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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 140529461-4795-02]

RIN 0648-BE26

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Atlantic Surfclam and Ocean Quahog Fishery

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

ACTION: Final rule.

SUMMARY: Based on a request from the U.S. Food and Drug Administration, NMFS is lifting the closure area referred to as the Northern Temporary Paralytic Shellfish Poisoning Closed Area for the harvest of bivalve molluscan shellfish. NMFS is taking this action because this area has not been subject to a toxic algal bloom for several years, and testing of bivalve shellfish has demonstrated toxin levels are well below those known to cause human illness. This action is expected to provide additional fishing opportunity for bivalves in the Gulf of Maine.

DATES: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] through December 31, 2014.

FOR FURTHER INFORMATION CONTACT: Jason Berthiaume, Fishery Management Specialist, phone: (978) 281-9177, or Jason.Berthiaume@noaa.gov.

SUPPLEMENTARY INFORMATION

Background

In 2005, at the request of the U.S. Food and Drug Administration (FDA), NMFS closed an area of Federal waters off the coasts of New Hampshire and Massachusetts to fishing for bivalve shellfish due to the presence in those waters of the toxins that cause paralytic shellfish poisoning (PSP) pursuant to section 305(c)(3) of the Magnuson-Stevens Fishery Conservation and Management Act. Shellfish contaminated with the toxin, if eaten in large enough quantity, can cause illness or death from PSP. NMFS modified the closure area several times from 2005-2008, and subsequently continued the closure through 2013. Beginning in 2014, NMFS also prohibited the harvest of gastropods (whelks/conchs) in the closed area.

Recently, NMFS, the FDA, the clam industry, and the Massachusetts Division of Marine Fisheries (MA DMF) investigated whether this closure is still warranted. On May 19, 2014, the FDA requested that NMFS reopen the area known as the Northern Temporary PSP Closed Area for bivalve harvesting. This request is based on the premise that the closed area has not been subject to a toxic algal bloom for several years, and that testing of bivalve shellfish has demonstrated toxin levels well below those known to cause human illness. In addition, the FDA has developed an agreement with the Commonwealth of Massachusetts to conduct PSP monitoring of bivalves from the area in accordance with currently accepted PSP testing procedures. MA DMF agreed to test the reopened waters to determine whether samples of bivalve shellfish harvested from the closed area exceed the threshold for public safety. The MA DMF will inform NMFS if samples from the closed area exceed the threshold for public safety, and we would work with the FDA to reinstate the closure, if necessary.

Approved Measures

This action reopens the area referred to as the Northern Temporary PSP Closed Area to bivalve harvesting in the Atlantic surfclam, ocean quahog, mussels, and other bivalve fisheries. The areas defined at 50 CFR 648.81(d) and (e), referred to as the Cashes Ledge and the Western Gulf of Maine Essential Fish Habitat Areas (EFH), respectively, overlap with the area that would be reopened. These overlapping EFH areas remain closed to hydraulic clam dredge gear. The area remains closed to the harvest of whole or roe-on scallops and gastropods. Whole and roe-on scallops and gastropods are believed to be more susceptible to PSP, and may accumulate and retain much higher levels of toxicity. In addition, sufficient data do not exist to demonstrate that it would be safe to lift the closure for gastropods or whole and roe-on scallops. NMFS, the FDA, and MA DMF are working with the fishing industry to collect samples to help determine whether the area could also be opened to whole or roe-on scallops and gastropods in the future.

Comments and Responses

NMFS published a proposed rule in the Federal Register on July 7, 2014 (79 FR 38274), and accepted public comments until July 22, 2014. We received 17 comments: 11 in support of lifting the closure; 5 opposed; and a comment from the New England Fishery Management Council requesting that we extend the comment period.

Comments Received in Support of Lifting the Closure: Comments received in support of lifting the closure were from the surfclam industry including vessel captains, crew members, and dealers. These comments were similar in nature, and explained that it would be beneficial for the industry to be able to access resources in the area. These

commenters requested that we open the area as soon as possible, suggesting that the closure should have been lifted a long time ago.

Response: Because there have been no recent occurrence of PSP causing toxins with the area, this action reopens the Northern Temporary PSP Closed Area for Atlantic surfclam, ocean quahog, mussel, and other bivalves. Sufficient testing protocols have been established to determine if samples of bivalve shellfish exceed the threshold for public safety.

Comments Received Opposing Lifting the Closure: We received comments in opposition to lifting the closure from surfclam dealers and business interests, primarily the Mid-Atlantic and offshore components of the fishery. These commenters did not support the reopening because they believe that the proposed testing procedure is less intensive than the testing that is currently required in the recently reopened offshore Georges Bank area. The commenters are concerned that the proposed protocol is not rigorous enough, and could potentially allow surfclams into the market that are not safe for human consumption, which would damage the surfclam market. They also raised equity concerns in that the costs of the George Banks testing are funded by the surfclam industry; the testing protocols proposed in this area would be funded and carried out by MA DMF.

Response: While the comments in opposition to lifting the closure appear to make some valid points, there is a rationale for the differences in the testing procedures for the offshore versus inshore areas. The protocol used on Georges Bank was evaluated extensively via a pilot study prior to being approved as a biotoxin management strategy for this specific purpose. The FDA states that there may be distinctions between the

toxin profiles in offshore waters versus inshore areas and that the offshore protocol would need to be evaluated for each specific purpose, including extending its application to different geographical regions and/or different species of molluscs. The offshore Georges Bank protocol has not yet been used in inshore areas and, as such, it is not known if the Georges Bank testing protocol would be adequate for testing in the inshore areas, including the Northern PSP Area. However, there are efforts underway that would evaluate the extension of the protocol. The testing procedure that we proposed in this rule reflects the testing that is commonly done in state waters, and is readily accepted and proven to work for inshore waters. In considering these comments, the FDA and MA DMF remain confident that the testing procedure we proposed is adequate to ensure public safety while allowing bivalves to be harvested from the Northern Temporary PSP Closed Area.

In addition, the fishery that would be carried out in the inshore Northern Temporary PSP Closed Area would be done at a much smaller scale than the offshore Georges Bank area. As such, it would likely not be feasible at this time to use the Georges Bank protocol in the Northern PSP Area. The offshore protocol includes onboard testing done by trained crew members, product segregation, acquiring additional permits, and dockside laboratory testing to be paid for by the industry. Given the smaller scale fishery that would likely occur in the Northern PSP Area, MA DMF is capable of funding and conducting testing of the inshore areas as we proposed based on the expected effort in that area. However, MA DMF would be not capable of doing the testing for the offshore Georges Bank area given the large scale of that type of operation.

Comment Requesting an Extension on the Comment Period: The New England Fishery Management Council submitted a comment requesting that we extend the comment period until after its September 30-October 2, 2014, meeting. The Council expressed concern about potential impacts on species that might be vital to the recovery of important groundfish stocks such as Gulf of Maine cod. The Council is concerned that there may be gear impacts specific to this area that have not been evaluated with respect to the harvest of a variety of bivalve species.

Response: We do not think it is necessary to extend the comment period. The Council's rationale for extending is largely due to habitat concerns. However, the area reopened as part of this action is already open to mobile bottom-tending gear such as scallop dredge gear. Because we do not anticipate a lot of clam fishing in the area, we do not expect significant additional habitat impacts. In addition, the PSP area does not overlap with any currently pending habitat management areas under consideration in the Council's Omnibus Habitat Amendment. The regulations prohibiting mobile bottom-tending gear fishing in the current Western Gulf of Maine Closure Area would continue to apply to clam dredges. It is also impractical to delay this action due to the timelines associated with the rulemaking process. Extending the comment period as suggested could result in the closure not being lifted until close to the end of the year, and just before the closure is set to expire anyway. This would unnecessarily reduce the potential economic benefit of reopening the area, and would not likely result in additional information that would affect efforts to protect bottom habitat under other Council initiatives.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the Assistant Administrator for Fisheries, NOAA, has determined that this final rule is consistent with the Atlantic Surfclam and Ocean Quahog Fishery Management Plan, other provisions of the Magnuson-Stevens Act, and other applicable law.

Pursuant to the APA, 5 U.S.C. 553(d)(1), NMFS has determined that good cause exists to waive the 30-day delay in effectiveness of this rule because delaying the effectiveness of this rule is contrary to the public interest. This final rule will reopen an area that has been closed to the harvest of surfclams and ocean quahogs since 2005 due to red tide blooms that cause PSP. Recent testing in the Northern Temporary PSP Closed Area has demonstrated that PSP toxin levels were below the regulatory limit established for public health safety. Therefore, continued closure of the area may not be necessary and could unnecessarily restrict Atlantic surfclam and ocean quahog fishing. This closure spans a large portion of the inshore coast of New England, which has prevented this fishery from occurring within the area. As a result, harvesting has been limited to the Mid-Atlantic, where Atlantic surfclam and ocean quahog stocks have recently become less abundant. A 30-day delay in effectiveness would continue to prohibit harvest from this area, and would continue to put pressure on Mid-Atlantic stocks. Waiving the 30-day delay would allow the area to be reopened sooner, which could relieve fishing pressure on southern stocks, and would allow for greater distribution of Atlantic surfclam and ocean quahog harvest effort in the region. Thus, a delay in effectiveness could result in continued loss of revenue for the Atlantic surfclam and ocean quahog fishing fleet. In addition, waiving the 30-day delay in effectiveness will not have a negative impact on any entities, as there are no new compliance requirements or other burdens placed on the

fishing community with this rule.. Therefore, because this action relieves the industry of regulations, NMFS has determined that good cause exists to waive the 30-day delay in effectiveness of this rule.

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

This final rule does not contain policies with federalism or "takings" implications, as those terms are defined in E.O. 13132 and E.O. 12630, respectively.

This action does not contain any new recordkeeping or reporting requirements, and does not impose any additional costs to affected vessels.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this final rule will not have a significant economic impact on a substantial number of small entities. The factual basis for this certification was provided in the proposed rule for this action (July 7, 2014; 79 FR 38274) and is not repeated here. No comments were received regarding the certification and NMFS has not received any new information that would affect its determination. As a result, a final regulatory flexibility analysis is not required and none has been prepared.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: September 25, 2014.

Samuel D. Rauch III,
Deputy Assistant Administrator for Regulatory Programs,
National Marine Fisheries Service.

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

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

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

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

2. In § 648.14, effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] through December 31, 2014, paragraph (a)(10)(iii) is suspended and paragraph (a)(10)(vi) is added to read as follows:

§ 648.14 Prohibitions.

(a) * * *

(10) * * *

(vi) Fish for, harvest, catch, possess or attempt to fish for, harvest, catch, or possess any sea scallops, except for sea scallops harvested only for adductor muscles and shucked at sea, and any gastropod species, including whelks, conchs, and carnivorous snails, unless issued and possessing on board a Letter of Authorization (LOA) from the Regional Administrator authorizing the collection of shellfish and/or gastropods for biological sampling and operating under the terms and conditions of said LOA, in the area of the U.S. Exclusive Economic Zone bound by the following coordinates in the order stated:

(A) 43°00' N. lat., 71°00' W. long.;

(B) 43°00' N. lat., 69°00' W. long.;

(C) 41°39' N. lat., 69°00' W. long.;

(D) 41°39' N. lat., 71°00' W. long.; and then ending at the first point.

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