

March 29, 2004

Via Electronic Mail: ScallopAN16@noaa.gov

Ms. Patricia A. Kurkel
Regional Administrator
National Marine Fisheries Service
One Blackburn Drive
Gloucester, MA 01930

Re: Proposed Rule on Fisheries of the Northeastern United States; Atlantic Sea Scallop Fishery; Amendment 10

Dear Ms. Kurkel:

The Office of Advocacy of the U.S. Small Business Administration (SBA) submits this comment letter in response to the above-referenced proposed rule. These comments reflect concerns that small entities have voiced to the Office of Advocacy.

Advocacy Background

Congress established the Office of Advocacy (Advocacy) under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or of the Administration. Section 612 of the Regulatory Flexibility Act (RFA) requires Advocacy to monitor agency compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act.¹ On August 13, 2002, President George W. Bush enhanced Advocacy's RFA mandate when he signed Executive Order 13272, which directs Federal agencies to implement policies protecting small entities when writing new rules and regulations.² Executive Order 13272 also requires agencies to give every appropriate consideration to any comments provided by Advocacy. Under the Executive Order, the agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to any written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.³

The Proposed Rule

On February 26, 2004, the National Marine Fisheries Service (NMFS) published a proposed rule in the Federal Register on the "Fisheries of the Northeastern United States; Atlantic Sea Scallop

¹ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

² Exec. Order No. 13272 § 1, 67 Fed. Reg. 53461 (Aug. 16, 2002).

³ Id.

Fishery; Amendment 10.”⁴ The New England Fishery Management Council (Council) developed the Atlantic Sea Scallop Fishery Management Plan (FMP) to propose a comprehensive long-term program to manage the sea scallop fishery through an area rotation management program to maximize scallop yield. The proposed rule allows areas to be closed and reopened to fishing on a rotational basis, depending on the condition and size of the scallop resource in the areas. In addition, Amendment 10 also includes measures to minimize the adverse effects of fishing on essential fishing habitat; establishes days-at-sea allocations; introduces measures to eliminate bycatch to the extent practicable; and sets forth other measures.⁵ NMFS prepared an initial regulatory flexibility analysis (IRFA) to meet its obligations under the RFA.

Requirements of the RFA

The RFA requires agencies to consider the economic impact that a proposed rulemaking will have on small entities. Unless the head of the agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities, the agency is required to prepare an IRFA. The IRFA must include: (1) a description of the impact of the proposed rule on small entities; (2) the reasons the action is being considered; (3) a succinct statement of the objectives of, and legal basis for the proposal; (4) the estimated number and types of small entities to which the proposed rule will apply; (5) the projected reporting, recordkeeping, and other compliance requirements, including an estimate of the small entities subject to the requirements and the professional skills necessary to comply; (6) all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule; and (7) all significant alternatives that accomplish the stated objectives of the applicable statutes and minimize any significant economic impact of the proposed rule on small entities. In preparing its IRFA, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.⁶ The RFA requires the agency to publish the IRFA or a summary of the IRFA in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule.⁷

NMFS’ Compliance with the RFA in the Proposed Rule

Overall, Advocacy is pleased that NMFS has sought to develop a proposal which promotes flexibility for fishing vessels the scallop industry, all of which are small businesses. However, we are concerned about aspects of the proposal and segments of the IRFA, discussed below, which address the economic impacts of those components.

Gear Modifications

The proposed rule has two gear modifications. The modifications will increase the minimum size of the rings used to construct scallop dredge chain bags from three and a half (3.5) inches in diameter to four (4) inches in diameter and increase the mesh used to construct scallop dredge twine tops from eight (8) inches to ten (10) inches. Although information on the cost of converting the ring size is not available, NMFS concludes that the overall impact will be beneficial because the

⁴ 69 Fed. Reg. 8915.

⁵ Id.

⁶ 5 U.S.C. § 603 and 5 U.S.C. § 607.

⁷ Id.

long term benefits will outweigh the short term costs and the costs will be temporarily mitigated by the six (6) months that the vessel owners have to comply with the requirement.⁸

Although section 607 of the RFA allows an agency to perform qualitative analysis when quantitative data is not available, Advocacy is concerned about the assumptions used in the qualitative analysis to determine the impact would be beneficial. The information provided in the discussion of the alternatives indicates that the change in ring size could result in a loss of about a million pounds of scallops a year.⁹ Moreover, according to the Fishery Survival Fund,¹⁰ the 4 inch ring size may lead to escapement of scallops, increased tow times, and increased bycatch.¹¹ This appears to suggest that the change could result in a loss of revenue and an increase in costs.

Advocacy questions the conclusion that the overall benefits will be positive for the industry if the industry could potentially lose over a million pounds a year in stock. If the industry loses stock, it seems that the industry would experience a reduction in revenue. Advocacy questions how NMFS could conclude that the long term impact will be beneficial if the industry is losing revenue while incurring increased costs.

Advocacy is concerned that the information included in the Federal Register notice does not convey the assumptions or data confirming that long term benefits outweigh the short term costs. Although the RFA does allow an agency to publish a summary of the IRFA, the summary should provide sufficient information for the public to be able to determine the basis of the agency's assertions and conclusions. Advocacy suggests that NMFS clearly delineate its assumptions and provide data to verify its assertions, including information on the number of years that it may take for the scallop fisheries to break even and the number of entities that may be forced to exit the market before the target date that the industry will begin to experience the long term benefits.

Advocacy understands from the industry that the lack of data may be due in part to the fact that 4 inch rings are not readily available. Instead of implementing this requirement without fully understanding its impact, Advocacy recommends that NMFS make the requirement optional rather than mandatory. Once NMFS has gathered the data about the impact, NMFS can perform an analysis that will provide the industry with verifiable information about the potential economic impact that this rule may have on small scallop vessels.

Days-at-Sea (DAS) Set-Aside for Observer Coverage

Under Amendment 10, all vessels that are issued permits to harvest sea scallops must carry an at-sea observer onboard, if requested by the Regional Administrator. In the proposed rule, NMFS estimates that the cost to the vessel for having an observer on board is \$1,100 per DAS.¹² NMFS does not explain how it arrived at a cost of \$1,100. Advocacy suggests that NMFS provide that information to the public so that it can be verified.

⁸ 69 Fed. Reg. 8920-8921.

⁹ 69 Fed. Reg. 8923. Although there is a potential gain of 32 million pounds over 10 years, Advocacy questions whether the scallop fishers will be forced to exit the industry in the first few years due to the massive loss of stock.

¹⁰ Members of the Fisheries Survival Fund ("FSF") include the bulk of full-time limited access Atlantic scallop permit holders, from Massachusetts, south through New Jersey to Virginia.

¹¹ Letter from counsel for the Fisheries Survival Fund to National Marine Fisheries Service (March 15, 2004).

¹² 69 Fed. Reg. 8920.

Amendment 10 proposes to mitigate the impact of this cost to vessel owners by establishing an observer set aside that would allow vessels to have an increase in possession limit¹³ and additional DAS.¹⁴ The multiplier for determining the DAS is 0.14.¹⁵ NMFS does not explain the methodology for determining the 0.14 multiplier. Without information about how the 0.14 multiplier was determined, it is difficult for small entities to comment on whether the 0.14 multiplier is appropriate for offsetting the cost of the observer.

According to the Fishery Survival Fund, the Council established the 0.14 multiplier based on an observer cost of approximately \$800 per DAS. If the multiplier was based on a lower cost, the multiplier to offset the \$1,100 cost should be higher. Since the overall cost to the vessel is higher, more DAS would be necessary to offset that cost. Thus, the multiplier to determine that offset should be higher. Advocacy recommends that NMFS verify the cost of having an observer onboard. If it is \$800, Advocacy suggests that NMFS modify its analysis accordingly. If it is \$1,100, Advocacy suggests that NMFS increase the multiplier so that the vessels using observers are compensated appropriately. Advocacy further suggests that NMFS prepare a sensitivity analysis to validate the number assigned to the multiplier. If NMFS has already performed such an analysis, the results should be summarized in the summary of the RFA analysis that is published in the Federal Register.

Advocacy understands that the industry has additional concerns about the observer set-aside issue. For example, the Fishery Survival Fund has expressed concerns that the language in the rule may misstate the process specified by the Council for determining the number of DAS that should be allocated for the observer set aside.¹⁶ While Advocacy recognizes that NMFS has some discretion in developing regulations to implement Amendment 10, Advocacy is concerned that these inconsistencies may increase the burden on small entities and that they may not have been considered fully in determining the economic impact of the rule, as required by the RFA. Advocacy encourages NMFS to give full consideration to the comments made by the small entities about the requirements in the proposed rule that may be inconsistent with Amendment 10 as adopted by the Council.

Compensation for Sea Scallop Access Area Trips Terminated Early

Advocacy also understands from small businesses in the industry that the proposed rule's treatment of compensation for trips terminated early may be inconsistent with the Council's intent on Amendment 10. In the proposed rule, the vessel owner or operator must report the emergency or safety reason for terminating the trip prior to leaving the Sea Scallop Access Area. The owner must then request that the Regional Administrator authorize an additional trip.¹⁷ According to the Fishery Survival Fund, this alters the Council's intent to provide captains with complete discretion to decide if it is necessary to terminate the trip.¹⁸

¹³ 69 Fed. Reg. 8932.

¹⁴ 69 Fed. Reg. 8928.

¹⁵ Id.

¹⁶ Letter from counsel for the Fisheries Survival Fund to National Marine Fisheries Service (March 15, 2004).

¹⁷ 69 Fed. Reg. 8915, 8932.

¹⁸ Letter from counsel for the Fisheries Survival Fund to National Marine Fisheries Service (March 15, 2004).

Moreover, there are penalties associated with early termination. From a safety standpoint, does NMFS want to place captains in a position where they have to determine whether they should risk being penalized for early termination if the Regional Administrator decides that the situation was not an emergency? Creating this type of dilemma could be harmful to the fishing industry from both the safety and economic standpoints.

Advocacy encourages NMFS to give full consideration to the comments made by the small entities about the inconsistencies in the proposed rule. Advocacy also encourages NMFS to reconsider whether the changes are necessary and whether there are less burdensome ways of accomplishing NMFS' goal.

Conclusion

The RFA requires agencies to consider the economic impact on small entities prior to proposing a rule and to provide the information on those impacts to the public for comment. Although NMFS has made an effort to comply with the spirit of the RFA, there are areas of the analysis that have questionable data and conclusions, as well as areas that may deviate from the Council's intent. Advocacy urges the Department of Commerce and NMFS to give careful consideration to the comments filed by small entities; clarify aspects of the rule that impose unnecessary burdens on small entities affected by the rule; and address the issues raised by Advocacy in the final regulatory flexibility analysis. Advocacy also recommends that the NMFS review the Council's management plan, the proposal, and analysis to determine whether the changes are truly necessary. In addition, as noted above, Advocacy recommends that NMFS make the gear modifications optional until NMFS has enough data to analyze the impact on small entities.

Advocacy and NMFS have worked successfully on rulemakings in the past. Advocacy is available to assist the NMFS in its RFA compliance. Thank you for the opportunity to comment on this important proposal and your consideration of Advocacy's comments. If you have any questions or if Advocacy can be of any assistance, please do not hesitate to contact Jennifer Smith at (202) 205-6943.

Sincerely,

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cc: Dr. John Graham, Administrator, Office of Information and Regulatory Affairs
Dan Cohen, Chief Counsel for Regulation, Department of Commerce

