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## 50 CFR Part 673

[Docket No. 950223058-5058-01; I.D. 022395A]

RIN 0648-AH93

### 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:** Emergency interim rule; request for comments.

**SUMMARY:** NMFS is closing the exclusive economic zone (EEZ) off Alaska to fishing for scallops in response to resource conservation concerns that result from unanticipated fishing for scallops in the EEZ by vessels outside the jurisdiction of Alaska State regulations governing the scallop fishery. This action is necessary to prevent localized overfishing of scallop stocks. This emergency closure is intended to control an unregulated scallop fishery in the EEZ until a Federal fishery management plan (FMP) can be implemented.

**DATES:** Effective February 23, 1995, through May 30, 1995. Comments must be submitted by March 10, 1995.

**ADDRESSES:** Comments may be sent to Ronald J. Berg, Chief, Fisheries Management Division, Alaska Region, National Marine Fisheries Service, P.O. Box 21668, Juneau, AK 99802, Attention: Lori Gravel. Copies of the Environmental Assessment prepared for the emergency rule may be obtained from the same address.

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

#### SUPPLEMENTARY INFORMATION:

##### Background

Fishing for scallops by U.S. vessels off Alaska is managed by the State of Alaska under regulations implemented by the Alaska Department of Fish and Game (ADF&G) at 5 AAC 38.076. These regulations establish guideline harvest levels for different scallop registration areas, fishing seasons, open and closed fishing areas, observer coverage requirements, gear restrictions, and measures to control the processing efficiency of undersized scallops that include a ban on the use of mechanical shucking machines and a limitation on vessel crew size.

Section 306(a)(3) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*) (Magnuson Act) provides that a state may not directly or indirectly regulate a fishing vessel in Federal waters unless the vessel is registered under the law of that state. As a result, regulations implemented by the State of Alaska to manage the scallop fishery only apply in the EEZ off Alaska to vessels registered under the laws of the State. Until now, all vessels fishing in the EEZ have been registered with the State and have been subject to ADF&G fishing regulations at 5 AAC 38.076.

The ADF&G recently became aware of a vessel fishing for scallops in the EEZ that is not registered under the laws of the State. The vessel is fishing for scallops in waters closed to Alaska registered vessels by the ADF&G. The State does not have authority to stop this activity because the vessel is not registered with the State and does not fall under its jurisdiction.

Section 305(c) of the Magnuson Act authorizes NMFS to implement emergency regulations necessary to respond to fishery conservation and management problems that cannot be addressed within the time frame of the normal procedures provided by the Magnuson Act. These emergency regulations may remain in effect for not more than 90 days after publication in the **Federal Register**, with a possible 90-day extension.

The North Pacific Fishery Management Council (Council) convened an emergency teleconference meeting on February 17, 1995, to address the situation of unregistered vessels fishing for scallops in the EEZ outside the management jurisdiction of the State of Alaska. The Council requested NMFS to implement emergency rulemaking to close the EEZ to fishing for scallops to prevent further unregulated and uncontrolled fishing for scallops in Federal waters. Continued fishing for scallops by vessels not registered with the State poses significant conservation and management concerns that can be effectively addressed in a timely manner only through emergency closure of the EEZ. A brief discussion of the State's management program for scallops and the Council's concerns and justification for emergency rule action follow.

##### Alaska State's Scallop Management Program

The primary pectinid harvested off Alaska is the weathervane scallop (*Patinopecten caurinus*). Since the early 1980's, between 4 and 20 vessels annually have participated in the Alaska

scallop fishery. Gross earnings experienced by the fleet during this same period of time has ranged from almost \$.9 million in 1983 to over \$7 million in 1992.

The ADF&G initiated development of a management plan for the scallop fishery in response to overfishing concerns resulting from recent changes in the weathervane scallop fishery off Alaska. Weathervane scallops possess biological traits (e.g., longevity, low natural mortality rate, and variable recruitment) that render them vulnerable to overfishing. Record landings occurred in the late 1960's (about 1.8 million lbs (816.47 mt) shucked scallop meat), followed by a significant decline in catch through the 1970's and 1980's when landed catch ranged between 0.2 (90.72 mt) and 0.9 million lbs (408.23 mt). The ADF&G believes this decline was due, in part, to reduced abundance of scallop stocks. Landings since 1989 have increased to near record levels. Since 1989, the number of vessels fishing for scallops has not increased (about 10-15 vessels annually), although an increase in fishing power is evidenced by a substantial increase in average vessel length (from 84 ft (25.6 m) registered length in 1981 to 110 ft (33.5 m) in 1991) a predominance of full-time scallop vessels, and an increased number of deliveries. Until 1993, the State did not have a data collection program, although some indication exists that overfishing, or at least localized depletion, may have occurred. Data voluntarily submitted by participants in the scallop fishery during the early 1990's showed that an increase in meat counts per pound has occurred, indicating that smaller scallops now account for a greater proportion of the harvest. These data also suggest that catch-per-unit-of-effort in traditional fishing grounds has decreased.

Limited age data suggest that the scallop stock historically exploited off west Kodiak Island experienced an age-structure shift from predominately age 7 and older scallops in the late 1960's to an age structure predominated by scallops less than age 6 during the early 1970's. This shift indicated that harvest amounts had exceeded sustainable levels. Changes in fleet distribution from historical fishing grounds primarily in State waters to previously unfished grounds in the EEZ compounded management concerns.

In response to these concerns, the ADF&G implemented a management plan for the scallop fishery in 1993 that established a total of eight fishery registration areas corresponding to the

Southeastern, Yakutat, Prince William Sound, Cook Inlet, Kodiak, Alaska Peninsula, Dutch Harbor, and Bering Sea portions of the State. To prevent overfishing and maintain reproductive potential of scallop stocks, ADF&G established a guideline harvest range (GHR) for each of the traditional weathervane scallop fishing areas. In the absence of biomass estimates needed to implement an exploitation rate harvest strategy, the upper limit of the GHRs is specified as the long-term productivity (catch) from each of the traditional harvest areas. The ADF&G may adjust GHRs based on changes in stock status, such as shifts in population size/age structure coupled to changes in area-specific catch-per-unit-effort.

If a GHR for a registration area is not specified, ADF&G may authorize fishing for weathervane or other scallop species under special use permits that generally include location and duration of harvests, gear limitations and other harvest procedures, periodic reporting or logbook requirements, requirements for on board observers, and scallop catch or crab bycatch limits.

The ADF&G also has implemented king and Tanner crab bycatch limits to constrain the mortality of Tanner crab and king crab incidentally taken by scallop dredge gear. Generally, crab limits are set at 1 percent of total crab population for those management areas where crab stocks are healthy enough to support a commercial fishery. In areas closed to commercial fishing for crab, the crab bycatch limits for the scallop fishery are set at 0.5 percent of the total crab population.

Specified waters are closed to fishing for scallops to prevent scallop dredging in biologically critical habitat areas, such as locations of high bycatch of crab or nursery areas for young fish and shellfish. State regulations also require each vessel to carry an observer at all times to provide timely data for monitoring scallop catches relative to GHRs and for monitoring crab bycatch. Observers also collect scientific data on scallop catch rates, size distribution and age composition. This information is required by ADF&G for potential adjustment of GHRs based on changes in stock in stock status and productivity.

ADF&G regulations establish gear specifications to minimize the catch of undersized scallops and efficiency controls to reduce the economic feasibility of harvesting scallops much smaller than sizes associated with optimum yield. Current efficiency controls include a ban on automatic shucking machines and a crew limit of 12 persons.

The ADF&G has closed all registration areas to fishing for scallops because either the 1995 scallop GHR has been reached or the scallop fishing season has yet to open (Table 1). The fishing vessel currently fishing for scallops in the EEZ outside State jurisdiction is operating in the Yakutat and Prince William Sound registration areas, which the State closed because the GHR for these areas has been harvested. In 1994, vessels fished for scallops in the Bering Sea and Alaska Peninsula registration areas under special-use permits. These areas were closed in late summer due to crab bycatch. The 1994 scallop fisheries in other registration areas generally were closed based on the attainment of the GHR (Table 1).

TABLE 1.—ALASKA STATE SCALLOP REGISTRATION AREAS, UPPER LIMIT OF GHRs (LBS SHUCKED MEAT), 1995 TANNER (TAN) AND KING CRAB BYCATCH LIMITS (NUMBER OF CRAB), 1994 AND 1995 SCALLOP AND CRAB CATCH AMOUNTS (IN PARENTHESIS) AND SEASON OPENING AND CLOSURE DATES

Area	GHR (catch)	Crab limits <sup>1</sup> (catch)	1995 season open—closed dates
Yakutat .....	250,000 .....	No crab limit .....	1/10/95–2/14/95
1995 catch .....	<sup>2</sup> (245,000) .....		
1994 catch .....	(236,830) .....		
Prince William Sound .....	50,000 .....	Tan—630 .....	1/10/95–1/26/95
1995 catch .....	<sup>2</sup> (48,000) .....	<sup>2</sup> (69) .....	
No 1994 fishery			
Cook Inlet .....	20,000 .....	King—138 .....	8/15/95–
1994 catch .....	(20,431) .....	(42) .....	
		Tan—18,070 .....	
		(13,300) .....	
Kodiak .....	400,000 .....	King—283 .....	7/1/95–
1994 catch .....	(381,850) .....	(157) .....	
		Tan—199,500 .....	
		(69,274) .....	
Dutch Harbor .....	170,000 .....	King—45 .....	7/1/95–
1994 catch .....	(1,931) .....	(6) .....	
		Tan—50,500 .....	
		(792) .....	
Alaska Peninsula .....	Permit .....	King—85 .....	7/1/95–
1994 catch .....	(66,412) .....	(0) .....	
		Tan—52,530 .....	
		(26,379) .....	
Bering Sea .....	Permit .....	King—17,000 .....	7/1/95–
1994 catch .....	(505,439) .....	(55) .....	
		Tan—260,000 .....	
		(262,500) .....	

<sup>1</sup> Crab bycatch limits for Prince William Sound and Cook Inlet are further divided into State management districts.

<sup>2</sup> Scallop catch and crab bycatch amounts do not include unreported amounts taken by the catcher/processor vessel fishing in the management area outside of State jurisdiction.

Continued fishing for scallops by vessels outside the jurisdiction of the

State will result in overharvest of the State's GHR's and potential localized

overfishing of scallop stocks. The catcher/processor vessel currently

fishing in the Prince William Sound registration area may have the potential to harvest nearly 65,000 lbs (29.48 mt) of shucked scallop meat per week based on 1995 ADF&G observer data collected from a similar vessel. At this rate of harvest, the Prince William Sound GHR could be overharvested by a significant amount since the fishery was closed on January 26, 1995. Although specific information on the vessel's harvesting activity is not available, the U.S. Coast Guard boarded the vessel on February 21, 1995, and was informed that 54,000 lbs (24.49 mt) of scallop meat was on board. This level of retained catch alone exceeds the Prince William Sound GHR by over 100 percent. The Council is concerned that this or other vessels fishing outside the jurisdiction of the State will continue to severely overharvest other GHRs and result in localized overfishing of scallop stocks.

For the reasons stated above, NMFS concurs with the Council's determination that unregulated and uncontrolled fishing for scallops by vessels outside the jurisdiction of Alaska State regulations poses a serious conservation concern that must be addressed as quickly as possible by emergency rulemaking. Although weathervane scallop is the primary species of commercial interest, NMFS' concern about localized depletion and overfishing extends to all scallop species that may be harvested in the EEZ by unregulated vessels. NMFS further concurs in the Council's determination that immediate closure of the EEZ off Alaska to fishing for scallops is an appropriate action to address the scallop management void in the EEZ and concerns of localized overfishing of scallop stocks.

The Council is considering options for a Federal FMP for scallops. Given the time necessary for the preparation of an FMP and the statutory review and implementation schedule for FMPs set out under sections 303 and 304 of the Magnuson Act, the Council requested NMFS repromulgate the emergency closure of the EEZ for an additional 90 days as authorized under section 305(c)(3)(B) of the Magnuson Act. NMFS agrees that additional time may be necessary for the preparation and implementation of a Federal management program for scallops in Federal waters and will consider promulgating a second emergency rule under the Magnuson Act at the appropriate time.

There are many factors to be considered in determining whether to issue a second emergency rule in that such a rule could have an impact on

State-registered vessels that participate in this fishery under the laws of the State of Alaska. Vessels that participate in the Yakutat and Prince William Sound scallop fisheries will not be affected because ADF&G has closed these management areas for the remainder of the year, since the GHR has been harvested. The Cook Inlet fishery is conducted primarily in State waters and will be available to State-registered vessels when the fishery opens in mid-August (Table 1). Scallop fishermen wishing to participate in the westward area scallop fisheries (Kodiak, Dutch Harbor, Alaska Peninsula, and Bering Sea registrations area) when these fisheries open July 1 would be restricted to fishing in State waters under ADF&G management regulations if a second 90-day emergency rule is promulgated in the same form as this emergency rule. If a second emergency rule is issued, ADF&G would make a downward adjustment of the GHRs specified for the westward area to compensate for a scallop fishery constrained to State waters. Given that all the Bering Sea scallop harvest comes from Federal waters, as well as about 70 percent of the scallop harvest from other westward registration areas, and assuming an exvessel price of \$6.00 per lb, the potential foregone harvest and revenue could approach 820,574 lbs (372.21 mt) and nearly \$5 million. Based on 1994 data, about 12 vessels made landings of scallops harvested in a westward area fishery and could potentially be affected by a second emergency rule action.

Comments on this emergency rule will be accepted by NMFS through March 10, 1995. (See ADDRESSES.) NMFS also is soliciting comments on appropriate Federal management measures the Council should consider during its further development of an FMP for the Alaska scallop fishery.

#### Classification

The Assistant Administrator for Fisheries, NOAA (AA), has determined that this rule is necessary to respond to an emergency situation and that it is consistent with the Magnuson Act and other applicable laws.

This rule is exempt from the procedures of the Regulatory Flexibility Act, because it is not required to be issued with prior notice and opportunity for prior public comment.

This emergency interim rule has been determined to be not significant for purposes of E.O. 12866.

NMFS finds that the immediate need to prevent overfishing and localized depletion of scallops in the EEZ off

Alaska, as explained in the preamble to this rule, constitutes good cause to waive the requirement to provide prior notice and an opportunity for public comment pursuant to authority set forth at 5 U.S.C. 553(b)(B), such procedures would be contrary to the public interest. Similarly, the need to implement these measures in a timely manner to prevent localized overfishing of scallop stocks by vessels fishing outside the jurisdiction of Alaska State law constitutes good cause under authority contained in 5 U.S.C. 553(d)(3) to waive the requirement for a 30-day delay in effective date.

#### List of Subjects in 50 CFR Part 673

Fisheries.

Dated: February 23, 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.*

##### § 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.

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

##### § 673.3 Prohibitions.

In addition to the general prohibitions specified in § 620.7 of this chapter, it is unlawful for any person to take or retain any scallops in the EEZ seaward off Alaska.

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