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[Rules and **Regulations**]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 673

[Docket No. 950428123-5193-02; I.D. 042595A]

RIN 0648-AIOO

Scallop Fishery off **Alaska**; Closure of Federal Waters to Protect **Scallop** Stocks

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

ACTION: Final rule.

SUMMARY: NMFS issues a final rule to implement a Fishery Management Plan for the **Scallop** Fishery off **Alaska** (FMP). The FMP specifies the optimum yield (OY) for the **scallop** fishery in Federal waters off **Alaska**

as a numerical range of 0-1.1 million lbs (0-499 mt) of shucked **scallop**

meats. The only management measure authorized under the FMP is an interim closure of Federal waters off **Alaska** to fishing for scallops. Federal waters will remain closed for up to 1 year. This action is necessary to prevent overfishing of **scallop** stocks while an amendment to the FMP is prepared that would allow the controlled harvest of scallops in Federal waters. This action is intended to prevent

overfishing of scallops that could otherwise result from unregulated fishing for scallops in Federal waters.

EFFECTIVE DATE: 12:01 a.m., **Alaska** local time (A.l.t.), August 29, 1995.

ADDRESSES: Copies of the FMP and the Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis (EA/RIR/FRFA) prepared for the FMP may be obtained from the North Pacific Fishery Management Council, P.O. Box 103136, Anchorage, AK 99510.

FOR FURTHER INFORMATION CONTACT: Susan Salveson, 907-586-7228.

SUPPLEMENTARY INFORMATION: Federal waters off **Alaska** have been closed to fishing for scallops under an emergency interim rule that expires August 28, 1995 (60 FR 11054, March 1, 1995, corrected at 60 FR 12825, March 8, 1995, and 60 FR 28359, May 31, 1995). The emergency interim closure was intended to prevent unregulated and uncontrolled fishing for scallops in Federal waters while the North Pacific Fishery Management Council (Council) prepared the FMP.

At its April 1995 meeting, the Council approved the FMP for review under section 304(b) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 et seq. (Magnuson Act)). A notice of availability of the proposed FMP was published in the Federal Register on April 28, 1995 (60 FR 20959), and invited comment on the FMP through June 26, 1995. A proposed rule to implement the FMP was published in the Federal Register on May 10, 1995 (60 FR 24822), and comments on the proposed rule were invited through June 19, 1995. Three letters providing written comment were received within the comment period. Written comments on the FMP and the proposed rule to implement it are summarized in the Response to Comments section, below.

The FMP was approved on July 26, 1995, under section 304(b) of the Magnuson Act. Upon reviewing the reasons for the FMP and the comments on the proposed rule to implement it, NMFS has determined that this final rule is consistent with the Magnuson Act and the FMP as adopted by the Council.

The final rule implements a maximum 1-year closure of Federal waters to fishing for scallops. The intent of this action is to prevent an unregulated and uncontrolled fishery for scallops in Federal waters that could result in overfishing of **scallop** stocks while an amendment

to the FMP is prepared, which would authorize fishing for scallops under a Federal management regime. NMFS has pursued this approach, because it has determined that the suite of alternative management measures necessary to support a controlled fishery for scallops in Federal waters could not be prepared, reviewed, and implemented before the emergency rule expires on August 28, 1995. Instead, NMFS has approved this rule to protect the long-term productivity of **scallop** stocks off **Alaska** necessary to achieve the future harvest of OY on a continuing basis without the ``boom and bust'' cycle historically experienced in other **scallop** fisheries.

The FMP and its implementing rule are explained further in the preamble to the proposed rule. The measures set out in the final rule do not differ from the proposed rule.

Response to Comments

Three letters of comments were received within the comment period. A summary of the written comments and NMFS' response follows:

Comment 1. No information exists to support closure of Federal waters to fishing for scallops under the proposed FMP.

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Response. NMFS disagrees. Fishing for scallops in Federal waters by a vessel not subject to State **regulations** governing the **scallop** fishery precipitated an emergency rule to close Federal waters to unregulated fishing for scallops (60 FR 11054, March 1, 1995, and 60 FR 28359, May 31, 1995). Based on the events that warranted the emergency interim rule, the Council has recommended that a Federal FMP is needed to authorize an interim closure of Federal waters to fishing for scallops that will continue for 1 year or until a superseding Federal management regime is implemented, whichever is earlier. In the absence of a management regime, NMFS anticipates that continued unregulated **scallop** fishing could result in local depletion of scallops, increasing the risk of overfishing of scallops stocks.

NMFS recognizes that an interim closure of Federal waters to fishing for scallops will result in a substantial impact on **scallop** fishermen. The potential foregone revenue to **scallop** fishermen could approach \$6 million if Federal waters remain closed for the entire year. However, this short-term impact is justified by the need to

prevent overfishing of **scallop** stocks and ensure the long-term productivity of the **scallop** resource so that the OY may be achieved on a continuing basis under a future management regime that authorizes a regulated fishery in Federal waters.

Comment 2. The proposed FMP is not consistent with National Standard 1, because the FMP does not establish a quantified maximum sustainable yield (MSY); the proposed OY range does not reflect the estimated range of harvests in Federal waters relative to distribution of weathervane scallops, which is from California to **Alaska**; and the specified OY is not based on the best information available (see Comment 3). Furthermore, the 1-year closure authorized under the proposed FMP would interfere with the achievement of OY on a long-term, continuing basis.

Response. NMFS disagrees. See also response to Comment 3. NMFS noted in the preamble to the proposed rule that biomass estimates for scallops are limited, and the continuing expansion of this fishery into new areas make numerical estimation of MSY for weathervane and other **scallop** species not possible at this time. Nonetheless, an OY range (0 to 1,100,000 lb (0-499 mt)) may be established based on historical catches from Federal waters. These catches are the best information available on the long-term productivity of the **scallop** resource off **Alaska**. During the period that Federal waters are closed to fishing for scallops, the OY is set at zero. This interim OY level is consistent with National Standard 1 and will achieve OY on a continuing basis because: (1) Prevention of overfishing during the short-term will help guarantee a healthy long-term OY from the fishery when it is reopened, (2) the **scallop** harvest foregone during the interim closure will be available for later harvest and will contribute to increased OY because this species is a long-lived resource, (3) uncontrolled **scallop** fishing (the alternative to implementing the FMP) in the EEZ may repeat the overfishing and stock depression that historically has occurred in the weathervane **scallop** fishery, and (4) uncontrolled **scallop** dredging increases the potential for increasing bycatch of crab beyond levels presently established by the State of **Alaska** and may interfere with achieving OY in certain crab fisheries.

If implementation of the FMP and its associated OY are delayed until more scientific information is collected and analyzed, unregulated fishing for scallops in Federal waters would continue

until

NMFS acquired all data necessary to refine the determination of MSY/OY.

At that point, the resource might be too diminished to allow achievement of OY on a continuing basis.

Comment 3. The proposed FMP is not consistent with National Standard 2, because the FMP does not use the best information available, that includes data on landings, meat counts, resource distribution, spatial catch, and fishing effort. Furthermore, the available scientific database for the **Alaska scallop** fishery is thin and does not justify an interim closure of Federal waters.

Response. NMFS disagrees. The FMP and preamble to the proposed rule

summarized the recent trends in **scallop** landings, meat counts per pound, and fishing effort that precipitated the preparation of a **scallop** management plan by the **Alaska** Department of Fish and Game (ADF&G). NMFS and ADF&G have acknowledged the limited information on **scallop** population structure and abundance. ADF&G is continuing to pursue analyses of biological, fishery, and resource assessment data to

better understand the population structure of the **Alaska scallop** resource and its sustainable exploitation level. Available scientific data on the life history traits of weathervane scallops and other scallops species indicate that weathervane scallops are susceptible to localized depletion and require a cautious resource management approach. Therefore, NMFS has determined that an interim closure of the

scallop fishery in the EEZ is necessary until such time as a management regime can be implemented to manage the fishery.

Comment 4. The weathervane **scallop** is distributed from California to **Alaska** and commercial fisheries occur off the States of Oregon and Washington. National Standards 3 and 6 require that an individual stock

of fish shall be managed as a unit throughout its range and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches. The proposed FMP does not indicate that any effort was made to consult with

the States of Oregon and Washington or with the Pacific Fishery Management Council (Pacific Council). Given that the proposed FMP only addresses fishing activity off **Alaska**, the FMP does not consider a properly defined management unit and violates National Standards 3 and

6.

Response. NMFS disagrees. Comment 4 confuses geographic distribution of a species with stock management. Concentrations of adult scallops do not mingle and typically are managed as separate stocks. The geographic range of the weathervane scallops consists of a collection of stocks. Available information on resource distribution supports the management of the **Alaska scallop** resource as separate stock units. NMFS anticipates that future amendments to the FMP that authorize controlled fishing for scallops off **Alaska** will further define management units of the **Alaska scallop** resource in a manner very similar to the **scallop** management areas developed by the State of **Alaska**.

The FMP for the **Alaska scallop** fishery was precipitated by uncontrolled fishing for scallops off **Alaska**. A similar situation could occur off the Pacific Coast States. This situation has prompted the Pacific States Marine Fisheries Commission (PSMFC) to pursue an amendment to the Magnuson Act that would authorize the West Coast States to protect legitimate state interests in the conservation and management of fish caught in Federal waters off the coast of Washington, Oregon, or California in the absence of an approved Federal fishery management plan.

The PSMFC predicated its action on the belief that scallops are very sensitive to fishing pressure and that sudden increases in fishing effort may have long-term negative consequences to the recuperative capability of **scallop** stocks. The PSMFC has further acknowledged action by the Council to initiate rulemaking to control the **scallop** fishery off **Alaska** and the resulting potential for

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increased effort for scallops off Washington and Oregon.

No information is available to NMFS that indicates that the interim closure of Federal waters off **Alaska** to fishing for scallops under either the February 24, 1995, emergency rule or the FMP will have an impact on the Washington and Oregon **scallop** fishery in a manner not already occurring due to increased fishing effort by vessels displaced from the East Coast of the United States. In recent years, the amount of scallops harvested off Oregon and Washington annually was not

substantial relative to the **Alaska** fishery and averaged less than 1 percent of the **Alaska** harvest during 1989-1992. In 1993, the **scallop** landings off Oregon and Washington increased to 270,000 lb (122.47 mt) and 246,000 lb (111.58 mt), respectively, due to increased fishing effort by east coast vessels.

The Council has no authority beyond the Federal waters off **Alaska**. Nonetheless, the Council consists of three members from the State of Washington and two members from the State of Oregon. At least one of these members serves on both the North Pacific and Pacific Councils, as well as the PSMFC. NMFS believes this joint membership served to inform adequately the Pacific Council about **scallop** management actions the Council was considering. The fact that the PSMFC chose to pursue a Magnuson Act amendment to resolve Pacific coast management concerns rather than an interjurisdictional management plan and that the **Alaska scallop** FMP only addresses fishing off **Alaska** does not constitute a violation of National Standards 3 or 6.

Comment 5. The proposed FMP is not consistent with National Standard 4. An interim closure of Federal waters to fishing for scallops discriminates against residents of different States, and only **Alaska** State registered vessels are allowed to harvest weathervane scallops in **Alaska** State waters. This provides a competitive advantage to Alaskan vessels.

Response. NMFS disagrees. The interim closure to fishing for scallops authorized under the FMP does not discriminate against non-**Alaska** State residents. All vessels are prohibited from fishing for scallops in Federal waters off **Alaska**, including vessels owned and operated by **Alaska** State residents and vessels registered under the laws of the State of **Alaska**. The State of **Alaska** has notified the public that it will open specified State waters to limited fishing for scallops. Any vessel owner, regardless of state of residency, may choose to register his/her vessel with the State of **Alaska** and abide by State **regulations** governing the **scallop** fishery in State waters. Neither inconsistency with National Standard 4 nor discrimination against non-**Alaska** state residents results from implementation of the FMP.

Comment 6. The proposed FMP is not consistent with National Standard 5, because the FMP seriously limits efficiency and no analysis is provided on how a 1-year closure of Federal waters will enhance long-term efficiency. Similarly, the previous acceptance by NMFS of an

Alaska State **scallop** management program also imposed technical and economic inefficiencies.

Response. NMFS disagrees. Efficiency in terms of resource management is enhanced by providing for the long-term sustainable harvest of the **scallop** resource (see response to Comment 2). NMFS concurs that short-term economic gain is subordinated to the long-term health of the **scallop** resource. This balance is considered and allowed under National Standards 1 and 5. Furthermore, fishery resources **regulations** typically control efficiency to prevent stock depletion. Without such controls, fishermen might fish until it were unprofitable to do so, resulting in localized depletion of scallops, which would increase the risk of overfishing **scallop** stocks.

Comment 7. The proposed FMP is not consistent with National Standard 7, because the FMP does not address how NMFS would monitor the closure of Federal waters to fishing for scallops. Effective enforcement could be costly. Furthermore, the proposed FMP differs from the **regulations** of Washington and Oregon and would not minimize costs and avoid unnecessary duplication.

Response. NMFS disagrees. NMFS would monitor and enforce closure of Federal waters to fishing for scallops in the same manner that groundfish area closures are enforced (i.e., observer data, surveillance flights by the U.S. Coast Guard (USCG), recordkeeping and reporting documentation, other available sources of information that indicate the location of fishing operations). NMFS recognizes that some **scallop** stocks straddle Federal and State waters in a manner that may make the enforcement of the closure of Federal waters off **Alaska** difficult. NMFS also recognizes that, in recent years, most of the **scallop** harvest has come from Federal waters and that the State of **Alaska** intends to follow a conservative approach to opening State waters to fishing for scallops so that the potential for redistribution of fishing effort from Federal to State waters does not jeopardize the resource in State waters. NMFS intends to coordinate management with the State of **Alaska** so that the State will consider any enforcement concerns resulting from the closure of the Federal fishery when determining whether or not to open State waters to fishing for scallops.

Comment 8. The proposed FMP is not consistent with the New England Fishery Management Council's (New England Council's) **scallop** fishery

management plan, which provides for an industry advisory panel. The proposed FMP should allow for an industry advisory panel to provide a forum for management agencies and industry members to discuss management and data collection strategy.

Response. The management measures contained in the **scallop** fishery management plan prepared by the New England Council may or may not be pertinent to the management of the **Alaska scallop** fishery under the authority of the Council. The proposed FMP contains a single management

measure, an interim closure of Federal waters, to provide the time necessary to prepare a management regime that would authorize a controlled fishery for scallops in Federal waters. This future management regime could provide for an industry advisory panel that provides input to management agencies if the Council so desires. An industry advisory panel beyond that which already exists in the normal Council process is not mandated, because the New England Council has made such a provision in its **scallop** management plan.

Comment 9. Concerns about localized overfishing of **scallop** stocks do not justify closure of Federal waters because fishermen will leave a fishing area before the stock is overharvested to the point where profit margin falls to the break even point. As a result, sufficient amounts of scallops will remain to repopulate an area.

Response. NMFS disagrees. Also see response to Comment 2. The weathervane **scallop** is a long-lived, slow growing species. As a result, this species is vulnerable to overfishing. Fishing a localized stock of scallops until catch-per-unit-of-effort (CPUE) drops to the point of becoming unprofitable poses conservation concerns, especially if the stock is reduced to the point where it is not able to recover or can recover only after a long period of time.

Prior to the 1990's, management of the **Alaska** weathervane **scallop** fishery was premised on the assumption that the fishery would self-regulate by

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economics. The fishery was fairly small and passively managed using gear restrictions, fishing seasons, and closed areas. Experience with this management approach for weathervane scallops and other **scallop** species has indicated that a collapse of a **scallop** fishery is not uncommon following a relatively brief period of intense fishing effort.

Recent expansion of fishing capacity of the **Alaska scallop** fleet has aggravated overfishing concerns.

The **scallop** resource off **Alaska** may have avoided overall depletion during the early years of the fishery (late 1960's and early 1970's) because scallops were widely distributed and the small fleet was economically motivated to move to new areas to maintain catch rates or to other fisheries. However, available fishery data suggest that the Kodiak and Yakutat area stocks may have been overfished.

During the early years of the **Alaska scallop** fishery, the **scallop** harvests from the Kodiak and Yakutat areas were predominated by scallops age 7 and older. By the early 1970's, 2-6 year old scallops dominated the catch. The magnitude of the age shift during the early years of the fishery, as well as subsequent poor fishery performance, indicates that high harvests during the early years of the fishery off Kodiak and Yakutat were not sustainable over the long term (Shirley and Kruse 1995). Published scientific literature provides numerous other examples where overharvesting of **scallop** stocks has led to long-term or permanent inability to support a commercial fishery (Young and Martin 1989, Orensanz 1986, Aschan 1991).

Comment 10. Closure of Federal waters to fishing for scallops will prevent the collection of fishery data that are needed for sound management of the fishery.

Response. NMFS recognizes the importance of fishery data in monitoring the status of the **scallop** resource. The FMP authorizes a 1-year closure of Federal waters, so the potential loss of commercial fishery data from Federal waters is limited. Fishery data still would be collected from State **scallop** fisheries authorized by ADF&G. Furthermore, ADF&G has scheduled a 1995 resource assessment for the **scallop** resource near Kayak Island in the Prince William Sound management area. In addition, ADF&G plans to analyze biological and fishery data already collected to assess sustainability of exploited weathervane **scallop** stocks off **Alaska**. Given the opportunity to collect data from State fisheries during the period of time Federal waters are closed, as well as ADF&G's analysis of data already collected to estimate recruitment, growth, and mortality parameters, NMFS does not believe that a 1-year hiatus in the collection of Federal fishery data will significantly affect the future management of the fishery.

Comment 11. NMFS accepts public comment and outside data perfunctorily and for no other reason than that it is required by statute to do so. No evidence exists, especially for the **scallop**

fishery, that the comments submitted from commercial fishing interests have had any effect whatsoever on ultimate decisions.

Response. NMFS disagrees. NMFS routinely revises final **regulations** in response to public comment. In the case of the proposed FMP, this public comment challenging the merits of a fishery closure or the efficacy of constraining fishing activity implies that short-term financial gain on the part of one or more vessels has priority over the long-term health of the **scallop** resource and sustainable yield by all participants in the fishery in future years. This perspective is counter to what NMFS believes to be wise use of the **Alaska scallop** resource. Nonetheless, NMFS has acknowledged and responded to such comments.

Comment 12. The implementation of the proposed FMP is being done on a fast track to prevent unregulated fishing in Federal waters by one vessel. A major concern posed by NMFS and the Council is that allowing unregulated fishing by one vessel in Federal waters could cause serious biological overfishing. Without any information on resource conditions and vessel performance measures, it is not possible to state whether or not a single vessel could endanger the resource locally or otherwise. This would be highly unlikely.

Response. NMFS disagrees. The schedule for review and implementation of the proposed FMP is established under section 304 of the Magnuson Act. NMFS has not deviated from this process to pursue an alternative ``fast-track'' implementation schedule. NMFS acknowledges that the preparation and review of the FMP have been given high priority. NMFS believes that the **Alaska scallop** fishery must be protected from uncontrolled fishing activity to better assure the long-term health of the **scallop** resource and sustain harvests of this resource at an optimum level. As experienced earlier in 1995, unregulated fishing by a single vessel in Federal waters exceeded an **Alaska** State guideline harvest level by over 100 percent. This degree of overharvesting has the potential for unrestricted crab bycatch and the possibility that one or more vessels would continue to overharvest the **scallop** stocks, necessitates closure of Federal waters until a Federal management regime is prepared that authorizes a controlled fishery for scallops. Moreover, continued unregulated fishing by one or more vessels could result in conflicts with other vessels that do not choose to pursue an unregulated fishery, or those **Alaska**-licensed

vessels that are prohibited from fishing for scallops. NMFS has determined that such conflicts represent serious management issues that should be addressed whenever possible.

Comment 13. NMFS was content to permit regulation of the **scallop** resource by the State of **Alaska**, which authorized the harvest of 1.6 million lbs (726 mt) of scallops for 1995. Furthermore, NMFS did not require the **Alaska** State **regulations** covering harvesting in Federal waters by **Alaska** State registered vessels to meet the national standards and purposes of the Magnuson Act. The 1995 quota under State management, which NMFS found acceptable, still has 1.5 million lbs (680 mt) available. Yet NMFS maintains that the fishery must be closed to protect the resource. The full 1995 **Alaska** quota should be harvested before the fishery is closed.

Response. NMFS disagrees. Comment 13 suggests that no conservation problem exists that justifies a closure of Federal waters under the proposed FMP, because the full 1.6 million lbs (726 mt) annual quota established by the State of **Alaska** has not been harvested. This premise is misleading and irrelevant to the basis for the interim closure authorized under the FMP. The interim closure under the FMP is necessary to address NMFS' concern for localized depletion as a result of uncontrolled dredging for scallops by one or more vessels. Experience in 1995 has shown that closure of an area to fishing for scallops under **Alaska** State **regulations** when an annual quota has been reached does not cause unregulated vessels to cease fishing operations. As a result of such action, the State's quota for its Prince William Sound registration area was exceeded by over 100 percent. This poses more than adequate evidence of a serious conservation problem. Therefore, the commenter's suggestion that scallops remain to be harvested in other Federal waters off **Alaska** is irrelevant to the problem faced by management agencies.

Comment 14. The determination in the preamble to the proposed rule that the rule is not significant for purposes

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of E.O. 12866 is unexplained and is not legally correct.

Response. The EA/RIR/Initial Regulatory Flexibility Analysis prepared for the FMP addressed the significance of the interim closure authorized under the FMP relative to E.O. 12866. This information was not required to be repeated in the preamble to the proposed rule.

NMFS requires the preparation of a RIR for all regulatory actions that either implement a new fishery management plan or significantly amend an existing plan. The RIR is part of the process of preparing and reviewing fishery management plans and provides a comprehensive review of the changes in net economic benefits to society associated with proposed regulatory actions. The analysis also provides a review of the problems and policy objectives promoting the regulatory action and an evaluation of the major alternatives that could be used to solve the problems. The RIR addresses many of the items in the regulatory philosophy and principles of E.O. 12866.

E.O. 12866 requires that the Office of Management and Budget review proposed regulatory programs that are considered to be ``significant.''

A ``significant regulatory action'' is one that is likely to:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlement, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866.

A regulatory program is ``economically significant'' if it is likely to result in the effects described in item (1) above. The RIR is designed to provide information to determine whether the proposed regulation is likely to be ``economically significant.''

NMFS believes the RIR prepared for the proposed FMP adequately assessed the costs and benefits that could result from the implementation of the proposed FMP and that the determination that the rule implementing the FMP is not significant under E.O. 12866 is justified.

Comment 15. The legal brief supporting Trawler Diane Marie, Inc.'s

motion for summary judgment in its case seeking to set aside the February 24, 1995, emergency rule, as well as the associated affidavit of James E. Kirkley and William D. DuPaul commenting on both the emergency rule and the proposed FMP closure of the **scallop** fishery in Federal waters off **Alaska** are submitted as comment on the proposed FMP.

Response. The issues and complaints contained in the legal brief filed by the plaintiffs in *Trawler Diane Marie, Inc. v. Ronald H. Brown*, No. 2-95-CV-15-D(2) (E.D.N.C.), have been responded to in several subsequent memoranda of reply and are not repeated here. General comments that directly pertain to the proposed FMP and that were contained also in the Kirkley and DuPaul review of the proposed FMP are addressed above. Comments specific to the Kirkley and DuPaul review are addressed below.

Comment 16. The proposed FMP presents insufficient information to assess whether or not the FMP will improve resource conditions and benefit the nation. There has been no stock assessment of the resource in recent years. Furthermore, the structure of the stock is not defined

and information is lacking on whether the resource is characterized as an open population or defined in terms of discrete, localized, and self-contained populations.

Response. NMFS acknowledges that the data on the weathervane **scallop** resource are not complete. ADF&G conducted an assessment of the Cook Inlet stock in 1984 and intends to conduct an assessment of the Prince William Sound stock this summer. Although stock structure of the weathervane **scallop** resource is not well defined, scientists generally recognize the resource to comprise megapopulations, which are discrete collections of adult animals that do not intermix but that may be connected by larval drift. Such populations are susceptible to localized depletion. Furthermore, the proposed FMP refers to scientific evidence that a number of other **scallop** species have megapopulations comprising multiple discrete self-sustaining populations. NMFS concludes from these studies that weathervane scallops structure may be organized similarly and be susceptible to localized overfishing. Weathervane scallops and other **scallop** species have a history of overexploitation that resulted in serious depletion of localized stocks, which may have led to overfishing (Shirley and Kruse 1995). Concerns about overexploitation as well as uncertainty about **scallop** stock structure and abundance support a conservative interpretation of

available data and development of a management regime in favor of resource protection. This approach is superior to that alluded to in Comment 16, which indicates that, in the absence of definitive information about the **scallop** resource, NMFS should err on the side of resource exploitation.

Comment 17. No apparent information exists on catch and effort or meat counts, although the proposed FMP refers to voluntary data submitted by members of the **scallop** fishery and to other anecdotal information. NMFS indicates that this information suggests a resource problem, because the number of meats per pound has increased and CPUE has declined in recent years. Contrary to NMFS' premise, increased meat counts could be the result of many factors, one of which is the fact that **scallop** vessels have increasingly exploited Federal waters off **Alaska**. The water depth is typically deeper in offshore waters and scallops from deep waters typically have lower yields or higher counts than scallops of the same size for shallow water areas because of reduced food abundance. Also, since the fishery has intensified, there has been more exploitation throughout the year. As a consequence, more scallops may now be harvested during the spawning period when meat yields typically decline or the counts increase.

Response. ADF&G has collected landings data from fish tickets from the **Alaska scallop** fishery since the 1960's. This information includes catch amounts and limited data on fishing effort (e.g., number of vessels, vessel size, number of tows). ADF&G also collected data from on board catch sampling and logbook interview programs from the **scallop** fishery during 1968-1972 and provided additional effort information (actual number of days fished) as well as data on shucked meat weights.

In addition, ADF&G has conducted an on board observer program since 1993 that collects detailed data on catch and effort (e.g., duration of tows).

Published literature indicates that **scallop** growth can vary between inshore and offshore areas (MacDonald and Bourne 1987, Can. J. Fish. Aquat. Sci. 44: 152-160) and between geographic areas. A movement of vessels from inshore to offshore fishing grounds would indicate that catch rate is declining in the area the vessels are leaving. This suggests inshore **scallop** stocks have been fished down to the point where vessels no longer can profitably harvest them. Furthermore, age composition data from the

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commercial fishery during the late 1960's and early 1970's showed a downward shift in age structure in the Kodiak and Yakutat stocks (see response to Comment 9).

Although a year-round fishery and exploitation during the spawning season could account for higher meat counts, this is not a likely explanation for increased meat counts in the **Alaska scallop** fishery, because most of the **Alaska scallop** harvest occurs in the summer months, after the spawning season.

Comment 18. The proposed FMP presents no information on pre-recruits, which would not be observed in the State's mandatory observer program and which could be extremely high. **Alaska State regulations** and the commercial gear configuration allow escapement of small scallops. Available data indicate the timing and frequency of spawning by weathervane scallops is highly synchronous. Consequently, **scallop** shell height frequency distributions could be a good indicator of year-class survival or strength for ages 1 to 4. This important information apparently is not obtained by at-sea observers.

Response. Vessels that fish under the authority of **Alaska State regulations** carry observers. These observers collect data on shell height frequency that is analyzed by ADF&G to assess stock condition and exploitation. Further, commercial fishery data on the abundance of age 3 or 4 scallops may provide an index of future productivity.

Although weathervane scallops can produce gametes by age 3 or 4, these ages may not contribute significantly to reproduction. Data on some related species show that adults do not produce fully viable gametes until several years after age at first maturity. Scientists in British Columbia currently are researching this phenomenon for weathervane scallops. Thus, published information on age-at-maturity may be changing. If mean age of maturity is older than previously thought, current **regulations** afford less protection for spawning stocks than currently believed and recruitment overfishing is more likely to occur.

Comment 19. Management agencies have not collected information on fishing effort in the **Alaska scallop** fishery regularly. However, the consensus of **scallop** researchers is that CPUE is not a valid indicator of the resource abundance of scallops.

Response. Information on CPUE in the **Alaska scallop** fishery has been regularly collected on ADF&G fish tickets since the 1960's. NMFS generally agrees that average CPUE may not be a valid indicator of resource abundance for aggregative species like scallops, because concentrations are fished heavily until CPUE drops, and the fleet or a vessel then moves on to a different stock to repeat this pattern. Rather than analyze region-wide CPUE data, the State of **Alaska** is analyzing detailed area-specific fishery data with geographic information systems to better understand stock distribution and abundance. Further, ADF&G is analyzing biological data collected from the State's observer program to estimate recruitment, growth, and mortality parameters and to increase management agency knowledge of the sustainability of the exploited **Alaska** weathervane **scallop** stocks.

Comment 20. The management of the **Alaska scallop** fishery by ADF&G has contributed to a decline in CPUE. Quotas established by ADF&G are notoriously inefficient and cause vessels to engage in derby-style fishing practices. This type of fishing strategy has been shown throughout the fishery literature to cause a decline in CPUE and to create economic and technical inefficiency. This approach to fishery management violates National Standard 5, because it fails to promote efficiency in the utilization of fishery resources.

Response. NMFS finds that this comment is not relevant to the action being proposed (i.e., a 1-year closure of the **scallop** fishery in the EEZ). Nonetheless, NMFS notes that establishment by the State of **Alaska** of management area quotas is an accepted management measure used by fishery management agencies.

Comment 21. The proposed FMP reports an unreasonably high harvest capacity (65,000 lbs, or 29 mt, of shucked **scallop** meats per week) for the single vessel that had fished Federal waters outside the regulatory authority of the State of **Alaska** and which precipitated the February 24 emergency closure of Federal waters as well as the proposed FMP.

Response. NMFS disagrees. The draft FMP does not state that the vessel that precipitated the closure of Federal waters had a 65,000 lb (29 mt) harvest capacity. Rather, the FMP reported that when the U.S.Coast Guard personnel boarded the vessel, they were informed by the vessel's crew that the vessel had about 54,000 lbs (24 mt) of shucked **scallop** meats on board. The point stressed in the proposed FMP and the

preamble to the proposed rule to implement the FMP was that this level of catch on board the vessel exceeded the quota for the management area

the vessel was operating in by over 100 percent.

Comment 22. The proposed FMP states that it is necessary to close the **scallop** fishery in Federal waters, because insufficient information

is available to regulate the fishery. Yet, scientific literature (Hillborn and Walters, 1992) has shown that little information necessary for resource management can be obtained when the fishery is managed or regulated by extremely conservative strategies (e.g., an area closure). With this in mind, it may not be possible for NMFS to ever reopen Federal waters, if the opening depends upon a plan based on

sound scientific information. The interim closure proposed under the FMP limits the collection of information necessary for sound resource management.

Response. NMFS disagrees. Also see response to Comment 10. The FMP does not authorize closure of Federal waters to fishing for scallops because insufficient information is available to regulate the fishery. Rather, the FMP implements an interim closure of Federal waters to prevent overfishing while a Federal management regime is prepared to authorize a controlled fishery for scallops. Until unregulated fishing activity of a single vessel precipitated closure of Federal waters, the

scallop fishery was managed with the best information available and it will continue to be managed with the best information available once Federal waters reopen to fishing under a future amendment to the FMP.

The cited reference (Hillborn and Walters, 1992) reports that key resource assessment calculations heavily depend on data that can be gathered early in a fishery's development and that a data gathering program should be developed to collect information from subsequent phases of the fishery. If a fishery is left unregulated, species that form large aggregations are easy targets for exploitation and are susceptible to depletion and collapse. This pattern of exploitation and

collapse has occurred repeatedly for a number of **scallop** stocks.

NMFS notes that although the importance of fishery data is clear, the single vessel fishing in the unregulated fishery for scallops in early 1995 carried no observer and did not report its catch to management agencies. As a result, catch information and other fishery data from this vessel are not included in the information base being developed to manage the **Alaska scallop** fishery. Although the interim

closure of Federal waters temporarily limits the collection of fishery data, not implementing the FMP and allowing unregulated vessels to fish for scallops in Federal waters would not guarantee that fishery data

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would be provided to management agencies.

Comment 23. Given the inadequacy of biological, social, and economic information to ascertain the status of the **scallop** stocks or the condition of the fishery, the available data do not support closure of Federal waters to fishing for scallops. If the FMP is implemented, NMFS will have to underwrite a large and expensive research program. If the research program has not yet begun, it will be a long time before a good FMP can be developed for the fishery.

Response. For the reasons described above, NMFS acknowledges that limited information on the **Alaska scallop** resource justifies a conservative approach to the management of this resource. This approach is based on the premise that uncertainty should lead to greater caution, not recklessness in the hope of short-term economic gain.

ADF&G has conducted resource assessments in Cook Inlet and intends to pursue a survey of part of the Prince William Sound stock this summer. An assessment of stock condition does not necessarily require expensive and long-term research. For example, observer data on catch, effort, and age composition could be analyzed to assess a stock's sustainability to exploitation. ADF&G plans to use these observer data in a geographic information systems analysis to provide a fishery-based

assessment of stock status and productivity. NMFS is considering possible cooperative arrangements with the State of **Alaska** to make use of the information made available from ADF&G's assessment program.

Comment 24. The proposed FMP specifies an OY of 1.1 million lbs (499 mt), which equals the highest estimated harvest from Federal waters off **Alaska**. NMFS inappropriately based the proposed OY on historical landings because the landings have been sporadic, not indicative of a fully exploited resource, and regulated by quotas. In fact, historical landings reflect opportunities in other fisheries as well as those in the weathervane **scallop** fishery. Bourne (1991) argues that the resource tends to be exploited when opportunities in other fisheries are diminished. As a result, the landings series do not

coincide with periods of full exploitation and the resulting guideline harvest ranges implemented by the State of **Alaska** and the proposed OY is likely to be artificially low.

Response. NMFS agrees that historical landings could have been affected as opportunities in other fisheries flourished or diminished. However, available data also support the premise of management agencies that fluctuating landings in the **Alaska scallop** fishery are reflective of the reduced availability of scallops resulting from the pulse nature of the fishery and the ``boom and bust'' cycles of resource abundance. Furthermore, the State of **Alaska** only recently (1993) implemented quotas for the **Alaska scallop** fishery. Prior to this time, **scallop** harvests were regulated only with gear restrictions, area closures, and fishing seasons. Last, analyses upon which ADF&G's guideline harvest ranges are based do not include very high or very low annual harvests to dampen the effect of annual variation on the calculation of sustainable yield estimates.

Comment 25. Using information contained in the draft FMP and a simple analysis of landings and number of trips using a surplus production model of the form of Schaefer (1957) indicates that the MSY for weathervane scallops off **Alaska** is approximately 6.3 million lbs (2,857 mt) of meats. The model is statistically significant, although the coefficient for the effort squared, measured by number of landings, is not statistically significant. This estimate is based on the best scientific information available--landings and number of trips over time. If the number of vessels is used instead of number of landings, the MSY is estimated to equal 1.3 million lbs (590 mt) of meats.

Response. The Schaefer model for estimating surplus production and MSY has been considered invalid since the 1960's (Larkin 1977). Furthermore, neither the number of landings nor the number of vessels are adequate variables to use because **scallop** vessel size and capacity has changed greatly over the past 20 years. Similarly, vessels have gone from a part-time engagement in the **Alaska scallop** fishery to full-time participation. Thus the vessels used to participate in the **scallop** fishery in the late 1960's and 1970's cannot be compared to the 15-17 vessels currently participating in the fishery because their levels of participation are not comparable. Even if the Schaefer model were appropriate, NMFS would seriously question the commenter's preferred alternative of using the highest MSY estimate of 6.3 million lbs

(2,857

mt), instead of a more conservative amount, given the wide range (1.3 million-6.3 million lbs (590 mt-2,857 mt) calculated from the commenter's efforts, and the uncertainty of the data used by the commenter.

Comment 26. The proposed FMP states that a major reason for the interim closure and a Federal FMP is to prevent the ``boom and bust'' syndrome historically exhibited by other **scallop** fisheries. There is absolutely no evidence that a ``boom and bust'' fishery is bad. In fact, many U.S. fisheries, particularly shellfish fisheries, exhibit cyclic patterns in resource abundance and fishing activity. A good example of this is the Calico **scallop** (*Argopecten gibbus*) fishery in the State of Florida. Moreover, pulse-fishing is a strategy often adopted by fishermen to maximize net returns over time. In general, management strategies have not been able to prevent ``boom and bust'' episodes in fisheries that are naturally cyclic.

Response. The Calico **scallop** fishery is a poor example for justifying a ``boom and bust'' fishery for weathervane scallops off **Alaska**. Contrary to the long-lived weathervane **scallop**, the Calico **scallop** has a short life span (less than 2 years). Species of short life span typically are less vulnerable to overfishing, unlike weathervane scallops, which have a long life span and are more susceptible to recruitment overfishing. Published literature cites many examples where a relatively brief intense period of fishery exploitation has resulted in stock collapse (see response to Comment 9).

Under the proposed FMP, as well as the State of **Alaska** management program, harvest constraints will have some effect in dampening the natural fluctuations in resource abundance. A constant supply of scallops would also dampen economic impacts on the weathervane **scallop** industry relative to the cyclic abundance pattern that can wreak havoc on established markets.

Comment 27. Under the proposed FMP, there will be unprecedented **scallop** fishing effort by vessels in State waters because Federal waters will be closed. Evidence exists that the State will allow increased harvest levels in State waters in response to the closure. Therefore, the likelihood exists that fishing activity in State waters will be unprecedented unless controlled by strict harvest quotas.

Thus, the same argument used to close Federal waters will have to be used to close State waters to the harvesting of weathervane **scallop** fishing. The only way to guarantee that the risk of recruitment failure or

growth overfishing will be minimal is to close the entire weathervane **scallop** fishery.

Response. Under the proposed FMP, as well as the State of **Alaska** management program, harvest constraints will help dampen the natural fluctuations in resource abundance, will better prevent recruitment overfishing, and will promote sustainable and predictable fishery-related employment on a

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continuing basis. A constant supply of scallops would also dampen the adverse economic impacts on markets that could be caused by erratic or cyclic patterns of **scallop** abundance.

The State of **Alaska** opened only limited areas in State waters to fishing for scallops under quotas that will protect **scallop** stocks within State waters from any increase in fishing effort that may occur because of the closure of Federal waters. For the 1995 fishing season, only the State waters of the Dutch Harbor and Adak areas opened to **scallop** fishing as scheduled on July 1. Available fishing grounds are extremely limited and harvest amounts are not expected to be significant. The harvests in these areas from the 1993 and 1994 seasons

were only 40,000 lbs (18 mt) and 2,000 lbs (0.9 mt), respectively. Furthermore, **scallop** harvests and crab bycatch rates will be assessed in-season to guide management decisions and inseason closures.

Comment 28. The proposed FMP states that weathervane scallops possess biological traits (e.g., longevity, low natural mortality rates, and variable recruitment) that render them vulnerable to overfishing. It is not clear why these traits would render scallops vulnerable to overfishing. In fact, the trait of variable recruitment is a trait that can result in resource restoration.

Response. Resource restoration is a factor of numerous variables, including recruitment and natural mortality (M). A number of biological

reference points is widely accepted for the management of fishery resources. One of these points is fishing mortality (F) at a level that equals natural mortality (M). If a stock exhibits low M, then chances increase that an unknown F is actually greater than M. Lacking more definitive information, another basic premise of traditional fishery management is that species of large size, longevity, and low natural mortality tend to be vulnerable to overharvest (Adams 1980; Leaman 1991). Moreover, published literature (Murphy 1967) shows that species that reproduce at multiple ages with variable reproductive success are

very vulnerable to overharvest when fishing alters the age structure such that the population approaches a single reproduction. In the case of scallops, fishing-induced shifts in age structure to ages 2-6, as occurred in the early 1970s, reduce the stock's ability to maintain itself under periods of poor recruitment.

Comment 29. Management alternatives exist to a closure of Federal waters to fishing for scallops. For example, NMFS could impose a quota of 1.1 million lbs (499 mt) in Federal waters and require an observer aboard every vessel. When the quota will be reached, NMFS could close the fishery. Concerns about a derby-style fishery could be addressed through daily or weekly quotas or vessel specific quotas or allocations.

Response. NMFS disagrees with the commenter's approach. NMFS does not at this time have information to justify how the harvest of a particular quota (e.g., 1.1 million lbs) should be spread among potential management areas to prevent localized depletion of scallops. If a single harvest amount were specified and allowed to be fished without this information, **scallop** stocks could be adversely impacted. Requiring an observer on board every vessel would not ameliorate this situation. The Council is in the process of preparing an amendment to the FMP that would establish a Federal management regime authorizing a controlled fishery for scallops in Federal waters as soon as possible. In addition to quotas and levels of observer coverage, the Council will likely consider measures such as area closures and prohibited species bycatch allowances to protect other fish species (e.g. crabs). Also, the Council will likely consider measures necessary for inseason management of the **scallop** fishery (e.g., gear configurations, crew sizes, recordkeeping and reporting requirements). The Council will consider carefully each of these measures as to whether it is necessary for conservation and management of the **scallop** fishery. Public comments will be invited, responded to, and if necessary, adjustments to particular management measures might be developed. Once the Council recommends its preferred alternative for each particular measure, NMFS will determine whether it comports with the national standards and other applicable laws, and decide whether to approve it. This process, although lengthy, is essential to provide a rational regime that responds to NMFS's responsibilities under the Magnuson Act to conserve and manage the **scallop** fishery off **Alaska**.

Comment 30. In recent years, the catch capacity and capitalization in the **Alaska scallop** fishery has become excessive due to speculative

entry. The result has been severe financial pressure on fishery participants. The only way to reduce this pressure is to reduce excessive capacity to a rational level. The management of this fishery must proceed as soon as possible towards a comprehensive system that will optimize the fleet at a more rational level.

Response. NMFS agrees. See response to Comment 29.

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Classification

The Director, **Alaska** Region, NMFS, determined that the FMP is necessary for the conservation and management of the Gulf of **Alaska** and

the Bering Sea and Aleutian Islands management area fisheries and that it is consistent with the Magnuson Act and other applicable laws.

NMFS prepared an FRFA as part of the RIR. A copy of this analysis is available from the Council (see ADDRESSES).

To avoid a regulatory hiatus when the February 23, 1995, emergency rule expires and to address conservation concerns resulting from uncontrolled fishing for scallops, this rule must be effective on 12:01

a.m., A.l.t., August 29, 1995. In addition, because this rule will continue the emergency rule's prohibition on fishing for scallops, the fishing industry will not need any additional time to adjust to the requirements imposed by this rule. These reasons constitute good cause under authority contained in 5 U.S.C. 553(d)(3) for waiving all or part

of the 30-day delay in effective date.

This rule has been determined to be not significant for purposes of

E.O. 12866.

List of Subjects in 50 CFR Part 673

Fisheries.

Dated: August 8, 1995.

Gary Matlock,

Program Management Officer, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 673 is added as follows:

1. Part 673 is added to Chapter VI of 50 CFR to read as follows:

PART 673--**SCALLOP** FISHERY OFF **ALASKA**

Sec.

673.1 Purpose and scope.

673.2 Definitions.

673.3 Prohibitions.

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

Sec. 673.1 Purpose and scope.

(a) These **regulations** implement Federal authority under the Magnuson Act to manage the **scallop** fishery in the exclusive economic zone off **Alaska**.

(b) **Regulations** in this part govern commercial fishing for scallops in the exclusive economic zone off **Alaska**.

Sec. 673.2 Definitions.

In addition to the definitions in the Magnuson Act and in 50 CFR part 620, the terms in 50 CFR part 673 have the following meanings:

Exclusive Economic Zone (EEZ) (see Sec. 620.2 of this chapter)

Scallop(s) means any species of the family Pectinidae, including without limitation weathervane scallops (*Patinopecten caurinus*).

Sec. 673.3 Prohibitions.

In addition to the general prohibitions specified in Sec. 620.7 of this chapter, it is unlawful for any person to retain any scallops in the EEZ seaward of **Alaska** during the period that extends through the earlier of August 28, 1996, or until superseded by other management measures.

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