to monitor the bycatch of finfish, including yellowtail flounder, skates, monkfish, cod, and other species. Monitoring of yellowtail flounder bycatch in the Scallop Access Areas within the year-round closed areas under the Northeast (NE) Multispecies FMP is of particular concern because the scallop fishery is constrained by a fishery-specific TAC of yellowtail flounder, which is part of the stock-wide yellowtail flounder TACs set by the NE Multispecies FMP to achieve specified mortality targets for the species. Observer coverage is also needed to monitor interactions of the scallop fishery with endangered and threatened sea turtles.

Through fiscal year (FY) 2005, the Northeast Fisheries Science Center (NEFSC) funded the necessary levels of observer coverage in the sea scallop fishery to evaluate bycatch of groundfish and sea turtles by utilizing observer funding that was carried over from FY 2004. However, in FY 2006 the NEFSC's level of funding for the observer program is sufficient to provide only minimal observer coverage in the scallop fishery. The NEFSC did not receive its observer program budget until February 2006 and has been working to reconcile the shortfall ever since. In April 2006 NMFS determined that it could not reconcile the reduced level of observer coverage in the scallop fishery with available budget. Consequently, without the program established through this emergency rule, observer coverage would be constrained to levels below those recommended in the Scallop FMP for precise estimates of yellowtail flounder bycatch TAC in Access Areas. In addition, the lower level of coverage could make it more difficult to monitor and estimate interactions between the scallop fishery and sea turtles in the Mid-Atlantic, particularly during the June through October period, when such interactions are most likely.

Despite the fact that the mechanism that allowed vessel owners to make payments for observer coverage became inoperable in 2004, the New England Fishery Management Council (Council) has continued to establish specifications for the fishery that include TAC and DAS set-asides that could be harvested on observed trips to offset the costs to the industry of observer payments. The existing scallop measures also specify that the industry must pay for observers, even if the set-asides have been exhausted. Set-asides are specified in the current scallop regulations, and in proposed Framework 18 to the Scallop FMP (71 FR 16091, March 30, 2006), which is intended by the Council to adjust the specifications for the 2006 and 2007 scallop fishing year. For vessels fishing in the Area Access Program, the Council has allocated a portion of the total projected scallop catch to defray the observer costs for vessel owners. Scallop vessels that are selected to carry observers will be authorized to land additional scallops on such trips to help offset the cost of carrying the observer. Additional scallops landed in excess of the amount necessary to compensate for costs of carrying an observer will be deducted from the access area set-aside for observers. A set-aside of DAS is also allocated for scallop vessel owners who pay for the cost of observers for observed trips in open areas. The open area DAS set-aside program is the same as the TAC set-aside program, with the exception that it allows DAS to accrue at a reduced rate when a vessel carries an observer, rather than providing additional pounds of scallops to the vessel to help defray the cost of carrying the observer.

NMFS is implementing this emergency final rule, pursuant to its emergency action authority specified in the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) at 16 U.S.C. 1855(c), because it is critical to enact a program that will enable the industry to utilize the observer set-aside specified in the Scallop FMP no later than June 2006. The Area Access Program in the NE Multispecies closed areas begins on June 15th, with a requirement for monitoring of yellowtail bycatch by scallop vessels. Sea turtle interactions with the scallop fishery are most prevalent in the Mid-Atlantic between June and October. The benefits of taking emergency action through this final rule without the opportunity for prior public comment outweigh the adverse impacts that could be expected if NMFS proceeded under notice and comment

rulemaking. The justification for this emergency action is consistent with the Policy Guidelines for the Use of Emergency Rules (62 FR 44422, August 21, 1997) because the limited amount of observer coverage for the scallop fishery that is possible under the current NEFSC funding situation is an unforeseen circumstance that also presents potentially serious management problems to the fishery that must be addressed as soon as possible. The NEFSC did not receive its observer program budget until February 2006 and NMFS determined in April 2006 that it could not reconcile the reduced level of observer coverage in the scallop fishery with available budget and therefore initiated this emergency rule. Much of the harvestable sea scallop biomass is currently located within areas closed to allow rebuilding of groundfish stocks. In order to access that scallop resource, the Area Access Program established bycatch TACs for the scallop fishery that maintain the yellowtail flounder conservation objectives of the NE Multispecies FMP. Low levels of observer coverage for scallop vessels fishing under the Area Access Program would make it difficult to monitor these yellowtail bycatch TACs and to obtain data concerning the scallop fishery's interactions with sea turtles.

This emergency action does not impact other FMPs or fisheries in the Northeast because other FMPs neither require industry to fund observers nor include provisions to defray the costs of observers. Such programs would be difficult, if not impossible, to administer within the short timeframe statutorily restricting emergency action under the Magnuson-Stevens Act.

This emergency action re-activates the industry-funded scallop observer program. Scallop vessels are required to procure observer coverage from a NMFS-approved observer service provider and to pay for the observer coverage. This emergency rule establishes criteria for being approved by NMFS as an observer service provider for the scallop fishery. Entities interested in being included on the list of NMFS-approved observer service providers are required to submit an application with the information specified in the regulatory text of this rule. Upon receipt of an application, NMFS shall provide all potential observer service providers with an estimated number of observer sea days for this fishing year under this program. Additionally, a planned schedule of observer deployments shall be posted on this NOAA website <http://www.nefsc.noaa.gov/femad/fbs/>. NMFS

will notify candidate observer service providers of their approval or disapproval within 15 days of NMFS's receipt of the application. This emergency rule specifies observer service provider requirements, as well as observer requirements and responsibilities to become certified as an observer for the scallop fishery.

The scallop observer set-aside will provide scallop vessel owners with compensation for observer coverage up to a specified limit, as specified in the regulations for the scallop fishery. Once the set-aside is exhausted, vessel owners will no longer be compensated for coverage but will still have to pay for the cost of the observers, as specified at §§ 648.53(h)(1) and 648.60(d)(2).

Classification

The need to implement these measures such that adequate observer coverage is available to the scallop fishery starting in June 2006, and to avoid potential management problems, constitutes good cause under authority contained in 5 U.S.C. 553(d)(3), to waive the 30-day delayed effective date, and implement the emergency action upon publication.

The emergency rule requires immediate implementation because without the measures in the emergency rule, NMFS's ability to monitor bycatch of NE multispecies and endangered and threatened sea turtles could be compromised. The Access Areas open on June 15 with yellowtail flounder bycatch TACs that require close monitoring. Reduced observer coverage for scallop vessels fishing under the Area Access Program particularly hampers NMFS's ability to monitor the yellowtail flounder bycatch TACs, which are a critical component of the yellowtail flounder rebuilding program under the NE Multispecies FMP. In particular, the yellowtail flounder TAC for the scallop fishery in the Access Area within the Nantucket Lightship Closed Area is only 31,544 lb (all catch, including discards), which, given the level of expected fishing effort in the area, could be harvested quickly. Without adequate observer coverage, excessive yellowtail flounder catch could result. Unless there is observer coverage, NMFS may need to rely on catch data from prior years to determine when bycatch TACs are attained. Such data may not be completely applicable to the 2006 fishing year. This would have immediate and/or long-term negative impacts on the fishery resources and the fishing industry due to the implications of excessive harvest levels of yellowtail flounder or closure based on incomplete information. In

addition, adequate observer coverage to monitor interactions between the scallop fishery and sea turtles is particularly important during June through October because this is when the turtles are in the same areas that the scallop fishery takes place.

NMFS did not initiate the emergency action earlier because it was pursuing other solutions to the observer coverage problems, including possible changes to budget allocations. NMFS determined that the emergency rule was necessary only after making the determination that it could not provide sufficient observer coverage in the scallop fishery through any other mechanism. The NEFSC did not receive its observer program budget until February 2006, and NMFS determined in April 2006 that it could not reconcile the reduced level of observer coverage in the scallop fishery with available budget. Subsequently, the Northeast Regional Administrator informed the Council's Executive Director during a coordinating meeting that because of the budgetary constraints, NMFS would be looking for an administrative solution to activate the observer set-aside program. Since there was no formal Council response, NMFS proceeded with the emergency rule. NMFS proceeded with this emergency rule with the intention of implementing the action in June 2006 to ensure that adequate observer coverage could be placed in the scallop fishery in order to monitor yellowtail flounder and sea turtle bycatch.

For these reasons described above, the Assistant Administrator for Fisheries, NOAA also finds it is impracticable and contrary to the public interest to provide for prior notice and an opportunity for public comment under 5 U.S.C. 553(b)(B) prior to publishing the emergency rule.

This emergency rule has been determined to be not significant for purposes of Executive Order 12866.

This emergency rule is exempt from the procedures of the Regulatory Flexibility Act because the rule is issued without opportunity for prior notice and opportunity for public comment.

This rule contains new collection-of-information requirements approved under emergency Paperwork Reduction Act by the Office of management and Budget (OMB) under the paperwork Reduction Act (PRA). These new requirements apply to entities interested in becoming NMFS-approved observer service providers and to those observer service providers approved by NMFS and providing observer services to the scallop fishery. Public reporting burden for these collections of information are estimated to average as follows:

1. Application for approval of observer service provider, OMB control number 0648-0546 (10 hr per response);
2. Applicant response to denial of application for approval of observer service provider, OMB control number 0648-0546 (10 hr per response);
3. Observer service provider request for observer training OMB 0648-0546 (30 min per response);
4. Observer deployment report, OMB control number 0648-0546 (10 min per response);
5. Observer availability report, OMB control number 0648-0546 (10 min per response);
6. Safety refusal report, OMB control number 0648-0546 (30 min per response);
7. Submission of raw observer data, OMB control number 0648-0546 (5 min per response);
8. Observer debriefing, OMB control number 0648-0546 (2 hr per response);
9. Biological samples, OMB control number 0648-0546 (5 min per response);
10. Rebuttal of pending removal from list of approved observer service providers, OMB control number 0648-0546 (8 hr per response);
11. Vessel request to observer service provider for procurement of a certified observer, OMB control number 0648-0546 (25 min per response); and
12. Vessel request for waiver of observer coverage requirement, OMB control number 0648-0546 (5 min per response).

These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection information.

Public comment is sought regarding whether this collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to NMFS and to OMB (see ADDRESSES).

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: June 14, 2006.

William T. Hogarth,

*Assistant Administrator for Fisheries,
National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 648 is amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

§ 648.10 [Amended]

■ 2. In § 648.10, paragraphs (b)(4)(ii) through (iv) are suspended.

■ 3. In § 648.11, paragraphs (a)(1) and (a)(2) are suspended, and paragraphs (a)(3), (g), (h), and (i) are added to read as follows:

§ 648.11 At-sea sea sampler/observer coverage.

(a) * * *

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

* * * * *

(g) *Atlantic sea scallop observer program*—(1) *General.* Unless otherwise specified, owners, operators, and/or managers of vessels issued a Federal scallop permit under § 648.4(a)(2), and specified in paragraph (b) of this section, must comply with this section and are jointly and severally responsible for their vessel's compliance with this section. To facilitate the deployment of at-sea observers, all sea scallop vessels issued limited access permits fishing in open areas or Sea Scallop Access Areas, and general category vessels fishing under the Sea Scallop Access Area program specified in § 648.60, are required to comply with the additional notification requirements specified in paragraphs (g)(2) of this section, except that scallop vessels issued Occasional scallop permits not participating in the Area Access Program specified in § 648.60 may provide the specified information to NMFS by calling NMFS.

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

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

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

(ii) For each scallop trip, the vessel owner, operator, or vessel manager shall notify NMFS by telephone, using the phone number provided by the Regional

Administrator in the Small Entity Compliance Guide, and provide the following information: Vessel Name; contact name and number; date and time of departure; port of departure; area to be fished (either open areas or the specific Sea Scallop Access Area), and fishing as a scallop dredge, scallop trawl or general category vessel.

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

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

(ii) An owner, operator, or vessel manager of a vessel that cannot procure a certified observer within 72 hours of the advance notification to the provider due to the unavailability of an observer, may request a waiver from NMFS from the requirement for observer coverage for that trip, but only if the owner, operator, or vessel manager has contacted all of the available observer

service providers to secure observer coverage and no observer is available. NMFS shall issue such a waiver within 24 hours, if the conditions of this paragraph (g)(4)(ii) are met.

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

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

(h) *Observer service provider approval and responsibilities—(1) General.* An entity seeking to provide observer services to the Atlantic sea scallop fishery must apply for and obtain approval from NMFS following submission of a complete application to The Observer Program Branch Chief, 25 Bernard St Jean Drive, East Falmouth, MA 02536. A list of approved observer service providers shall be distributed to scallop vessel owners and shall be

posted on NMFS's web page as specified in paragraph (g)(4) of this section.

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

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

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

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

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

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

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

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

(vii) Evidence of holding adequate insurance to cover injury, liability, and accidental death for observers during their period of employment (including

during training). Workers' Compensation and Maritime Employer's Liability insurance must be provided to cover the observer, vessel owner, and observer provider. The minimum coverage required is \$5 million. Observer service providers shall provide copies of the insurance policies to observers to display to the vessel owner, operator, or vessel manager, when requested.

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

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

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

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

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

(iii) An application shall be denied if NMFS determines that the information provided in the application is not complete or the evaluation criteria are not met. NMFS shall notify the applicant in writing of any deficiencies in the application or information

submitted in support of the application. An applicant who receives a denial of his or her application may present additional information to rectify the deficiencies specified in the written denial, provided such information is submitted to NMFS within 30 days of the applicant's receipt of the denial notification from NMFS. In the absence of additional information, and after 30 days from an applicant's receipt of a denial, an observer provider is required to resubmit an application containing all of the information required under the application process specified in paragraph (h)(3) of this section to be reconsidered for being added to the list of approved observer service providers.

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

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

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

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

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

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

(iii) *Observer deployment logistics.* Each approved observer service provider must assign an available certified observer to a vessel upon request. Each approved observer service provider must provide for access by

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

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

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

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

(vii) *Reports—(A) Observer deployment reports.* The observer service provider must report to NMFS when, where, to whom, and to what fishery (open or closed area) an observer has been deployed, within 24 hours of their departure. The observer service provider must ensure that the observer reports back to NMFS its Observer Contract (OBSCON) data, as described

in the certified observer training, within 12 hours of landing. OBSCON data are to be submitted electronically or by other means as specified by NMFS. The observer service provider shall provide the raw (unedited) data collected by the observer to NMFS within 72 hours of the trip landing.

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

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

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

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

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

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

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

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

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

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

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

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

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

decision of NMFS and the Department of Commerce. Removal from the list of approved observer service providers does not necessarily prevent such observer service provider from obtaining an approval in the future if a new application is submitted that demonstrates that the reasons for removal are remedied. Certified observers under contract with an observer service provider that has been removed from the list of approved service providers must complete their assigned duties for any scallop trips on which the observers are deployed at the time the observer service provider is removed from the list of approved observer service providers. An observer service provider removed from the list of approved observer service providers is responsible for providing NMFS with the information required in paragraph (h)(5)(vii) of this section following completion of the trip. NMFS may consider, but is not limited to, the following in determining if an observer service provider may remain on the list of approved observer service providers:

- (i) Failure to meet the requirements, conditions, and responsibilities of observer service providers specified in paragraphs (h)(5) and (h)(6) of this section;
- (ii) Evidence of conflict of interest as defined under paragraph (h)(3) of this section;
- (iii) Evidence of criminal convictions related to:
 - (A) Embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements or receiving stolen property; or
 - (B) The commission of any other crimes of dishonesty, as defined by state law or Federal law that would seriously and directly affect the fitness of an applicant in providing observer services under this section;
- (iv) Unsatisfactory performance ratings on any Federal contracts held by the applicant; and
- (v) Evidence of any history of decertification as either an observer or observer provider.
 - (i) *Observer certification.* (1) To be certified, employees or sub-contractors

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

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

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

- (i) Have a valid NMFS/NEFOP fisheries observer certification pursuant to paragraph (i)(1) of this section;
- (ii) Be physically and mentally capable of carrying out the responsibilities of an observer on board scallop vessels, pursuant to standards established by NMFS. Such standards are available from NMFS website specified in paragraph (g)(4) of this section and shall be provided to each approved observer service provider; and
- (iii) Have successfully completed all NMFS-required training and briefings for observers before deployment, pursuant to paragraph (i)(2) of this section.

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

(5) *Issuance of decertification.* Upon determination that decertification is

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

■ 4. In § 648.51, paragraphs (c)(4) and (e)(3)(iii) are added to read as follows:

§ 648.51 Gear and crew restrictions.

* * * * *

(c) * * *

(4) A certified at-sea observer is on board, as required by § 648.11(g).

* * * * *

(e) * * *

(3) * * *

(iii) A certified at-sea observer is on board, as required by § 648.11(g).

* * * * *

■ 5. In § 648.60, paragraphs (a)(2)(i) and (ii) are suspended and paragraph (a)(2)(iii) is added to read as follows:

§ 648.60 Sea scallop area access program requirements.

(a) * * *

(2) * * *

(iii) Vessels participating in the Sea Scallop Access Area Program must comply with the trip declaration requirements specified in § 648.11(g), and each participating vessel owner or operator shall declare a Sea Scallop Access Area trip via VMS less than one hour prior to the vessel leaving port, in accordance with instructions provided by the Regional Administrator.

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