

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 110502274-1275-01]

RIN 0648-BB05

Fisheries of the Northeastern United States; Atlantic Sea Scallop Fishery; Closure of the Nantucket Lightship Access Area

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

ACTION: Temporary rule; emergency action.

SUMMARY: NMFS issues this temporary rule pursuant to its authority to implement emergency measures under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). This emergency rule closes the Nantucket Lightship Access Area (NLS) prior to its scheduled opening on June 15, 2011, and is consistent with Framework Adjustment 22 to the Atlantic Sea Scallop Fishery Management Plan (FMP) (Framework 22), which is currently being proposed and subject to public comments, and which would close the NLS in FY 2011 as well. This closure prevents potentially high levels of scallop and yellowtail flounder (yellowtail) catch that could result from opening the area prior to the approval and implementation of Framework 22, which could be detrimental to the long-term management and health of the scallop fishery.

DATES: Effective [insert date of publication in the FEDERAL REGISTER], through November 28, 2011. Comments must be received by [insert date 30 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: The Environmental Assessment (EA) is available by request from: Patricia Kurkul, Regional Administrator, National Marine Fisheries Service, Northeast Region, 55 Great Republic Drive, Gloucester, MA 01930-2276, or via the Internet at <http://www.nero.noaa.gov>.

You may submit comments, identified by RIN 0648-BB05, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal e-Rulemaking portal <http://www.regulations.gov>;
- Fax: (978) 281-9135, Attn: Emily Gilbert;
- Mail to NMFS, Northeast Regional Office, 55 Great Republic Dr, Gloucester, MA 01930. Mark the outside of the envelope “Comments on Emergency Rule to Close the Nantucket Lightship Access Area.”
- Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Emily Gilbert, Fishery Policy Analyst, 978-281-9244; fax 978-281-9135.

SUPPLEMENTARY INFORMATION:

Background

The New England Fishery Management Council (Council) adopted Amendment 15 to the Scallop FMP (Amendment 15) and Framework 22 at its September and November 2010 meetings, respectively. Amendment 15 proposes the process for setting annual catch limits (ACLs) and accountability measures (AMs) for the scallop fishery, and sub-ACLs and AMs for the Georges Bank and Southern New England/Mid-Atlantic (SNE/MA) yellowtail stocks. Framework 22 proposes scallop management measures for fishing years (FY) 2011 through 2013 based on the ACL/AM process in Amendment 15, and is thus contingent upon approval and implementation of Amendment 15. Framework 22 would make adjustments to the current scallop access area rotational schedule outlined in the regulations, including the closure of the NLS, which is scheduled to open on June 15, 2011, and allocating trips into three other access areas that were closed in FY 2010 (i.e., Closed Area I, Closed Area II, and Hudson Canyon Access Areas). NMFS published the proposed rules for Amendment 15 and Framework 22 in the Federal Register on April 11 and April 29, 2011, respectively (76 FR 19929 and 76 FR 23940), with the comment period ending on May 26, 2011, for Amendment 15, and May 31, 2011, for Framework 22. Amendment 15 and Framework 22, if approved, are expected to be implemented as soon as possible, but likely after June 15, 2011.

FY 2011 began on March 1, 2011, and FY 2010 scallop fishery regulations remain in effect until superseded by Amendment 15 and Framework 22, if approved. These two actions

were originally intended to be in place on or around March 1, 2011, or at least before the June 15 date when the NLS area was scheduled to be opened. Due to circumstances more fully described below, these actions were delayed and it is not possible to implement before June 15, meaning the NLS area will open, if this emergency action is not taken. If the NLS opens, scallop vessels, which still have trips allocated into NLS under the current regulations, will be able to fish their NLS trips beginning June 15, 2011. Limited access vessels could take up to one trip; limited access general category (LAGC) vessels could take up to 714 trips fleetwide. If all limited access vessels fished their full NLS trip, the fleet could land up to 6 M lb (2,727 mt) of scallops from the area. In addition, potential LAGC effort could increase the total scallop landings from NLS. This amount of landings would jeopardize the fishery's ability to remain below the ACL proposed for the scallop fishery and for yellowtail, in turn potentially triggering the AMs, to the detriment of the scallop fishery as a whole. Moreover, harvest of scallops from NLS in FY 2011 could undermine the rotational area management program for FY 2012 and beyond, thereby jeopardizing the cornerstone of scallop fishery management. While NMFS and the Council anticipated the implementation of Amendment 15 and Framework 22 after June 15, 2011, neither NMFS nor the Council anticipated the level of catch expected during the short period that the NLS would be open if this rule is not implemented.

Because of complications in developing Amendment 15 and Framework 22, the Council was not able to submit these actions to NMFS in time for them to be promulgated by June 15, 2011. Initially, the Council intended to take final action on Amendment 15 in June 2010. Due to delays in fully vetting the alternatives, the Council did not take final action on Amendment 15 until its September 2010 meeting. The Council took final action on Framework 22 at its

November 2010 meeting. Because of various issues with the development of the environmental impact statement (EIS) for Amendment 15, as well as the environmental assessment (EA) for Framework 22, final submission of the EIS and EA for these actions did not occur until January 11, 2011, and March 22, 2011, respectively.

Because a delay was anticipated, the Council included an individual payback measure in Framework 22, which was designed to discourage fishing in NLS, should that area open prior to the implementation of Framework 22. Specifically, if a vessel lands scallops from NLS in FY 2011, it would have those pounds deducted from an allocated access area trip in FY 2012 to account for the overage. Similar payback measures, also designed to be disincentives, were included in Framework 22 for other access areas and open area days-at-sea (DAS). However, Framework 22 did not fully anticipate or account for the impacts of a delayed implementation of Framework 22 if the majority of the fleet fished this additional effort in FY 2011. Based on similar payback measures enacted in previous FYs, NMFS expected that the majority of vessels would not be willing to suffer the penalty of having scallops caught in FY 2011 deducted from their FY 2012 allocation. However, in the days leading up to the Council meeting on April 28, 2011, the scallop industry reported that many industry members might fish an NLS trip in FY 2011 and accept the consequences in FY 2012 because they view the benefits of high scallop prices this year as outweighing the negative consequences of having a reduced allocation in FY 2012. Based on this rationale, the scallop industry has commented to NMFS and the Council that, if some vessels fish in NLS, it is likely that the majority of other scallop-permitted vessels will follow suit so that they remain competitive with scallop landings of other vessels. As a

result, similar to FY 2010, a very high level of unanticipated scallop fishing effort could occur in NLS within the first 2 or 3 weeks it is open, in the absence of this emergency action.

On April 28, 2011, at the request of the Fisheries Survival Fund, an organization that represents a large portion of the scallop industry, and that is an active participant in the development of scallop fishery management measures, the Council passed a motion requesting that NMFS take emergency action to close NLS in FY 2011 to prevent vessels from landing scallops and catching yellowtail in the area. NMFS has reviewed this request and determined that there is good cause to implement this emergency rule to keep the NLS closed after June 15, 2011, as intended by Framework 22.

NMFS' policy guidelines for the use of emergency rules (62 FR 44421; August 21, 1997) specify the following three criteria that define what an emergency situation is, and justification for final rulemaking: (1) The emergency results from recent, unforeseen events or recently discovered circumstances; (2) the emergency presents serious conservation or management problems in the fishery; and (3) the emergency can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants to the same extent as would be expected under the normal rulemaking process. NMFS' policy guidelines further provide that emergency action is justified for certain situations where emergency action would prevent significant direct economic loss, or to preserve a significant economic opportunity that otherwise might be foregone. NMFS has determined that the issue of closing the NLS meets the three criteria for emergency action for the reasons outlined below.

The emergency results from recent, unforeseen events or recently discovered circumstance. Although the delay in Framework 22's implementation was expected, as explained above, and measures were included at the vessel level to account for the delay, there are potential impacts of NLS opening on June 15 that were not anticipated or accounted for during the Council's development of Framework 22 that NMFS considers to be "recently discovered circumstances." Because Framework 22 proposes payback measures as individual disincentives, it was not anticipated that many vessels would still take their NLS trips if that area opened. However, because of unexpectedly high scallop prices, the disincentive value of payback measures have been undermined, and the scallop industry believes that the majority of the fleet may be willing to risk the payback measures in order to capitalize on these high prices and stay competitive in the scallop market. The impact of most vessels fishing in the NLS area would result in unanticipated high level of scallop landings from NLS in FY 2011 which likely would have long-term negative impacts on the scallop fleet and management of the scallop fishery, for reasons described in greater detail below.

The emergency also presents serious conservation and management problems in the fishery. If the limited access scallop fleet exceeded the fleet's proposed sub-ACL as a result of large fishing effort in NLS, the entire fleet, including those that may not choose to fish their NLS trip, could be subject to a DAS deduction in FY 2012. Based on Amendment 15 ACL specifications, Framework 22 set a buffer of about 7.8 M lb (3,538 mt) between the limited access fleet's sub-ACL and allocated catch (as an annual catch target (ACT)), primarily to account for varying open area catch levels and carryover DAS. However, the buffer does not take into account the effects of delayed implementation of specification frameworks. If access

into NLS in FY 2011 results in nearly 6 M lb (2,727 mt) of additional landings, there is a strong possibility that the fishery-wide ACL would be exceeded in the first year of managing the fishery under ACL measures. The ACL measures are intended to promote the conservation of the scallop resource, and exceeding them could undermine those efforts, and would be contrary to the Magnuson-Stevens Act.

Additionally, the scallop fishery's yellowtail sub-ACL in FY 2011, already allocated through Framework 45 to the Northeast Multispecies FMP, does not include trips into NLS, an area with relatively high yellowtail catch rates. The scallop fishery's sub-ACL of yellowtail was based, in part, on projections of what amount of yellowtail scallop vessels would catch in order to harvest the scallop allocations in the areas proposed in Framework 22. Unanticipated high fishing effort in the NLS would likely increase the amount of yellowtail catch in the scallop fishery beyond what is allocated to the scallop fishery, and what was anticipated in the event that Framework 22 was not implemented before June 15, resulting in a seasonal closure of a portion of SNE/MA waters to scallop vessels in FY 2012. The length of the closure depends on the extent of the overage of the yellowtail sub-ACL.

Finally, the potential impacts on the long-term scallop biomass within, and yield from, NLS if fishing effort occurs during FY 2011 was not anticipated in the development of Framework 22. Based on the status of the resource that was analyzed in developing Framework 22, the current scallop biomass within NLS would benefit from a closure in FY 2011, and from limited fishing effort in FY 2012, and result in higher scallop yield in future fishing years. The 2007 scallop year class, which is now large enough to be vulnerable to commercial fishing gear, is the only substantial recent year class in NLS. The closure of NLS in FY 2011 under

Framework 22 was, in part, to protect this year class from harvesting and/or discarding until it grows to a larger size. With the NLS closed in FY 2011, Framework 22 projected sufficient biomass in NLS to provide access into the area in FY 2012 for half of the full-time scallop vessels, and one trip each for all full-time scallop vessels in FY 2013. These projections did not account for significantly high levels of fishing effort in FY 2011 in NLS, and this unanticipated effort could compromise future scallop resource levels and access to this area, resulting in reduced overall yield. Rotational area management is a cornerstone of the Scallop FMP, and jeopardizing its success in future years in turn jeopardizes the overall and long-term success of the management program.

These potentially serious conservation and management consequences of high fishing effort in the NLS in FY 2011 justify the emergency closure of this area.

NMFS also finds that this emergency can be addressed through emergency regulations for which the immediate benefits to both the scallop resource and those who depend on it outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants to the same extent as would be expected under the normal rulemaking process. Because of the delayed development and submission of Amendment 15 and Framework 22, addressing the NLS closure issue in a timely fashion through Council action is not now possible. Secretarial emergency authority, which does not include the delay of further public comment, is the only means available to avoid the negative consequences to the scallop and yellowtail resources described above. Closing the NLS prior to June 15, 2011, is critical, given the potential for a very high level of scallop fishing effort in NLS that would otherwise occur during the first 2 to 3 weeks it is open. Although this emergency action would be implemented

without specific prior public comment, this specific measure was part of Framework 22, and was subject to extensive public comment during the development of that rule. That public comment opportunity may mitigate the impact of waiving prior public notice for this specific emergency rule. Moreover, this measure is subject to public comment in connection with the proposed rule to approve and implement this framework.

Although taking no action would result in higher vessel short-term revenues in FY 2011, the benefits would be short-lived if Framework 22 is approved, because a vessel that fished its NLS trip would have those landings deducted pound-for-pound from an access area trip in FY 2012. At the fleet level, the high risk that scallop and yellowtail ACLs would be exceeded and that future scallop yield would be negatively impacted for vessels in FY 2012 and beyond indicate that the future costs for the entire fleet, not just vessels that choose to fish in NLS, would likely outweigh the benefits of the short-term revenue gain in FY 2011. Additionally, fishing a resource in an area that could not support that level of harvest in FY 2011 has negative impacts on both the resource and those who depend upon it. This level of fishing in NLS jeopardizes the long-term success of the rotational management program and negatively impacts the scallop resource for future years.

Classification

The Assistant Administrator for Fisheries, NOAA, has determined that this rule is necessary to respond to an emergency situation and is consistent with the national standards and other provisions of the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws. The rule may be extended for a period of not more than 186 days as described under section 305(c)(3)(B) of the Magnuson-Stevens Fishery Conservation Management Act.

The Assistant Administrator for Fisheries, NOAA, finds under section 553(b)(B) of the Administrative Procedure Act (APA) that it would be contrary to the public interest and impracticable to provide prior notice and opportunity for the public to comment on this rule, and therefore good cause exists to waive those requirements. As more fully explained above, the reasons justifying promulgation of this rule on an emergency basis make solicitation of public comment contrary to the public interest.

This action provides benefits to both the scallop resource and the scallop fishery by not jeopardizing the success of the access area program in future years, not compromising future scallop biomass levels and subsequent scallop yield for short-term gain, and ensuring that the scallop fleet, including those that did not fish in NLS, would not be inequitably subjected to possible FY 2012 AMs. Although the measure being implemented by this action is receiving public comment in connection with Framework 22, the immediate need for this particular measure does not allow for prior public comment. Due to the inherent time constraints associated with the process and the fact that the information on which this action is based (i.e., the much higher interest in fishing in NLS than initially anticipated and the fleetwide impacts that would result) became available very recently, the review process and determination could not have been completed any earlier. Indeed, this emergency action is necessary due to the inadequate time to receive prior public comment on Framework 22, which proposed this measure in the first place.

If this rulemaking were delayed to allow for notice and comment, vessels would be able to fish in NLS beginning June 15, 2011. If this were to occur, it is likely that limited access vessels would harvest most, if not all, of their scallop allocations in NLS within the first 2 to 3

weeks of its opening. The time necessary to provide for prior notice, opportunity for public comment, and delayed effectiveness for this action could result in the scallop fishery incurring long-term negative impacts on scallop yield. A delay could also potentially trigger DAS deductions and seasonal closures in future FYs, and the scallop resource being harvested more quickly than anticipated, thus potentially resulting in future biomass concerns within an important scallop management access area (i.e., the same impacts that this action itself is striving to avoid).

A delay would also be impracticable. The Magnuson-Stevens Act tasks NMFS with conserving fishing resources, and allowing the potential over-harvest of scallops by not enacting this rule would impede NMFS' ability to comply with those provisions of the Act. For these reasons, NMFS finds good cause under section 553(d) of the APA to waive the 30-day delay in effectiveness of this emergency rule. In the interest of receiving public input on this action, the EA analyzing this action will be made available to the public and this temporary final rule solicits public comment.

The Office of Management and Budget has determined that this rule is not significant according to Executive Order 12866.

This rule is exempt from the procedures of the Regulatory Flexibility Act to prepare a regulatory flexibility analysis because the rule is issued without opportunity for prior public comment. Nevertheless, Framework 22, which proposes the same measure, if approved, will assess impacts as required by the RFA.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: May 25, 2011

John Oliver,
Deputy Assistant Administrator
For Operations,
National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is amended 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 § 648.58, paragraph (e) is added to read as follows:

§ 648.58 Rotational Closed Areas.

* * * * *

(e) Nantucket Lightship Closed Area. No vessel may fish for scallops in, or possess or land scallops from, the area known as the Nantucket Lightship Closed Area. No vessel may possess scallops in the Nantucket Lightship Closed Area, unless such vessel is only transiting the area as provided in paragraph (c) of this section. The Nantucket Lightship Closed Area is defined by straight lines connecting the following points in the order stated (copies of a chart depicting this area are available from the Regional Administrator upon request):

Point	Latitude	Longitude
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NLSA1	40°50' N.	69°00' W.
NLSA2	40°30' N.	69°00' W.
NLSA3	40°30' N.	69°14.5' W.
NLSA4	40°50' N.	69°29.5' W.
NLAA1	40°50' N.	69°00' W.

§ 648.59 [Amended]

3. In § 648.59, paragraph (d) is suspended.

[FR Doc. 2011-13526 Filed 05/26/2011 at 4:15 pm; Publication Date: 06/01/2011]