

Appendix 1 – Background Information on the Industry-Funded Monitoring Omnibus Amendment

The New England and Mid-Atlantic Fishery Management Councils have been interested in increasing monitoring and/or other types of data collection in some fishery management plans (FMPs) to assess the amount and type of catch, to more precisely monitor annual catch limits, and/or provide other information for management. This increased monitoring would be above and beyond coverage required for the Standardized Bycatch Reporting Methodology (SBRM), the Endangered Species Act (ESA) or Marine Mammal Protection Act (MMPA). Recognizing that the lack of availability of Federal funding prevented the National Marine Fisheries Service (NMFS) from increasing monitoring coverage, both Councils proposed industry-funded monitoring requirements in some fisheries. However, NMFS disapproved these proposals because they were inconsistent with Federal law. In order to meet the Councils' desires for increased monitoring, this amendment would provide options and set priorities for industry funding to be used in conjunction with Federal funding to pay for additional monitoring to meet fishery-specific coverage targets.

Industry-funded monitoring is a complex and highly sensitive issue. In addition to accounting for socioeconomic conditions of the fleets that must bear the cost of industry-funded monitoring requirements, it involves the Federal budgeting and appropriations process and a diverse suite of Federal mandates. In an effort to simplify these issues for fisheries stakeholders, we use a question and answer format throughout the introduction and background, alternatives descriptions, and impacts sections of this document. We hope this approach helps clarify the considerations that drove the development of the alternatives considered in this action, as well as the expected function and impacts of the alternatives.

The introduction and background section includes 4 categories of questions and answers, including: 1) General questions about the Industry-funded Monitoring Omnibus amendment; 2) Cost responsibilities; 3) NMFS administrative costs; and 4) Industry Costs. The list of questions under each of these categories is summarized below. If you are viewing this document electronically, click on any question of interest, and the hyperlink will take you to the page with the answer. Page numbers are provided for those viewing paper copies of the document.

General questions about this amendment

- How is this document organized? (p. 3)
- Why are the Councils establishing industry-funded monitoring programs? (p. 3)
- How is the Federal budget for monitoring decided each year? (p. 3)
- Why did NMFS disapprove past Council proposals for industry-funded monitoring programs? (p. 4)
- How does this amendment fix the issues that resulted in the recent disapprovals? (p. 5)
- Under this amendment, would setting an industry-funded monitoring coverage target for a given FMP mean the fishery is guaranteed that level of coverage for a given year?

For example, if the Atlantic herring FMP sets a coverage target of 100% for 2017, does this amendment ensure that level of coverage would be achieved? (p. 5)

- How are existing industry-funded monitoring programs administered in the Greater Atlantic Region? (p. 6)
- Why does this action propose to consider industry-funded monitoring programs in a different way than it is considered for the NE Multispecies and Scallop FMPs? (p. 8)
- Why does NMFS caution the Councils about additional costs for monitoring but not for other FMP requirements, such as vessel trip reports? (p. 8)
- What types of monitoring are considered in this amendment? (p. 9)

Cost responsibilities

- What are the cost components for monitoring programs? (p. 9)
- What is cost sharing? Can industry split the cost of monitoring with the government by some percent (e.g., industry pays for 30%, NMFS pays for 70%) or some dollar amount (e.g., industry pays for \$325, NMFS pays for the rest)? (p. 10)
- Why can't NMFS directly collect fees for monitoring programs? (p. 10)
- Why has it been difficult for NMFS to give cost estimates for various types of monitoring programs? (p. 11)

NMFS administrative costs

- How was the use of certain funding lines changed related to SBRM? (p. 12)
- What funding lines are available to fund administrative costs for industry-funded monitoring programs? (p. 13)
- Can NMFS accept funding from external groups to fund administrative costs for monitoring programs? (p. 13)
- How does NMFS cover its administrative costs for the groundfish at-sea monitoring (ASM) program? (p. 14)
- When could SBRM funds be used to cover the administrative costs for monitoring? (p. 14)
- If SBRM isn't fully funded every year, how could there be discretionary funding available to cover administrative costs from industry-funded programs? (p. 15)

Industry costs

- The expected industry contribution for monitoring in the Northeast seems a lot higher than other regions. Don't Alaska fishermen only pay \$325 per sea day for observer coverage? (p. 16)
- The scallop fishery has an observer set aside to help defray industry costs for monitoring. Can other FMPs use this approach? What are some of the challenges of using a monitoring set-aside to pay for industry costs? (p. 16)
- Can there be a fully industry-funded program where industry pays for both administrative and monitoring costs, and hands packaged data over to NMFS? (p. 17)

- If NMFS has extra funding available, can the money be passed along to industry to help defray its cost responsibilities for monitoring? (p. 17)

General questions about the Industry-Funded Monitoring Omnibus Amendment

How is this document organized?

The Industry-funded Monitoring Omnibus Amendment had three sets of alternatives.

The first set of alternatives is referred to as the “Omnibus alternatives.” These alternatives include: (1) standard cost responsibilities associated with industry-funded monitoring for NMFS and the fishing industry, (2) a process for FMP-specific industry-funded monitoring to be implemented via a future framework adjustment action, (3) standard administrative requirements for industry-funded monitoring service providers, and (4) a process to prioritize available Federal funding for industry-funded monitoring across FMPs. If selected, these alternatives will apply to all New England and Mid-Atlantic Fishery Management Council fishery management plans.

The second set of alternatives includes monitoring coverage target alternatives specific to the Atlantic herring FMP. These alternatives are referred to as the “Herring alternatives.”

The third set of alternatives includes monitoring coverage target alternatives specific to the Atlantic mackerel fishery, which is managed as part of the Atlantic Mackerel, Squid, and Butterfish FMP. These alternatives are referred to as the “Mackerel” alternatives.

Why are the Councils establishing industry-funded monitoring programs?

The New England and Mid-Atlantic Councils have been interested in increasing monitoring and/or other types of data collection in some FMPs to assess the amount and type of catch, to more precisely monitor annual catch limits, and/or provide other information for management. NMFS has limited financial resources, so both Councils have considered requiring industry to contribute to the cost of monitoring. Therefore, this amendment considers measures that would provide options to allow the Councils to implement industry-funded monitoring coverage in New England and Mid-Atlantic fishery management plans. Industry funding would be used in conjunction with available Federal funding to pay for additional monitoring to meet FMP-specific coverage targets. This amendment would also set priorities for meeting coverage targets when Federal funding is limited.

How is the Federal budget for monitoring decided each year?

Each year, the White House Office of Management and Budget submits a budget request for the entire Federal government for the following fiscal year, which starts in October. The budget

request contains numerous funding lines and Congress makes the final determination on that request. Each of these funding lines is accompanied by a brief description which explains to Congress and the public how the funding in that line will be used. Funds cannot be used for activities that are not included in the description of the budget line, or as directed by Congress in appropriations bills.

Why did NMFS disapprove past Council proposals for industry-funded monitoring programs?

Recent Council proposals for industry-funded monitoring either attempted to require NMFS to spend money that was not in the budget, or attempted to split monitoring costs between industry and NMFS in ways that are not consistent with Federal law. These actions raised concerns relating to the Miscellaneous Receipts Statute,¹ the Anti-Deficiency Act,² and other statutes and regulations that govern federal budgets. The concepts behind the disapprovals are summarized here.

Congress must decide how to finance any program or activity it establishes. Typically, programs and activities are funded by appropriating funds from the U.S. Treasury. In addition to designating the funds necessary for a program or activity, a congressional appropriation sets a maximum authorized program level. The maximum authorized program level functions as a cap on funding for a program or activity. A Federal agency cannot spend money on a program or activity beyond the maximum authorized program level without authorization from Congress. A Federal agency also cannot get around the maximum authorized program level by adding to its appropriations from sources outside the government without permission from Congress.

The disapproved monitoring provisions in Herring Amendment 5 and Mackerel Amendment 14 would have required NMFS to fund very high levels of observer coverage in the herring and mackerel fisheries. Because NMFS's spending is limited by its Congressional appropriations, NMFS cannot approve a monitoring program that it doesn't have enough money to fund. NMFS also cannot take money from budget lines intended for other activities in order to fund monitoring programs.

Second, the Herring Amendment 5 and Mackerel Amendment 14 attempted to specify a set industry contribution for industry-funded monitoring (i.e., industry would only pay \$325 per sea day). Similarly, the NE Multispecies Framework 48 attempted to limit the types costs that

¹ The Miscellaneous Receipts Statute provides that “an official or agent of the United States Government having custody or possession of public money shall keep the money safe” and may not lend, use, deposit in a bank or exchange the money for other amounts. 31 U.S.C. § 3302(a). It obliges government officials “receiving money for the Government from any source [to] deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.” *Id.*

² The Anti-Deficiency Act prevents federal officers from “mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation” from Congress or “involv[ing] either government in a contract or obligation for the payment of money before an appropriation is made [by Congress] unless authorized by law.” 31 U.S.C. § 1341(a)(1).

industry would be responsible for in an industry-funded program (i.e., industry would only have to pay for observer salary). These proposals were disapproved because the government cannot commit to pay for costs that are not inherently the responsibility of the government. In the case of industry-funded monitoring, NMFS interpreted this to mean that it is only obligated to pay for its administrative costs to support industry-funded programs and is not obligated to pay for any costs generated from sampling activities for these programs. This standard was applied to the monitoring cost provisions recently proposed in the Herring, Mackerel, and NE Multispecies FMPs and resulted in the disapproval of those measures.

How does this amendment fix the issues that resulted in the recent disapprovals?

The amendment addresses the disapprovals by: 1) Establishing a process through which NMFS can approve new monitoring programs without committing funding that is not in the budget, and 2) establishing a legal approach to allow industry funding to be used in conjunction with Federal funding to pay for additional monitoring to meet fishery-specific coverage targets.

First, the concept of a monitoring *coverage target*, as opposed to a mandatory monitoring coverage level, allows NMFS to approve new monitoring programs without committing to support coverage levels above appropriated funding or before funding is determined to be available. The realized coverage in a given year would be determined by the amount of Federal funding available to cover NMFS cost responsibilities in a given year. Fishery management plans interested in coverage above SBRM would set coverage targets in an individual fishery management plan action (i.e., a framework adjustment or amendment). The realized coverage for the fishery in a given year would fall somewhere between no additional coverage above SBRM and the specified coverage target.

Second, this amendment establishes a description of the division of cost responsibilities for industry-funded monitoring programs between industry and NMFS that is consistent with legal requirements. This division of costs is described under the heading “Standardized Cost Responsibilities” in Omnibus Alternative 2. Department of Commerce General Counsel has advised NMFS that monitoring cost responsibilities may be allocated between industry and the government as long as the costs of government responsibilities are paid by the government, and the government’s costs are differentiated from the industries responsibilities. Currently, the delineation has been made between administrative and sampling costs. This amendment will set a standard delimitation to avoid confusion and ensure compliance with appropriations requirements. Establishing a common definition means that all future Council proposals for industry-funded monitoring programs would consider NMFS and industry cost responsibilities in the same way.

Under this amendment, would setting an industry-funded monitoring coverage target for a given FMP mean that the fishery is guaranteed that level of coverage for a given year? For example, if the herring FMP sets a coverage target of 100% for 2017, does this amendment ensure that level of coverage be achieved?

No. This amendment establishes tools that NMFS and the Councils could use to provide for and prioritize additional monitoring in Northeast fisheries when Federal funding is available, but it cannot resolve the underlying issue of limited Federal funding. This means that this industry-funded omnibus amendment WOULD NOT automatically allow for higher coverage levels in Northeast fisheries. During years when there is no additional funding to cover NMFS cost responsibilities above funding for SBRM, there would be no additional monitoring coverage, even if industry is able to fully fund their cost responsibilities.

How are existing industry-funded monitoring programs administered in the Greater Atlantic Region?

The Greater Atlantic Region currently administers an industry-funded monitoring program for the Atlantic sea scallop fishery, and will be transitioning to an industry-funded monitoring program for groundfish sectors in the NE Multispecies FMP. Additional detail about the industry-funded monitoring programs for these fisheries is provided below.

The IFM Omnibus Amendment does not currently modify the coverage levels or allocation of funding for NMFS administrative costs for the scallop or groundfish sector industry-funded monitoring programs. The standardized structure and prioritization process considered in the IFM Omnibus Amendment could apply to groundfish sectors and/or the scallop fishery if, in a future action, the Council desires coverage above the levels currently set by these FMPs and/or if the Council wants Federal funding prioritized for NMFS administrative costs associated with these programs.

Scallop Industry-funded Observer Program. NMFS incorporated the industry-funded observer program into the Atlantic Sea Scallop FMP in 1999 in Framework Adjustment 11 (64 FR 31144, June 10, 1999). The scallop industry-funded observer program first applied to the Closed Area II scallop fishery exemption program. Six subsequent management actions addressed major aspects of the industry-funded observer program:

- Framework 13 to the Scallop FMP (65 FR 37903, June 19, 2000) kept the program in place for the Closed Area I, Closed Area II, and Nantucket Lightship exemption program;
- Framework 14 to the Scallop FMP (66 FR 24052, May 11, 2001) kept the program in place for the Hudson Canyon and Virginia Beach Area Access program;
- Amendment 10 to the Scallop FMP (69 FR 35194, June 23, 2004) formally included the program for all limited access scallop fishing under the area access and open area days-at-sea programs;
- Framework 16 the Scallop FMP (69 FR 63460, November 2, 2004) established observer coverage levels to meet a 30-percent CV for Closed Area 1, Closed Area II, and the Nantucket Lightship area access fisheries;
- Secretarial Emergency Rule (71 FR 34832, June 16, 2006; extension 71 FR 69073, November 29, 2006) established a mechanism for vessels to contract directly

with observer service providers to resolve legal constraints of industry paying for observer coverage; and

- Amendment 13 to the Scallop FMP (72 FR 32549, June 13, 2007) formally incorporated the emergency action industry funded observer measures into the Scallop FMP.

As monitoring needs expanded and administration of the program became more efficient, the Council and NMFS ultimately expanded the scallop industry-funded monitoring program to all access areas, open areas, and to the limited access general category individual fishing quota fleet. The Council and NMFS have made minor operational modifications to the program over the years. The Scallop FMP's program is therefore a good example of an effective industry funded program that phased in changes as program and administration needs evolved.

The need for the scallop industry-funded program consistently has been to collect catch information (kept fish and bycatch) through levels of at-sea observer coverage that could not otherwise be consistently achieved through NMFS observer program funding alone. NMFS has, and continues to be able to pay for its costs of administering the Scallop industry-funded observer program because the coverage level is primarily set through SBRM. Prior to the implementation of the 2007 SBRM amendment, the Council concluded that industry-funded coverage levels set to achieve a 30-percent CV performance standard would appropriately reduce variability in bycatch estimates for yellowtail flounder, other finfish, and sea turtles. When the SBRM was first implemented, this goal for monitoring the scallop fishery was included in the SBRM coverage goals. The Scallop industry-funded observer program provides funding through a quota set-aside (described below) that enables the scallop fishery to pay for coverage levels that meet or exceed the SBRM coverage targets.

The observer set-aside model works well in the scallop fishery because the high value of scallops allocated to vessels that carry an observer helps compensate the vessel for the cost of the observer. The vessel receives extra pounds or days-at-sea on each observed trip that provides additional funds to pay for the observer. However, vessel owners are required to pay for the observer even if the vessel does not catch any scallops or the additional set-aside of scallops, or if there is insufficient set-aside allocated to compensate the vessel. NMFS's goal is to set a compensation rate (the amount of extra pounds of scallops allocated to trips that carry observers) that covers the cost of an observer, without providing financial incentive for a vessel to desire observer coverage, which could bias sampling.

Groundfish Industry-funded At-Sea Monitoring. The groundfish sector at-sea monitoring (ASM) program was first developed by the Council in Amendment 16 to the Northeast Multispecies FMP (75 FR 18262; April 9, 2010). Amendment 16 stated that the primary purpose of the groundfish ASM program was to verify area fished, catch, and discards by species on sector trips, and that coverage levels must be sufficient to at least meet the coefficient of variation (CV) (a measurement of the precision of the estimate) performance standard in SBRM (i.e., a 30% CV). This CV standard is achieved through a combination of SBRM (fully-NMFS funded) and ASM (industry-funded) coverage. Framework 48 to the Northeast Multispecies FMP (78 FR

26118; May 3, 2013) further defined specific goals and objectives for the ASM program, and also clarified that the 30% CV standard for ASM should apply at the stock level (i.e., each stock of fish for the fishery as a whole). In contrast, the SBRM CV standard for groundfish applies at the stock complex level (e.g., for all groundfish stocks in aggregate).

The groundfish ASM program was designed to transition to an industry-funded program in 2012, but from groundfish fishing years 2010 through 2014, NMFS was able to fully fund both the NMFS and industry cost responsibilities for groundfish ASM. Though NMFS has paid both sampling and administrative costs for ASM for groundfish sectors since 2010, groundfish sectors are responsible for covering the sampling costs for the ASM program if NMFS is unable. In a letter to the sectors dated February 24, 2015, NMFS indicated that, due to funding changes required by the SBRM Amendment (described above), industry would be required to cover its portion of the ASM cost responsibilities before the end of the 2015 calendar year. NMFS and industry are currently working through the logistics of transitioning to an industry-funded ASM program.

Why does this action propose to consider industry-funded monitoring programs in a different way than it is considered for the NE Multispecies and Scallop FMPs?

The Atlantic sea scallop and NE Multispecies monitoring programs have already been established by the Councils, and the operation of their fisheries depends on these programs. For example, the sector fishery requires at-sea monitoring to reliably estimate catch to ensure that the groundfish catch limits are not exceeded and that overfishing does not occur. Sectors could not operate without these at-sea monitoring programs. In addition to the programs they already established, the Councils have been increasingly interested in requiring monitoring coverage for purposes different than those for which NMFS is legally required to provide monitoring coverage (e.g., Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), MMPA, ESA). NMFS's limited budget requires NMFS to prioritize resources across competing monitoring interests. The standardized process for industry-funded programs described in this amendment, including the prioritization process detailed under Omnibus Alternative 2, provides a method to address the Councils' identified monitoring needs within NMFS's budget limitations. This process would allow NMFS and the Councils to work together to prioritize coverage where it is most needed to achieve the highest priority objectives, and allows both the Council and the public to be informed about funding limitations and to contribute to the decision-making process about tradeoffs.

Why does NMFS caution the Councils about additional costs for monitoring but not for other FMP requirements, such as vessel trip reports?

NMFS evaluates its ability to financially administer all of the Councils' recommendations prior to approval. Certain requirements, for example, an increase to weekly vessel trip reports (VTRs) for a fishery, can be administered within existing resources because they are either cost neutral under the existing administrative infrastructure, or they only add incrementally to NMFS costs. In the example of VTRs, NMFS already has staff processing weekly VTRs for a

number of fisheries, and most Greater Atlantic Region permit holders already submit VTRs weekly related to permit requirements for the NE Multispecies and Atlantic herring fisheries.

In contrast, the costs associated with implementing new at-sea monitoring, portside sampling, or electronic monitoring programs are often substantial and cannot be easily completed by existing staff using the existing budget. In addition, the amount of money Congress appropriates to fund monitoring costs fluctuates from year to year, so NMFS cannot commit to pay for new, expensive monitoring programs indefinitely. For these reasons, NMFS has made efforts to communicate to the Councils that funding for new monitoring programs must be a significant consideration during program development.

What types of monitoring are considered in this amendment?

This amendment discusses industry-funded programs to implement three types of monitoring: 1) at-sea monitoring; 2) dockside monitoring; and 3) electronic monitoring. These three types of monitoring are briefly described below.

1. At-sea monitoring focuses data collection at sea, recording the type and quantity of retained and/or discarded catch. This document uses the terms “observer” and “at-sea monitor” interchangeably. However, the reader should note the following:
 - The term “NEFOP-level observer” is used to refer to observers that collect an advanced and diverse set of information on fishing trips; and
 - This document refers to FMP-specific at-sea monitoring programs by prefacing the terms “at-sea monitor” or “ASM” with a fishery name (e.g., the groundfish ASM program, groundfish at-sea monitors, the herring/mackerel ASM program, etc.). Fishery-specific at-sea monitors collect a more limited set of information on fishing trips than NEFOP-level observers, in direct support of FMP-specific goals.
2. Dockside monitoring focuses data collection at the dock, accounting for landings of target species and incidental catch. If all fish caught are retained and landed, dockside monitoring can also record type and quantity of total catch. The reader should note that the terms “dockside monitor” and “portside sampler” are used interchangeably in this document.
3. Electronic monitoring (EM) uses video cameras and other sensors to monitor discards at sea or to monitor compliance with full retention requirements or other at-sea requirements.

Cost Responsibilities

What are the cost components for monitoring programs?

There are two types of costs associated with monitoring programs: (1) Sampling costs, such as observer salary and travel costs, and (2) NMFS administrative costs, such as observer training and data processing. This amendment would codify the separation of monitoring cost responsibilities such that industry is responsible for sampling costs and NMFS is responsible for administrative costs. This division of costs is described under the heading “Standardized Cost Responsibilities” in Omnibus Alternative 2.

What is cost sharing? Can industry split the cost of monitoring with the government by some percent (e.g., industry pays for 30%, NMFS pays for 70%) or some dollar amount (e.g., industry pays for \$325, NMFS pays for the rest)?

The concept of “cost sharing” has come up throughout the discussions of industry-funded monitoring. Conceptually, cost sharing implies that industry and the government both contribute to the cost of the monitoring program. However, given legal constraints that require NMFS to pay for certain cost categories in an industry-funded monitoring program, it is necessary to correctly refer to this concept as a division of cost responsibilities between NMFS and industry, rather than as NMFS and industry truly sharing costs.

Department of Commerce General Counsel has advised NMFS that monitoring cost responsibilities can be allocated between industry and the government by delineating the sampling and administrative portions of the costs of monitoring. Industry would be responsible for costs directly attributable to the sampling portion of a monitoring program, and NMFS would be responsible for costs directly attributable to the administrative portion of the monitoring program (See Omnibus Alternative 2 under “Standardized Cost Responsibilities”). Thus, the division of cost responsibilities should remain the same and should differentiate between inherently governmental responsibilities and industry costs.

It is illegal for industry to pay inherently government costs, but either group can pay for sampling costs. Actual payment of different cost responsibilities for monitoring programs can work in two ways: 1) NMFS can pay for its cost responsibilities, such as support and administrative costs, and also pay for the industry’s cost responsibilities, such as sampling costs (e.g., the Northeast Fisheries Observer Program); or 2) NMFS can pay for its cost responsibilities, such as support and administrative costs, and industry can pay for its cost responsibilities, such as sampling costs (e.g., industry-funded Atlantic scallop observer program). Additionally, NMFS can help to offset industry's cost responsibilities by reimbursing vessel owners through cooperative agreements with third parties when funding is available.

Why can’t NMFS directly collect fees for monitoring programs?

The Miscellaneous Receipts Act requires Federal employees to deposit any money received on behalf of the government into the general Treasury, unless otherwise directed by law. This means that if NMFS could accept funds from the industry, NMFS would be required to direct those funds to the Treasury and would not be able to reserve them to pay for monitoring in the Greater Atlantic Region without a change in law to allow that to happen. For example, the

Alaska Region has special authorization in the Magnuson-Stevens Act to collect fees from the industry and to put these fees into a fund to be used to defray the costs of monitoring in that region (Magnuson-Stevens Act § 313). The Greater Atlantic Region does not have such authority, except for cost recovery for Limited Access Privilege Programs (LAPPs). Currently, cost recovery is applicable only to the Atlantic sea scallop limited access general category individual fishing quota (IFQ) and the golden tilefish IFQ programs (both are forms of LAPPs). These fisheries, along with the surfclam and ocean quahog fisheries, are the only programs in the Greater Atlantic Region that are subject to the cost recovery requirement.

Under the LAPP cost recovery authority (Magnuson-Stevens Act § 303A(e)) and the authority to establish fees (Magnuson-Stevens Act § 304(d)), the Magnuson-Stevens Act requires NMFS to collect a fee to recover the actual costs directly related to the management, data collection, and enforcement of any LAPP and community development quota program that allocates a percentage of the total allowable catch of a fishery to such program. NMFS must collect a fee not to exceed 3 percent of the ex-vessel value of fish harvested under these programs. The fees are deposited into a unique fund that NMFS uses to directly pay for the management, data collection, and enforcement of the program. The relevant costs to recover are the incremental costs, meaning those costs that would not have been incurred but for the LAPP. If the Councils decided at some future point to develop additional LAPPs in other fisheries, cost recovery programs could be implemented in those fisheries. Development of LAPPs and cost recovery programs are complex and often take several years.

Why has it been difficult for NMFS to give cost estimates for various types of monitoring programs?

Monitoring program costs include a variety of administrative and sampling costs that vary substantially within and between years. This variability affects the estimates of both NMFS and industry costs for monitoring programs, which means that the estimate of the total or per sea day cost for the same monitoring program can vary depending on the time period of interest. A discussion of the difficulties with generating a cost estimates for monitoring is included in the 2015 Program Review of the Northeast Fisheries Science Center Fisheries Sampling Branch, available at <http://www.nefsc.noaa.gov/fsb/index.html#fsb-review>.

Some of the reasons why estimates of NMFS administrative costs can vary include:

- The costs associated with training vary substantially within and between years because of the high monitor turnover rate.
- The costs associated with data editing varies greatly depending on the experience of the cohort of monitors for a given time period. Data editing costs may be lower for a given period if the cohort of monitors is highly experienced. Conversely, data editing costs may be higher for a period with a large cohort with less experienced monitors.

In addition, the breakdown of industry costs for sampling for a single sea day can vary depending on:

- How close the monitor's home port is to the port of deployment (an observer will be reimbursed travel costs which include mileage and an hourly wage for time traveling if traveling greater than 50 miles from their assigned home port);
- How long monitors are retained by the service provider (training wages are amortized over the career span of the monitors);
- Trip length;
- How accurately a vessel schedules its departure time; and
- A given service providers' business models (provider observer support, strategies for retention, observer bonus structure, benefits).

Finally, with the exception of the industry-funded scallop observer program, industry-funded monitoring is a relatively new arrangement for funding monitoring programs in the Greater Atlantic Region. Most of the monitoring program cost estimates in this document are based on costs negotiated and structured as part of Federal contracts between NMFS and various monitoring service providers. When individual vessels or groups of vessels form contracts with service providers for monitoring coverage in future industry-funded monitoring programs, the terms and structure of the contracts may differ from those in recent and existing Federal contracts. This means that the actual costs that industry may pay to service providers for monitoring may differ from the available estimates.

For these reasons, this document presents several of the available Greater Atlantic Region and national cost estimates for at-sea, dockside, and electronic monitoring programs. With each estimate, we state the source and assumptions that generated the estimate. Although this may be confusing, we hope that providing the managers and the public a full understanding of the potential costs will allow for informed decision making when establishing industry-funded monitoring programs.

NMFS administrative costs

How was the use of certain funding lines changed related to SBRM?

The Court order in *Oceana v. Locke*, which vacated the 2007 SBRM Omnibus Amendment, found legal fault with two aspects of the process used to prioritize funding for observer coverage. First, the Court found that NMFS had too much discretion in determining whether there were sufficient resources available to fully implement the estimated number of sea days needed to achieve the CV-based SBRM performance standard. Second, the Court found that NMFS had too much discretion in how observer sea days were redistributed under the prioritization process. To address these two aspects of the court order, the revised SBRM established a threshold that would be used to determine what resources are available to implement the SBRM coverage in a given year, and defines a method for distributing the available observer sea days if resources are limited.

Under the revised SBRM prioritization process, the amount of money available for the SBRM will be the funding allocated to the Region under four specific historically-appropriated observer funding lines. In fiscal years 2011-2014, the Northeast Fisheries Observers funding line made up 53 percent to 59 percent of all observer funds for the Greater Atlantic Region under these four funding lines. The Northeast Fisheries Observers funding line is now fully committed to funding SBRM. The three other observer funding lines now dedicated to SBRM are allocated among different NMFS regions, including the Greater Atlantic Region, to meet national observer program needs. The total amount of the funds allocated to the Greater Atlantic Region from these three funding lines will constitute the remainder of the available SBRM funds.

Historically, the available SBRM funding has been insufficient to fully meet the CV-based performance standard for all of the fishing modes (gear type, access area, trip category, region, and mesh group combinations analyzed under SBRM). If the available funding continues to be insufficient to meet the CV-based performance standard, the SBRM amendment establishes a non-discretionary formulaic processes for prioritizing how the available observer sea-days would be allocated to the various fishing modes to maximize the effectiveness of bycatch reporting and bycatch determinations.

What funding lines are available to fund administrative costs for industry-funded monitoring programs?

A number of different funding lines contribute to monitoring programs in the Greater Atlantic Region.

NMFS Greater Atlantic Regional Fisheries Office (GARFO) and Northeast Fisheries Science Center (NEFSC) receive funding amounts through specific budget line items to cover its costs for monitoring programs. Some of the funding lines must be used for specific monitoring programs. With implementation of the Greater Atlantic Region SBRM amendment, NMFS no longer has the flexibility to use certain funding lines as we have in the past, as described above. In addition, there are certain funding lines specifically designated for other monitoring priorities (e.g., protected species monitoring). Thus, there are certain funding lines that will not be available to support industry-funded programs, unless there is excess funding in these lines above the amount needed to meet the designated monitoring obligations for that year.

Other funding lines that include monitoring or administrative aspects of monitoring programs in their described purpose could be used to cover NMFS costs for industry-funded monitoring programs. Once the Council establishes industry-funded monitoring programs, NMFS will be able to determine the funding lines that could contribute to NMFS costs for industry-funded monitoring programs. If there is not enough money to cover NMFS costs related to industry-funded monitoring programs for a given year, either NMFS or the Councils would need to prioritize which programs are funded first.

Can NMFS accept funding from external groups to fund administrative costs for monitoring programs?

Consistent with current law, there are two mechanisms by which the Greater Atlantic Region may accept outside resources for monitoring. First, Section 208 of the Magnuson-Stevens Act established a Fisheries Conservation and Management Fund, which may be funded through quota set-asides, appropriations, states or other public sources, and private or nonprofit organizations. This fund may be used to expand the use of electronic monitoring, and each region must be apportioned at least 5 percent of any money contributed to this fund. There have been inquiries about the fund over the years, but to date no contributions have been made.

Second, Section 403(b) of the Magnuson-Stevens Act allows for NMFS to accept resources and facilities for observer training from state, university, and any appropriate private nonprofit organizations on a limited basis. This provision has not been previously implemented and may have limitations that might undermine its utility for this region's fisheries.

How does NMFS cover its administrative costs for the groundfish ASM program?

In part, NMFS has used funding in budget line items related to Catch Shares to fund administrative and sampling costs for the groundfish ASM program. The groundfish ASM program was designed to be an industry-funded program, but from groundfish fishing years 2010 through 2014, NMFS was able to fully fund both the NMFS and industry cost responsibilities for groundfish ASM. Groundfish sectors are required to pay for their sampling costs responsibilities for the ASM program if NMFS is unable. In a letter to the sectors dated February 24, 2015, NMFS indicated that, due to funding changes required by the SBRM Amendment (described above), industry would be required to cover its portion of the ASM cost before the end of the 2015 calendar year. NMFS and industry are currently working through the logistics of transitioning to an industry-funded ASM program.

When could SBRM funds be used to cover the administrative costs for monitoring?

SBRM funding is used to cover the administrative costs for the industry-funded Atlantic sea scallop observer program. NMFS could explore using SBRM funding to cover the administrative costs for NEFOP-level observer coverage for other FMPs, but there three important considerations for this approach.

First, the sampling criteria (i.e., the gears and areas combinations) that the observer coverage applies to would need to match SBRM modes (gear type, access area, trip category, region, and mesh group combinations analyzed under SBRM). This means that this approach could not be used if the Councils desired to use an industry-funded program to cover specific permit categories unless those permit categories directly aligned with SBRM modes. In the case of the scallop industry-funded observer program, the observer coverage requirements apply to gear and area combinations that match SBRM modes.

Second, industry would be fully responsible for paying the sampling costs for NEFOP-level observer coverage, currently estimated at \$816 per sea day. In addition, this approach could not be used for other types of monitoring coverage, including fishery specific at-sea monitors, portside sampling, or electronic monitoring. The scallop industry-funded observer program uses a set-aside to help defray industry costs for monitoring. However, vessel owners are required to pay for the observer even if the vessel does not catch any scallops or the additional set-aside of scallops, or if there is insufficient set-aside allocated to compensate the vessel. These same requirements would apply to other FMPs desiring to use SBRM funding to cover the administrative costs for monitoring.

Third, this approach could only be used to reach SBRM monitoring coverage levels for a given FMP. SBRM seeks to allocate observer coverage to reach a 30% CV on the discard estimate for managed species. This means that if only 10% observer coverage on a given SBRM mode is needed to reach the 30% CV, then this approach would only allow for 10% coverage for that gear and area combination in a given year. The Councils have been interested in higher levels of monitoring coverage for a number of FMPs, so this approach may not provide the level of coverage necessary to meet FMP goals.

If SBRM isn't fully funded every year, how could there be discretionary funding available to cover administrative costs from industry-funded programs?

Under the revised SBRM prioritization process, the amount of money available for the SBRM will be the funding allocated to the Region under four specific historically-appropriated observer funding lines. Unless there is excess funding in these lines above the amount needed to meet the designated monitoring obligations for that year, SBRM funding will not be available to fund industry-funded monitoring programs. Historically, the available SBRM funding has been insufficient to fully meet the CV-based performance standard for all of the fishing modes (gear type, access area, trip category, region, and mesh group combinations analyzed under SBRM). Thus, there is stakeholder concern that there will never be funding available to cover NMFS administrative costs for industry-funded monitoring programs.

We reiterate that other funding lines that include monitoring or administrative aspects of monitoring programs in their described purpose, other than the four funding lines designated for SBRM, could be used to cover NMFS costs for industry-funded monitoring programs. Until the Council establishes industry-funded monitoring programs, it will not be clear what NMFS costs might be related to these new programs, and what amount and type of administrative support will be necessary. Thus it is not possible to list the funding lines that could contribute to NMFS costs for industry-funded monitoring programs at this time. If there is not enough money to cover NMFS costs related to industry-funded monitoring programs for a given year, either NMFS or the Councils would need to prioritize which programs are funded first.

Industry costs

The expected industry contribution for monitoring in the Northeast seems a lot higher than other regions. Don't Alaska fishermen only pay \$325 per sea day for observer coverage?

There are a number of factors that influence industry costs for monitoring programs. A 2012 MRAG Americas report titled "Comparison of At-Sea Catch Monitoring Programs with Full Observer Coverage to the Directed Atlantic Herring Fishery – New England" compared the industry costs for NEFOP monitoring in the Atlantic herring fisheries to the industry contribution for several other fisheries that require 100% industry-funded monitoring coverage, including the Hawaii longline swordfish fishery, the Alaska pollock midwater trawl fishery, the west coast at-sea whiting (hake) midwater trawl fishery, and the west coast non-whiting trawl Individual Fishing Quota fishery. The report estimated industry contributions for these programs in the range of \$360-420 per sea day. However, the report noted that the short trip duration (1-5 days) and complicated deployment logistics for the herring fleet result in higher per sea day costs for monitoring. In contrast, some of the other fisheries reviewed in the report have much longer trip duration (21-90 days) and have vessels that operate out of a limited number of ports, which simplifies deployment logistics.

The scallop fishery has an observer set-aside to help defray industry costs for monitoring. Can other FMPs use this approach? What are some of the challenges of using a monitoring set-aside to pay for industry costs?

There are aspects of the scallop fishery, including the health and value of the stock, the management regime, and the predictability of landings, that allow the observer set aside model to work well.

First, the health of the scallop resource means that a certain amount of the quota can be set aside to compensate the vessel for the cost of the observer. If a fishery resource is in poor shape, it may not be possible to allocate enough of the quota to a set-aside to effectively offset industry costs for monitoring. In addition, the high value of scallops allocated to vessels that carry observers helps compensate the vessel for the cost of the observer. Other fisheries with a lower price per pound may need to set aside a much larger portion of the resource to compensate industry for monitoring cost.

Second, the management regime of the scallop fishery supports the set-aside model. The scallop fishery uses trip or days-at-sea limits for many of its permits, and vessels receive extra pounds or days-at-sea on each observed trip that provides additional funds to pay for the observer. The set-aside approach may not be appropriate for fisheries that have permits without possession limits (e.g., Herring Category A or Mackerel Tier 1), or would require those fisheries to adjust their management regimes to allow the set-aside to function.

Finally, scallop trips are more predictable than trips targeting other species, specifically migratory species like herring and mackerel. While it is fairly likely that a given scallop trip could land the set-aside amount necessary to offset the cost of observers, the availability of herring and mackerel is much less predictable, and is influenced by a number of environmental

factors. On a given herring or mackerel trip, it is much less likely that a vessel may be able to land a set-aside amount necessary to offset the cost of an observer.

Can there be a fully industry-funded program where industry pays for both administrative and monitoring costs, and hands packaged data over to NMFS?

All governmental agencies perform some work that is so intimately related to the public interest that it requires performance by a Federal employee, rather than a contractor or third party. This type of work is classified as an “inherently government function.” Guidance about the types of work that is classified as an inherently government function can be found in the Office of Federal Procurement Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions (76 FR 56227; September 12, 2011).

For NMFS, our responsibilities for maintaining the public interest are governed by a number of Federal mandates, including the Magnuson-Stevens Act, the MMPA and the ESA. Because our monitoring programs are used to support our mission to conserve and manage fisheries and other marine resources, we are obligated to assure the quality of data collected through these programs. Ultimately, this means that there are certain aspects of monitoring programs that NMFS must manage and fund, even if industry contributes for sampling costs.

Department of Commerce General Counsel has advised NMFS that monitoring cost responsibilities may be allocated between industry and the government by delineating the sampling and administrative portions of the costs of monitoring. Industry can be responsible for costs directly attributable to the sampling portion of a monitoring program, but NMFS must be responsible for costs directly attributable to the administrative portion of the monitoring program (See Omnibus Alternative 2 under “Standardized Cost Responsibilities”) in cases where the monitoring programs support our management objectives. If industry were to pay for inherently governmental costs such as the administrative costs for monitoring programs that directly support our Federal mandates, it would mean that industry was supplementing Federal appropriations, which would violate appropriations laws.

While it is not possible for industry to fully fund a monitoring program that supports our obligations under the Magnuson-Stevens Act, the MMPA and the ESA, it is possible for industry to fully fund a monitoring program to gather information in support of future management actions. For example, industry could fully fund a monitoring program to gather data on a gear modification to reduce incidental catch of river herring and shad in midwater trawl gear. Industry could then provide the results of the study to the Councils and NMFS, who could in turn make the gear modification a regulatory requirement.

If NMFS has extra funding available, can the money be passed along to industry to help defray its cost responsibilities for monitoring?

Yes, NMFS could reimburse industry for sampling costs through cooperative agreements with third parties if additional funding is available. This model was used to reimburse groundfish

sectors for dockside monitoring costs. Additionally, if NMFS received appropriations for industry-funded monitoring programs, NMFS could pay industry's cost responsibilities through a government contract. This model was used to pay for at-sea monitoring coverage of groundfish sectors.