**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**15 CFR Part 902 and 50 CFR Part 648**

**[Docket No. 040210050–4166–03; I.D. 011204A]**

**RIN 0648–AN16**

## Fisheries of the Northeastern United States; Atlantic Sea Scallop Fishery; Amendment 10

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

**ACTION:** Final rule.

**SUMMARY:** NMFS is implementing approved measures contained in Amendment 10 to the Atlantic Sea Scallop Fishery Management Plan (FMP), developed by the New England Fishery Management Council (Council). Amendment 10 includes a long-term, comprehensive program to manage the sea scallop fishery through an area rotation management program to maximize scallop yield. Areas will be defined and will be closed and re-opened to fishing on a rotational basis, depending on the condition and size of the scallop resource in the areas. This rule includes measures to minimize the adverse effects of fishing on Essential Fish Habitat (EFH) to the extent practicable. Amendment 10 also includes updated days-at-sea (DAS) allocations, measures to minimize bycatch to the extent practicable, and other measures to make the management program more effective, efficient, and flexible. In addition, NMFS publishes the Office of Management and Budget (OMB) control numbers for collection-of-information requirements contained in this final rule.

**DATES:** Effective July 23, 2004 except for §§ 648.53(b)(2), which is effective June 23, 2004, and § 648.51(b)(3)(ii), which is effective December 23, 2004.

**ADDRESSES:** Copies of Amendment 10, its Regulatory Impact Review (RIR), including the Initial Regulatory Flexibility Analysis (IRFA), and the Final Supplemental Environmental Impact Statement (FSEIS) are available on request from Paul J. Howard, Executive Director, New England Fishery Management Council, The Tannery Mill #2, 50 Water Street, Newburyport, MA 01950. These documents are also available online at *http://www.nefmc.org.* NMFS prepared a Final Regulatory Flexibility Analysis (FRFA), which is contained in the Classification section of the preamble of this rule. Copies of the FRFA, Record of Decision (ROD), and the Small Entity Compliance Guide are available from the Regional Administrator, Northeast Regional Office, NMFS, One Blackburn Drive, Gloucester, MA 01930–2298, and are also available via the internet at *http://www.nero.nmfs.gov.*

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to Patricia A. Kurkul at the above address and to David Rostker at OMB by e-mail to *David_Rostker@omb.eop.gov*, or by fax to (202) 395–7285.

**FOR FURTHER INFORMATION CONTACT:** Peter W. Christopher, Fishery Policy Analyst, 978–281–9288; fax 978–281–9135.

**SUPPLEMENTARY INFORMATION:**

### Background

This final rule implements the approved measures of Amendment 10, which was partially approved by NMFS on behalf of the Secretary of Commerce (Secretary) on April 14, 2004. A proposed rule for this action was published on February 26, 2004 (69 FR 8915), with public comments accepted through March 29, 2004. The details of the development of Amendment 10 were contained in the preamble of the proposed rule and are not repeated here. In the proposed rule, NMFS requested comment on all proposed measures, but specifically highlighted five issues for which NMFS had concern. The five highlighted issues were: Scallop fishing access in the groundfish closed areas; cooperative industry surveys; the increase in the minimum ring size for scallop dredges; implementation of an observer set-aside program; and the title of the proposed Mid-Atlantic (MA) closed area. A discussion of these issues, including NMFS consideration of public comments on the issues, follows.

*1. Scallop Fishing Access in Groundfish Closed Areas*

NMFS expressed concern in the proposed rule with respect to Amendment 10's inclusion of the groundfish closed areas as part of the area rotation scheme. Although Amendment 10 contemplates access to the three groundfish closed areas, it is not possible to enact the access program for those areas through this action. Complementary action must be taken under the Northeast Multispecies FMP (Multispecies FMP) to authorize access because these areas were closed by the Multispecies FMP to protect groundfish. Amendment 10 is implemented with initial DAS established at a level that is consistent with an area rotation program that includes scallop fishing access to the groundfish closed areas. The initial DAS under Amendment 10 are 42, 17, and 4 for full-time, part-time, and occasional vessels, respectively. The proposed rule included a provision that would increase DAS on August 15, 2004, to 62, 25, and 5 for full-time, part-time, and occasional vessels, respectively, if a final rule to allow access to the groundfish closed areas is not published by August 15, 2004. The Council has adopted and submitted Framework 16 to the Scallop FMP and Framework 39 to the NE Multispecies FMP (Joint Frameworks 16/39) to allow such access, but NMFS remains concerned that it may not be possible to implement the measures proposed in Joint Frameworks 16/39, if approved, by the August 15, 2004, date. If approved, a delay in implementing Joint Frameworks 16/39 beyond the default date would complicate implementation of the groundfish closed area access program proposed by the Council in Joint Frameworks 16/39. To help alleviate timing concerns, this final rule changes the default date for increasing DAS to September 15, 2004, at the request of the Council and other commenters. Since the default date is an administrative matter, NMFS has determined that it is consistent with Amendment 10 to make the change. Amendment 10 implements lower DAS initially to allow the DAS to be increased if necessary. Extending the default date by one month will not cause any detriment to conservation of the scallop resource or to the goals and objectives of the FMP, consistent with Amendment 10. However, it would still be a complication if Joint Frameworks 16/39 are approved and a final rule is not published by September 15, 2004.

*2. Cooperative Industry Surveys*

NMFS raised concern regarding the cooperative industry resource survey provision and has disapproved the measure in Amendment 10. The basis for the disapproval is provided in the Disapproved Measures section of the preamble of this final rule.

*3. Minimum Ring Size Increase*

This final rule increases the minimum ring size for scallop dredges from 3.5 inches (8.9 cm) to 4 inches (10.2 cm). NMFS specifically sought comment on whether it would be feasible to implement the gear conversion requirement upon initial implementation of Amendment 10.

With the exception of a comment from the Council agreeing with the proposed 30-day delay in effectiveness for the 4-inch (10.2-cm) ring size increase in the Hudson Canyon Area, and a 6-month delay elsewhere, NMFS received no written comments on this issue. Other comments on the ring size increase pertained to other issues, which are addressed in the ''Response to Comments'' and ''FRFA'' sections of the preamble of this final rule. Therefore, this final rule implements the 4-inch (10.2-cm) ring requirement for the Hudson Canyon Access Area 30 days after publication of this final rule in the **Federal Register**, and 6 months after publication of this final rule in the **Federal Register** for all other areas.

*4. DAS Set-Aside for Observer Coverage*

NMFS expressed concern in the proposed rule about effective implementation of the DAS set-aside for observer coverage to help defray the cost of observers on open area trips. Implementation of this measure will be complicated because it requires allocation of additional fishing time that is based on several variables, including random selection of vessels to carry an observer, actual trip length, DAS and observer cost equivalents (*i.e.*, how many days of fishing is equal to the cost of carrying an observer for 1 day, or for a trip), catch rates, and scallop value. This issue was the subject of significant comment from the public. After consideration of public comments on the issue, NMFS determined that, for each Open Area trip on which an observer is carried, the vessel's DAS will accrue at a reduced rate. Based on the analysis in Amendment 10, this reduced rate will initially be an adjustment factor of 0.86 DAS for every DAS fished with an observer on board. For example, if a vessel fishes for 10 actual DAS with an observer on board in an Open Area, the DAS charged for that trip will be 8.6 DAS. The result is the same as if a vessel were allocated additional DAS at a rate of 0.14 DAS per actual DAS fished with an observer on board, as described in the proposed rule. The change is being made because commenters felt it was more useful to them than an after-the-fact adjustment.

Since the publication of the proposed rule, NMFS has determined that the cost of observers for scallop vessels will be $719.12 per day for the 2004 fishing year. Although this amount may change annually, the 0.86 DAS adjustment factor should provide sufficient additional fishing opportunity to help compensate for that cost. If costs change, the Administrator, Northeast Region, NMFS (Regional Administrator), will re-evaluate the compensating amount of DAS and possession limit that would be appropriate to offset the cost of observers. The proposed rule included regulatory text that would have codified the proposed 0.14 DAS multiplier. The regulatory text in this final rule does not specify the adjustment factor in order to preserve the Regional Administrator's flexibility to adjust the compensation when necessary to reflect changes in observer cost and projected catch rates. Likewise, the amount of the additional possession limit allowed for vessels carrying observers in Scallop Access Areas is not specified in the regulatory text of this final rule to preserve the Regional Administrator's flexibility.

*5. MA Closed Area*

NMFS sought public comment on how to clarify the designation of the area proposed in Amendment 10 to avoid confusion with another area reportedly known as the ''Elephant Trunk'' on Georges Bank. The Council recommended keeping the designation as the ''Elephant Trunk'' closed area, and no other comments were received on this issue. This final rule therefore maintains the designation of the area as the ''Elephant Trunk'' closed area.

**Disapproved Measures**

After reviewing Amendment 10, its supporting analysis and public comments received on the amendment and its proposed rule, NMFS, on behalf of the Secretary, has disapproved two measures in Amendment 10, as submitted, based on NMFS's determination that the measures are inconsistent with one or more of the National Standards or required provisions of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The disapproved measures are: The measure restricting limited access scallop vessels to a possession limit of 40 lb (18.14 kg) of shucked, or 5 U.S. bushel (176.2 L) of in-shell scallops, while fishing outside of scallop DAS; and the provision that required a cooperative industry resource survey to be conducted.

The measure that would have restricted limited access scallop vessels fishing outside of scallop DAS to a possession limit of up to 40 lb (18.14 kg) (*i.e.*, the incidental amount of scallops) of shucked scallops, or 5 U.S. bushels (176.2 L) of in-shell scallops, was disapproved because it is inconsistent with National Standard 2 and section 303(a)(1) of the Magnuson-Stevens Act. The possession restriction for limited access scallop vessels fishing outside of DAS has no clearly documented conservation purpose and is not supported by the best available scientific information, as required by National Standard 2 of the Magnuson-Stevens Act. Also, the measure is not necessary and appropriate for the conservation of the fishery, as required under section 303(a)(1) of the Magnuson-Stevens Act.

The data and analyses in Amendment 10 demonstrate that, while landings of scallops by vessels fishing outside of scallop DAS (limited access and General Category vessels) have increased dramatically from approximately 400,000 lb (181.4 mt) to over 1 million lb (453.6 mt) over the past 3 years, landings from the limited access vessels fishing outside of scallop DAS were relatively steady at about 210,000 lb (95.2 mt) in 2000 and 2001, and appear to have decreased in 2002. The proposed measure to restrict limited access scallop vessels was determined to be insufficient to address the growth in landings made outside of DAS by both limited access and General Category vessels. Although measures to control effort outside of DAS may be warranted, such action would require more comprehensive development to ensure that the measures are necessary and appropriate to achieve meaningful conservation benefits.

The measure that required a cooperative resource survey to be conducted annually was disapproved because it was not sufficiently developed to be implemented effectively and to provide useful information to manage the fishery. Therefore, it is inconsistent with section 303(a)(1)(A) of the Magnuson-Stevens Act, which requires measures that are necessary and appropriate for the conservation and management of the fishery. There is no assurance, even through the total allowable catch (TAC) and DAS set-aside program, that the results of the proposed survey would be ready for use when needed, if, for instance, no vessels came forward to participate in the survey. The disapproval of this proposed provision as a mandatory requirement of the FMP does not preclude the use of cooperative survey information, should such surveys be carried out. The survey remains the top priority in the research set-aside request for proposals (RFP) for the scallop fishery, and a resource survey program approved for set-aside funding could be used to modify the rotation program, as intended by the Council.

**Approved Measures**

NMFS approved the remainder of the measures included in Amendment 10, although not all approved measures require regulatory text in this final rule. In order to provide the public with the clearest information possible on the numerous changes to the scallop regulations that result from the implementation of Amendment 10, NMFS is publishing in this final rule the entirety of the regulations in 50 CFR part 648, subpart D, that pertain to the scallop fishery (both the existing and new regulations). A general summary of the approved measures and their implementing regulations follow.

This final rule also includes some non-substantive revisions to the existing text in subpart D that were not part of Amendment 10; these revisions remove obsolete language and improve the organization and clarity of the regulations.

*1. Overfishing Definition*

Amendment 10 maintains the existing overfishing definition in the FMP, but increases the minimum biomass threshold from ¼$B_{MAX}$ to ½$B_{MAX}$, to be consistent with the National Standard Guidelines. Full descriptions of the overfishing definition and biological reference points used in the FMP can be found in the FSEIS for Amendment 10. Annual determinations of the status of the resource will be based on the resource conditions and fishery performance relative to biomass and fishing mortality reference points for the combined Georges Bank (GB) and Mid-Atlantic (MA) scallop resource. Amendment 10 includes new guidelines for the Council to use during the development of biennial or more frequent framework adjustments that would assure that the management measures implemented in the future would prevent overfishing and achieve optimum yield (OY) on a continuing basis The framework process approved in Amendment 10 and implemented through this final rule will allow the PDT and the Council the flexibility to take the existing status of the resource into account, determine optimum yield-per-recruit based on the condition of the scallop resource, and devise appropriate measures to assure that OY is achieved on a continuing basis. The achievement of optimum yield-per-recruit from the resource as available for harvest in the upcoming fishing years could result in differential fishing mortality rates for various spatial components, as long as OY is achieved for the resource as a whole.

*2. Area Rotation*

Under area rotation, as approved in Amendment 10, three types of areas are established: Rotational Closed Areas; Sea Scallop Access Areas; and Open Areas. Rotational Closed Areas are closed to all scallop harvest as a result of large concentrations of fast-growing, small scallops. Sea Scallop Access Areas are re-opened closed areas or areas needing area-specific effort or harvest controls. Sea Scallop Access Areas have area-specific effort allocation programs, or ''Area Access Programs,'' as described below, established to prevent rapid harvest of the scallop resource within the areas. Vessel transit with gear stowed is allowed for both Sea Scallop Access Areas and Rotational Closed Areas. Open Areas are all areas without area-specific controls. In general, Open Areas are subject to DAS and gear restrictions with no possession limit and trip limitations other than those specified for General Category vessels and vessels fishing for scallops outside of scallop DAS. As a result of public comment on the proposed rule, this final rule adds appropriate definitions to § 648.2 to clarify the meaning of some of the area rotation terms.

The Council considered various approaches to area rotation and adopted an approach that provides flexibility to define future rotational areas. This final rule implements the ''fully adaptive area rotation scheme,'' which allows more specific area definitions and management controls compared to the fixed-boundary alternatives considered by the Council.

Amendment 10 establishes Rotational Area Closures for areas of small sea scallops, closing areas before the scallops are exposed to fishing. Scallops grow fastest when they are very small and protection of these small scallops through area closures is critical in the rotational management of the scallop resource. After a period of closure, and after evaluation according to the criteria and procedures established in Amendment 10, the areas will re-open for scallop fishing, when the scallops are larger and more suitable for harvest. This process boosts scallop meat yield and yield per recruit. The fully adaptive area rotation scheme in Amendment 10 establishes no pre-defined conditions for area closures and reopenings, except that areas will close when the expected annual increase in exploitable biomass in an area exceeds 30 percent, and areas will re-open when the expected annual increase in exploitable biomass in an area is less than 15 percent. There are no standard closure area boundaries, dimensions, or durations. This area rotation program is based entirely on changing conditions of the scallop resource. The fully adaptive area rotation scheme includes guidelines as part of the biennial framework process that will be used to establish the rotational areas.

*3. Initial Area Rotation*

Amendment 10 includes two areas in the MA as part of the initial area rotation scheme. First, the Hudson Canyon Access Area, with redefined boundaries, is maintained continues as a controlled access scallop fishing area. Emergency regulations implemented on March 1, 2004 (69 FR 9970), allowed full-time scallop vessels to take four trips into the area, and part-time and occasional vessels to take one trip into the area. These trip allocations are maintained under Amendment 10. Second, an area is closed that includes the lower portion of the existing Hudson Canyon Access Area, and an adjacent area. The new closed area is called the ''Elephant Trunk Area.'' Fishing for scallops and possession of scallops, except for transiting, is prohibited in the Elephant Trunk Area through February 2007.

*4. Area-Specific DAS and Trip Allocations for Limited Access Vessels*

Amendment 10 limits fishing by limited access scallop vessels under area access programs in order to prevent rapid harvest of scallops in controlled access areas. Limits on fishing include: Area-specific DAS allocations; a number of DAS to be charged for each closed area trip, regardless of trip length; a total number of trips allowed into access areas by permit category, with corresponding area-specific limits on the number of trips; and a maximum sea scallop possession limit per trip. These limits are specified based upon a target TAC for each area and assumptions about the level of effort that would be required to harvest the target TAC. The harvest of scallops at a level at or above the target TAC will not result in a closure of the area. Rather, landings relative to the target TAC will be evaluated through biennial, or more frequent, reviews of the fishery.

Unused controlled access DAS cannot be carried forward into the next fishing year. The area target TAC, DAS allocations, maximum number of trips and possession limit, and number of DAS charged per trip are calculated to optimize yield while reducing the potential for overexploitation of the resource in the open fishing areas.

Amendment 10 includes specific measures that are part of the rotational

area access program for the Hudson Canyon Access Area, based on a target TAC of 18,789,999 lb (8,523 mt) in 2004, and 14,956,160 lb (6,784 mt) in 2005. DAS assignments for the 2004 and 2005 fishing years are in trip-length blocks of 12 DAS, four trips for full-time vessels and one trip for part-time and occasional vessels, and a trip possession limit of 18,000 lb (8,164.7 kg), consistent with a 1,500-lb (680-kg) per day catch rate. Each vessel will be charged 12 DAS for each trip, regardless of actual trip length. Trip length DAS charge and possession limits will be re-evaluated for future years through the framework adjustment process, beginning with the development of the first biennial framework in 2005, which would be effective March 1, 2006.

*5. One-for-One Controlled Access Trip Exchanges*

The controlled area access program allocates each category of Limited Access scallop vessel a total number of trips into controlled access areas, with a maximum number of trips by area. When more than one Sea Scallop Access Area is specified, Limited Access scallop vessel owners may exchange trips in the areas on a one-for-one basis to take advantage of fishing area preferences. For example, a vessel owner in the north with an allocated trip in a southern area may exchange a trip in a northern area with a vessel owner in the south. The northern vessel would thus gain one trip in the northern area, but would give up one trip in the southern area. The total number of trips in each area would be unchanged, assuming each vessel takes all of its allocated trips. The one-for-one trip exchange provision requires more than one area to be managed under a controlled access program.

*6. Compensation for Sea Scallop Access Area Trips Terminated Early*

Vessel owners may request that NMFS allow compensation for a Sea Scallop Access Area trip that is terminated before the vessel has fully attained the possession limit allocated to an access area trip. Such trips are allowed without counting as one of the initially allocated trips and at a reduced DAS charge and possession limit. The vessel owner is required to submit information pertaining to the terminated trip, including the reason for terminating the trip (which may be for unforeseen events, emergencies, safety reasons, or other reasons deemed appropriate by the captain) and verification of the pounds of scallop landed when the vessel returned to port. The Regional Administrator shall review the information to verify the possession limit and the DAS charge that would apply to the makeup trip. This provision promotes vessel and crew safety by allowing vessels to exit Sea Scallop Access Areas without losing most of a trip into the area. It also reduces concern regarding the requirement that a portion of a scallop vessel's trips be taken in the Sea Scallop Access Areas.

*7. Gear Restrictions*

The minimum size of the metal rings used to construct the chain bag in scallop dredge gear is increased from 3.5 inches (8.9 cm) to 4 inches (10.2 cm) in diameter. The new minimum ring size is intended to improve yield from the scallop resource by promoting harvest of larger scallops with higher meat weights. All scallop dredges onboard vessels conducting a Hudson Canyon Area controlled access trip are required to comply with the requirement by July 23, 2004. Vessels fishing in the Open Areas are required to use 4-inch (10.2-cm) rings by December 23, 2004. The ring size increase is required earlier in the Hudson Canyon Access Area because the improved selectivity of the larger rings would help achieve the objective of the controlled access program, to improve yield. The 6-month delay in effectiveness in open areas allows vessel owners time to convert their gear and adjust to the overall requirement and cost associated with the gear conversion.

This final rule also requires all scallop dredge twine tops to be constructed of mesh with a minimum size of 10 inches (25.4 cm), inside measure, for both diamond and square mesh. The increase in the twine top mesh size is intended to minimize bycatch and bycatch mortality by improving escapement of some species of finfish.

*8. EFH Closures*

This rule designates areas closed to scallop fishing to minimize the impacts of scallop gear on EFH to the extent practicable. These areas are within the areas currently closed under the Northeast Multispecies FMP to protect groundfish (Closed Area I, Closed Area II, and the Nantucket Lightship Closed Area). These areas do not include the portions of the groundfish closed areas that were previously opened to the scallop fishery under the Scallop Framework 13 Closed Area Access Program. The EFH closed areas include areas designated as EFH for several finfish species.

*9. Data Collection, Monitoring, and Scallop Research*

Vessels issued federal scallop permits are required by the Regional Administrator to carry an observer onboard if requested, with the related costs being borne by the vessel. To partially or entirely defray these costs, vessels carrying an observer are allowed to land more scallops or receive DAS compensation. This final rule establishes a 1-percent set-aside of the total DAS in Open Areas and the target TAC within the Sea Scallop Access Areas to help vessels pay for the cost of observers. The cost of observers will be $719.12 per day for the 2004 fishing year and may change in the future. The set-asides for observers are intended to improve data on scallop catch and bycatch.

Amendment 10 also establishes a DAS set-aside from Open Area DAS and a TAC set-aside from Sea Scallop Access Areas to supplement the available funding for research. Amendment 10 expands the research objectives to be pursued using this set-aside to include cooperative industry scallop resource survey work as the highest research priority, as well as habitat-related research, and research to identify potential solutions to bycatch of fish and sea turtles. The TAC set-aside made available for the research is 2 percent of the target TAC within the Area Access Program. In addition, 2 percent of the Open Area DAS allocation is set aside to help fund scallop related research. A request for proposals was published in the **Federal Register** on April 15, 2004 (69 FR 19983), which solicited proposals for research that would begin in the 2004 fishing year. The research set-aside program promotes cooperative research related to the scallop resource and fishery.

*10. Framework Adjustment Process*

This rule implements a biennial framework adjustment process for changing area rotation closed areas and area re-openings, setting DAS allocations, and making other management adjustments. In addition to a change from the current annual process to a biennial process, the new framework procedures ensure that OY is achieved and overfishing is prevented on a continuing basis, through consideration of the resource condition by the Scallop Plan Development Team (PDT). In addition to the measures already included in the FMP, this final rule specifies that changes in the following measures can be enacted through framework action: Size and configuration of rotational management

areas; controlled access seasons to minimize bycatch and maximize yield; area-specific DAS or trip allocations; amount and duration of TAC specifications following re-opening; limits on number of closures; TAC or DAS set-asides for funding research; priorities for scallop-related research that is funded by a set-aside from scallop management allocations; finfish TACs for controlled access areas; finfish possession limits; sea sampling frequency; and area-specific gear limits and specifications.

*11. Proactive Protected Species Program*

To reduce the risk of takes of sea turtles and other species protected under the Endangered Species Act by fishing gear used in the scallop fishery, this rule includes a mechanism, through the framework process, to close areas, establish seasons, implement gear modifications, or implement other measures through the framework adjustment process. As new information about sea turtles and other protected species becomes available, particularly if interactions between protected species and the scallop fishery increase beyond anticipated levels, the Council will propose actions to mitigate takes.

**Response to Comments**

*General Comments on Amendment 10*

*Comment 1:* One commenter stated that fisheries should not be allowed to continue to fish at maximum sustainable yield and that doing so constitutes overfishing.

*Response:* Section 303(a)(3) of the Magnuson-Stevens Act requires NMFS to assess and specify the present and probable future condition of, and the maximum sustainable yield, and optimum yield from, the fishery, and include a summary of the information utilized in making such specification. Amendment 10 fulfills this requirement. Amendment 10 adequately documents that the scallop fishery is managed to achieve OY, as required by National Standard 1 of the Magnuson-Stevens Act, and measures under Amendment 10 have been determined to be consistent with that requirement. The FMP establishes fishing mortality and biomass targets that are the reference points by which the fishery is managed. Fishing mortality and biomass thresholds also determine when more restrictive measures are necessary to prevent overfishing and maintain a sustainable biomass.

*Comment 2:* One commenter recommended that NMFS reduce DAS by 50 percent in 2004 and 10 percent every year thereafter.

*Response:* Such reductions in DAS are excessive, given the current status of the scallop resource, and would prevent the achievement of OY. The scallop resource is currently rebuilt and large reductions in DAS without measures to compensate for the lack of harvest would cause the FMP to be inconsistent with National Standard 1 and other provisions of the Magnuson-Stevens Act and the control rule established for the scallop fishery.

*Comment 3:* One commenter requested that NMFS include an explanation of $B_{MAX}$ and other scientific terms in rules published in the **Federal Register** so that readers can understand the terminology.

*Response:* Definitions for reference points that are commonly used in overfishing definitions are found in the Magnuson-Stevens Act Provisions, 50 CFR part 600. Relative to the scallop fishery, a definition of $B_{MAX}$ is included in the Glossary of the Amendment 10 FSEIS (Section 15.0) and is included in the Amendment 10 FSEIS in Section 5.1.1 (*See* **ADDRESSES**). NMFS will continue to try to define terms that may be unfamiliar in its rulemaking.

*Comment 4:* One commenter was concerned that NMFS had not made a determination that the measures contained in the proposed rule were consistent with the Magnuson-Stevens Act.

*Response:* Before partially approving Amendment 10 and issuing this final rule, NMFS determined that the approved measures and this final rule are consistent with the Magnuson-Stevens Act and other applicable law. These determinations cannot be made until NMFS completes the review and decision-making process mandated by the Magnuson-Stevens Act as to whether to approve, partially approve, or disapprove an FMP or amendment.

*Comment 5:* One commenter stated that dredging is highly ''anti-environmental'' and, along with trawl gear, should be prohibited.

*Response:* Scallop fishing with dredges and trawls can have adverse impacts on the environment, at least in certain habitats. However, the Magnuson-Stevens Act requires that fisheries be managed to achieve OY, while taking into consideration impacts on the physical, biological, economic, and social environments. The FSEIS (*see* **ADDRESSES**) evaluates the impacts of scallop fishing on the environment, and this rule implements measures to mitigate those impacts, to the extent practicable.

*Comment 6:* Two commenters stated that the Amendment 10 National Environmental Policy Act (NEPA) process was flawed throughout Amendment 10's development because the Council failed to fully develop and adequately analyze alternatives that were recommended and that would incorporate habitat protections and bycatch measures into any rotational management program. The commenters stated and that such flaws need to be corrected before NMFS takes action.

*Response:* NMFS fully complied with NEPA and the NEPA process in the development and partial approval of Amendment 10. Over the course of the 4 years during which Amendment 10 was developed, the Council considered a wide range of alternatives with varying environmental impacts and obtained extensive public input throughout the process. To evaluate EFH impacts, the Council devoted significant effort to coordinate the work conducted by groundfish, scallop, and habitat technical teams to develop alternatives to minimize the impacts of fishing on EFH to the extent practicable. Numerous advisory panel meetings were held to develop a wide range of alternatives to address EFH and bycatch in the management of the scallop fishery. The commenters suggest that certain alternatives they advanced were either ignored or unjustly rejected. The FSEIS fully considered all of these comments, as seen in the discussion of alternatives in the FSEIS, including some alternatives considered but rejected by the Council. Many of the alternatives in Amendment 10 are representative of those suggested by the commenters. The Council and NMFS fully considered all reasonable alternatives in light of the scope and context of Amendment 10. Responses to comments regarding the incorporation of EFH and bycatch protection into area management programs are provided in responses to Comments 9 and 29.

*Comments on EFH Measures*

*Comment 7:* One group commented that Amendment 10 fails to minimize to the extent practicable the adverse effects of fishing on EFH to the extent practicable.

*Response:* Amendment 10 considered a wide range of alternatives for minimizing the adverse effects of fishing on EFH and conducted a practicability analysis for each alternative. The practicability analysis followed the guidelines published in the EFH regulations (50 CFR part 600, subpart J) and considered the nature and extent of the adverse effect on EFH and the long and short-term costs and benefits of potential management measures to EFH, associated fisheries, and the Nation, consistent with National Standard 7.

The practicability analysis (FSEIS Section 8.5.6.4) shows that Habitat Alternatives 2, 6, 11, and 12 are all practicable, and the remainder of the Habitat Alternatives are not practicable. All four practicable alternatives were approved and are being implemented as a suite, to minimize the adverse effects of fishing on EFH.

*Comment 8:* One group commented that, of the habitat alternatives adequately analyzed in the FSEIS, Alternative 3a (area closures to protect hard-bottom habitat) comes closest to fulfilling NMFS's responsibilities to minimize habitat impacts because it would provide the most protection for most sensitive habitats.

*Response:* The commenter incorrectly characterizes NMFS's legal responsibilities to minimize adverse effects of fishing on habitat to the extent practicable. Specifically, the comment mistakenly seems to equate the NMFS's statutory responsibility of minimizing habitat impacts to the extent ''practicable'' with the concept of minimizing impacts to the extent ''possible.'' The term ''possible'' would require the agency to implement virtually any feasible measure that addresses EFH, whereas the term ''practicable'' allows NMFS to consider, weigh, and balance the alternatives in light of the national standards and other Magnuson-Stevens Act requirements, and in accordance with the EFH regulations.

NMFS carefully considered Habitat Alternative 3a. Ultimately, however, NMFS determined that the suite of alternatives making up the approved measures would provide habitat protection, minimize adverse effects to the extent practicable, consistent with the guidelines specified in the EFH regulations, and better balance the overall objectives of the various national standards and required provisions of the Magnuson-Stevens Act than would Habitat Alternative 3a. Although Habitat Alternative 3a was shown to provide more protection to EFH than some of the other habitat alternatives, it was also found to be impracticable (FSEIS Section 8.5.6.4.3). This alternative would have dramatic social and economic impacts by creating significant revenue losses to the scallop fishery, the groundfish fishery, and other fisheries, as well as inequitable port and community impacts. NMFS must implement EFH management measures that are practicable, as well as compliant with the national standards and other required provisions of the Magnuson-Stevens Act.

*Comment 9:* One group commented that NMFS should also recommend Habitat Alternatives 10 and 13 as practicable measures to minimize habitat impacts.

*Response:* The analysis in the FSEIS (Section 8.5.6.4.11) shows that Habitat Alternative 10 (restriction on the use of rock chains) is not practicable when balancing the potential benefits to EFH with safety-at-sea issues and economic costs to the industry, as specified by EFH regulations. Habitat Alternative 13 (rotational management based upon habitat protection) was included in conceptual form, without specified parameters. Despite the efforts of the Council and NMFS, specific criteria for controlling the frequency, duration, and intensity of scallop fishing could not be defined for this alternative in time for this action. Even so, this conceptual alternative was considered and included for analysis in the FSEIS (Section 5.3.4.13). Although Habitat Alternative 13 as a whole was not determined to be readily practicable, aspects of the alternative can be found within alternatives contained in Amendment 10. Specifically, the analysis of Habitat Alternative 13 (FSEIS Section 8.5.4.13) recognizes that two alternatives developed to improve scallop yield also utilize habitat benefits as criteria for determining the status of rotational management areas (Alternative 5.2.1.5—Adaptive closures and re-openings with fixed boundaries and mortality targets; Alternative 5.2.1.7—Area-based management with area specific fishing mortality targets without formal area rotation). These two analyzed alternatives advance the concept of including habitat concerns in rotational area management.

*Comment 10:* One group commented that the FSEIS failed to include an alternative establishing additional Habitat Areas of Particular Concern (HAPC) and Habitat Research Areas.

*Response:* Neither the Magnuson-Stevens Act nor the EFH regulations mandate the establishment of HAPCs as part of the development of an FMP. However, the Council has established a process for identifying HAPCs and is currently seeking public comment on this issue as part of the development of EFH Omnibus Amendment 2 (69 FR 8367, February 24, 2004). Because of the integrated nature of EFH for all species, it is more appropriate for a comprehensive EFH management action to explore the need for a Habitat Research Area, instead of approaching this issue on an FMP-by-FMP basis, as suggested. This is the rationale that was used to consider and reject this alternative as part of Amendment 10. The concept of a Habitat Research Area is being addressed by the EFH Omnibus Amendment 2.

*Comment 11:* One commenter stated that the socio-economic analysis in Amendment 10, relative to measures to protect EFH continues to be inadequate. The commenter states that the analysis focuses almost exclusively on the potential adverse economic impacts of implementing closed areas to protect EFH and offers no discussion of the economic benefits that can be realized by protecting sensitive and important habitat areas. The commenter states that the analysis also fails to analyze the potential economic benefits that are likely to result from improved spawning success and recruitment associated with habitat closed areas, including improvements to cod and other groundfish species currently experiencing historically low recruitment, which the commenter states is due to habitat alteration.

*Response:* The social and economic analyses, which were conducted using the best available science, adequately consider benefits as well as costs of habitat impacts. The FSEIS provides a comparison of the benefits of the EFH measures to the environment with the economic costs of implementing the measures on the industry. By considering these analyses and comparisons, the Council and NMFS were able to make an informed decision on the alternatives by determining their benefits and practicability.

*Comment 12:* One commenter stated that too much of the habitat data contained in the document are ''stale'' and of questionable utility, and that the supposed seabed impacts of scallop dredging continue to be measured using suspect and perhaps inapplicable means, and are often vastly overstated.

*Response:* The habitat data utilized in the FSEIS is the best available science. In fact, the habitat metrics analysis is an innovative approach, utilizing the best available science from a variety of sources from within the region and incorporating it into a Geographic Information System for geo-spacial analysis (See FSEIS Section 8.5.1 for methodology). The consideration of seabed impacts associated with scallop dredging was based on a review of recent literature from within the region, which utilized dredges that are identical or similar to those used in New England—New Bedford style dredge (FSEIS Section 7.2.6.2.4.6.2).

*Comment 13:* One commenter supported reliance on existing measures as a practicable means to reduce impacts of the scallop fishery on EFH, such as the present DAS program and the rotational closure system.

*Response:* Utilizing existing measures to minimize the adverse effects of fishing on EFH is contained within Habitat Alternative 2. Although this alternative provides a benefit to EFH through reductions in DAS as well as other measures that reduce effort or area swept by the dredge, it does not alone best satisfy, on balance, the Magnuson-Stevens Act requirement to minimize to the extent practicable the adverse effects of fishing on EFH. Habitat Alternatives 6, 11, and 12 were also shown to be practicable alternatives (FSEIS Section 8.5.6). This suite of management measures fulfills the Magnuson-Stevens Act requirement to minimize to the extent practicable the adverse effects of fishing on EFH.

*Comment 14:* One commenter opposed the need for habitat closures in Amendment 10 but stated that, of the closure alternatives presented, Habitat Alternative 6 selected for adoption in Amendment 10 was the best.

*Response:* Habitat Alternative 6 was selected for implementation. The analysis in the FSEIS shows that this alternative provides a significant amount of EFH protection (FSEIS Section 8.5.2.2 ). In addition, this closure alternative provided the best balance, in considerations of EFH regulations, insofar as it protects habitat without causing significant revenue losses for the scallop, groundfish, monkfish, or other fisheries. Accordingly, NMFS found it to be practicable and appropriate to implement (FSEIS Section 8.5.6.4.6).

*Comment 15:* One commenter opposed 4-inch (10.2-cm) rings as a habitat measure on grounds that it will have increased impacts on EFH.

*Response:* The anlaysis provided in the FSEIS (Section 8.5.4.11) recognizes that initially there may be an increase in the area swept by dredges in order to compensate for more escapement of smaller scallops through larger rings. But this result is likely to diminish significantly after the first year as the average size of scallops increases throughout the range of the fishery. The result of the increased size composition of the scallop resource is expected to be a decrease in area swept. In the long-term, area swept is expected to be approximately 15 percent lower than Amendment 10 alternatives with 3.5-inch (8.9-cm) rings. Therefore, the long-term benefits to habitat outweigh the short-term impacts.

*Comment 16:* One commenter expressed concern about the habitat impact analysis in the FSEIS, asserting that the sediment maps continue to be used in ways that are not appropriate; that much more of the recent scientific studies on mobile gear impacts on the seabed are not included; that many of the projected impacts are based on different gear (*e.g.*, European toothed dredge) or on different types of bottom not found in the Atlantic scallop fishery; and that many of the basic analytical flaws remain to be addressed.

*Response:* NMFS disagrees with this characterization of the analysis. The sediment data utilized in the analysis are the only data available that span the entire region. Although some other data exist, they do not cover a sufficiently large geographic area to be useful for a comprehensive evaluation of regional closure options. The limitations of the data are recognized in the FSEIS (Section 8.5.2.1) and are taken into account within the analyses. The FSEIS contains the most recent available scientific information pertaining to the effects of bottom-tending mobile gear and provides a literature review summarizing this recent information (FSEIS Section 7.2.6.2.4.6). Studies related to the effects of bottom-tending mobile gear on habitat are continually being published. However, not all studies are relevant to the Northeast, either due to the habitat type studied or the gear utilized. Recent studies that are not relevant to the Northeast or unpublished reports or reports that were not available to the authors of the document, were not included. Although the FSEIS references some large-scale comprehensive studies on the effects of trawls and dredges on habitat, and summarizes those findings, the gear effects determinations (FSEIS Section 7.2.6.3.4.) are based primarily upon existing regional literature, the results of a Northeast Region Gear Effects Workshop, the distribution of fishing in the Northeast region, and the vulnerability of EFH to the types of disturbances caused by gear used in the Northeast.

*Comment 17.* One group stated that NMFS must revise the description of scallop dredge gear in the FSEIS because it is inaccurate and misleading.

*Response:* Appendix VI of the FSEIS describes the New Bedford style scallop dredge. Much of the description of this gear is based upon the results and report of the 2001 Northeast Gear Effects Workshop, as well as on published literature on this gear. The description describes those elements of the dredge that contact the bottom. It was not, however, the purpose of the gear description section to discuss the potential habitat impacts associated with this gear. The effects of this gear on habitat are more fully described in FSEIS Section 7.2.6.2.4.6.2, based upon published scientific literature.

*Comment 18:* One group commented that NMFS must revise the gear impacts analysis to take into account the recovery time for gravel habitat.

*Response:* The Council and NMFS took habitat recovery time, including gravel habitat recovery time, into account when developing Amendment 10. The FSEIS in Section 7.2.6.3.4 discusses adverse impacts. Forty-four relevant peer-reviewed and non-peer-reviewed publications were included in the literature review comprising the best available science on the subject. Recovery rates were provided when reported by the authors of the scientific studies. Discrepancies between recovery rates listed in tables 139–142 and those reported by the 2001 Gear Effects Workshop are due to the subjective nature of the responses provided by the Workshop participants compared to the research results published by various authors. Therefore, NMFS is confident that the best available science was utilized in the fishing gear effects analysis consistent with National Standard 2.

*Comment 19:* One group commented that NMFS must reject Habitat Alternative 2 because it specifically relies on the purported incidental benefits of non-habitat related measures in the FMP.

*Response:* Habitat Alternative 2 is not the only alternative being relied upon to minimize the adverse effects of fishing on EFH. It represents only a part of a strategy for habitat impact reduction, and should not be considered in isolation. The strategy for minimizing the adverse effects of fishing on EFH to the extent practicable includes the effort reductions provided in Habitat Alternatives 2 and 7, the direct benefits of closing areas to bottom-tending mobile gear in Habitat Alternative 6, and the indirect benefits of habitat research in Habitat Alternative 12. The EFH regulations specifically require that the evaluation of fishing effects should list management actions that minimize potential adverse effects on EFH and describe the benefits of those actions to EFH. Habitat Alternative 2 includes approximately 16 measures that will be implemented to achieve the non-habitat goals of Amendment 10 and provides indirect net benefits to EFH (*see* analysis in Section 8.5.4.2 of the FSEIS and Table 221).

*Comment 20:* One group commented that NMFS must partially reject the proposed GB habitat closures in Habitat Alternative 6 because it weakens habitat protection compared to the No Action Alternative.

*Response:* Implementation of Habitat Alternative 6 establishes a series of

habitat closed areas within the Gulf Of Maine (GOM), GB, and Southern New England (SNE), which prohibit the use of scallop dredges and scallop trawls. These closed areas total 4,041 square nautical miles and encompass 7.9 percent of the total of all vulnerable EFH for all 43 species/life stages (17.4 percent of juvenile cod EFH) (*see* Table 203 in the FSEIS).

However, it is not the amount of area closed that provides the basis of comparison between Alternative 6 and the No-Action Alternative, so much as it is the purposes for the closures in the respective alternatives. Alternative 6 is intended to directly protect habitat from the adverse impacts from bottom-tending mobile gear used in the scallop fishery. In other words, Habitat Alternative 6 provides closures specifically to protect EFH, whereas the No-Action Alternative considers closures, not specifically for any habitat reason (although habitat might incidentally benefit), but for purposes related to groundfish mortality. Because the No-Action Alternative closures are established for reasons other than habitat protection, the areas under that alternative are available to access by various bottom-tending mobile gears, and such closures might prove to be more temporary, intermittent, and less valuable for habitat as compared to the specific habitat protections afforded under Alternative 6 (FSEIS Section 8.5.4.1). Accordingly, the No-Action Alternative is not directly comparable to Alternative 6 because of the type of closure it represents, and its listing in the various tables in Section 8.5 of the FSEIS is more to provide both context and a point of reference for closed area alternatives. This is why Section 8.5.3 of the FSEIS (EFH Benefits of Habitat Alternatives) does not compare the No Action Alternative to the 12 closed area alternatives.

Alternative 6 does not weaken EFH protection for any species and, in fact, the FSEIS shows that Habitat Alternative 6 is a more effective alternative. It provides permanent or better defined EFH protection in comparison to the zero permanent or indefinite protection provided by the No Action Alternative.

*Comment 21:* One commenter indicated that NMFS must partially reject and revise the DEIS to identify, develop, and adopt a broad range of alternatives that protect various percentages, including 100 percent of juvenile cod EFH and known complex gravel areas, from scallop dredging and other bottom-tending mobile gear.

*Response:* NMFS believes that the Amendment 10 FSEIS contains a broad range of reasonable alternatives, which has provided the Council and NMFS with the ability to make an informed decision on Amendment 10. NEPA does not require that every conceivable alternative be analyzed, but rather only reasonable alternatives. These alternatives must be viewed holistically, and not in isolation.

The Amendment 10 FSEIS concludes (Section 7.2.6.3) that there are 24 managed species, and 43 distinct life stages, that have EFH that is vulnerable to the effects of bottom-tending mobile gear. The Magnuson-Stevens Act requirement for Amendment 10 is to minimize, to the extent practicable, the adverse effects of scallop fishing on the EFH of these 43 species/lifestages, not all of which utilize or require the same habitat type (FSEIS Table 215). Amendment 10 undertook an approach to balance EFH protections among all 43 species/lifestages instead of targeting minimization measures on one or a few species/lifestages. Amendment 10 contains a series of management measures that represent several major strategies for providing direct and indirect protection to a wide variety of vulnerable EFH.

As stated in Response to Comment 20 above, implementation of Habitat Alternative 6 establishes a series of habitat closed areas within the GOM, GB, and SNE that prohibit the use of scallop dredges and scallop trawls. These closed areas total 4,041 square nautical miles and encompass 7.9 percent of the total of all vulnerable EFH for all 43 species/life stages and 17.4 percent of juvenile cod EFH (*see* Table 203 in the FSEIS). Therefore, juvenile cod EFH, as well as the EFH of 40 other species/life stages, is afforded direct protection against the adverse impacts from bottom-tending mobile gear.

The FSEIS concludes that complex hard-bottom (gravel) habitats are vulnerable to the adverse effects of bottom-tending mobile gear. However, the FSEIS also shows that hard-bottom sediments are not the only vulnerable EFH. The EFH for other species found in sand, soft sediments, silt, mud, and soft mud have also been determined to be highly vulnerable to the adverse effects of bottom-tending mobile gear (Table 215 of FSEIS). Amendment 10 provides a balanced approach to EFH protection and protection of these substrate types.

The substrate analysis provided in the FSEIS (Section 8.5.2.1) shows the percent composition within each closed area based upon six sediment characteristics: Bedrock, gravel, gravelly sand, sand, muddy sand, and mud. Table 201 in the FSEIS shows that, out of the 83,550 square nautical miles included in the Northwest Atlantic analysis area, 53,856 square nautical miles are composed of sand/gravelly sand representing 64 percent of the entire area. Less than 1 percent of the Northwest Atlantic analysis area has been mapped as gravel or bedrock. These complex hard bottom areas of bedrock and gravel are not uniformly distributed (*see* Map 53 and 55 of the FSEIS) and are difficult to encompass in closed areas without including large amounts of sand and other substrates. The closed area alternatives analyzed in the FSEIS encompass anywhere from 0 to 72 percent of the mapped gravel areas. Habitat Alternative 6 includes all substrate types representing vulnerable EFH, except bedrock. Compared to the Northwest Atlantic analysis area, Alternative 6 includes 17 percent of the gravel, 16 percent of the gravelly sand, 5 percent of the sand, 6 percent of the muddy sand, and 2 percent of the mud (Table 201 of the FSEIS).

*Comment 22:* One commenter urged NMFS to partially reject and modify Amendment 10 to include mitigation measures to protect mapped gravel habitats in areas within Closed Area 1, the Nantucket Lightship Closed Area, and rotational management areas proposed to be opened to scallop dredging.

*Response:* See response to Comment 21 above. In addition, NMFS is limited in its authority pursuant to Section 304(a)(3) and could not unilaterally include additional management alternatives.

*Comment 23:* One group urged NMFS to consider development of a rotational management alternative based on the group's proposals submitted to the Council during the scoping process and its comments submitted in 2001 on Amendment 10.

*Response:* Consideration of rotational management based on habitat and bycatch protection is discussed in the response to comments 9 and 29. NMFS and the Council considered all of the group's proposals provided during scoping, and did, in fact, adopt aspects of the proposals. In response to this comment submitted on the DSEIS, NMFS prepared a summary of the proposals and their resulting alternatives in response to Comment 115 included in Section 19, ''Response to Comments,'' of the FSEIS (*see* **ADDRESSES**).

*Comment 24:* One group urged NMFS to implement an interim closure via emergency rule to establish: (1) A no-trawl/dredge zone in the top 30–50 percentile of designated juvenile GB cod

EFH; and (2) sufficient protection to protect known complex gravel habitats on the northern edge of GB and in areas west of the Great South Channel.

*Response:* This was not a measure considered in Amendment 10. NMFS cannot initiate such emergency rule making to implement the recommended closures unless it can be determined that an emergency justifying such closures exists, and the commenter offers no justification that such an emergency exists.

*Comment 25:* One commenter stated that NMFS failed to mention that the Council, through Framework Adjustment 16 to the FMP, replaced Habitat Alternative 6 in Amendment 10 with Habitat Alternative 10b, and that the Amendment 10 FSEIS fails to notify the public of this change.

*Response:* Joint Frameworks 16/39 have been submitted to NMFS for review and approval, but the Council had not approved any alternatives for Joint Frameworks 16/39 prior to the publishing of the FSEIS for Amendment 10. The Amendment 10 FSEIS repeatedly recognizes that a framework adjustment is a necessary next step in scallop rotational area management. The FSEIS also recognizes that there are some differences between habitat closed area alternatives in Scallop Amendment 10 and Groundfish Amendment 13 and that Habitat Alternative 6 could be replaced by Habitat Alternative 10b from Groundfish Amendment 13 (See Table 151 in FSEIS). However, the Council and NMFS have not yet taken final action on Joint Frameworks 16/39 and will not take final action until the NEPA process has been completed. One of the critical issues that will be evaluated in the Joint Frameworks 16/39 with respect to any reconfiguration of habitat closed areas under Amendment 10 is whether or not there will be a change in overall EFH protections.

*Comment 26:* One commenter stated that the information included in Amendment 10 does not support the closures included in Amendment 10 to minimize the adverse effects of scallop fishing on EFH to the extent practicable. The commenter states that EFH closure alternatives included in Addendum I to the Amendment 10 FSEIS would be better suited to minimize the adverse effects of scallop fishing on EFH to the extent practicable, and that NMFS could defer action to close areas until a future action.

*Response:* The EFH alternatives implemented by this final rule were determined to minimize adverse effects of fishing on EFH to the extent practicable in accordance with all applicable law, as is more fully discussed in responses to Comments 7 through 11 above.

*Comments on Bycatch*

*Comment 27:* Two commenters stated that Amendment 10 does not meet Magnuson-Stevens Act requirements to minimize bycatch and bycatch mortality to the extent practicable. One of commenters recommended that NMFS adopt long-term closures for bycatch.

*Response:* The Council considered several alternatives designed to minimize bycatch and bycatch mortality to the extent practicable, including seasonal and long-term closures, gear restrictions, and area rotation based on the protection of species caught as bycatch. In considering national standards and other Magnuson-Stevens Act provisions and bycatch reduction measures already in place with the impacts of additional bycatch measures, the Council determined, and NMFS agrees, that the proposed large area closure alternatives were not practicable because of the negative overall impacts on scallop vessels that would result, combined with existing closed areas and area rotation measures. The gear modifications and combined effect of other management measures and effort reductions already in place and included in Amendment 10 are expected to reduce bycatch of small scallops, finfish vulnerable to capture in scallop dredges, skates, and monkfish.

*Comment 28:* One commenter stated that Amendment 10 relies on a single measure to reduce bycatch (10-inch (25.4-cm) twine tops), which does not address barndoor skate bycatch.

*Response:* Numerous scallop management measures are already in place that significantly reduce bycatch, such as DAS restrictions, crew size, closed areas, and gear restrictions. In addition, the Council considered several additional alternatives to reduce bycatch in the scallop fishery, including gear modifications and time and area closures, and recommended those measures necessary to reduce bycatch to the extent practicable. The rationale for the bycatch measures included in Amendment 10 and for those not recommended as part of Amendment 10 is included in Table 1, and Sections 5.1, 6.1.9 and 8.3 of the FSEIS. Amendment 10 increases the minimum twine-top mesh size for scallop dredges from 8 inches (20.3 cm) to 10 (25.4 cm) inches to reduce bycatch and concluded that the rotational management fishing restrictions and area closures would further minimize bycatch and bycatch mortality. The increased twine-top mesh size has proven to be an effective measure to reduce bycatch, particularly of flounder species often caught by scallop dredge gear. Area rotation area access programs and area closures are projected to further reduce bycatch by limiting fishing time and preventing access to some areas. Amendment 10 does not include additional closures specifically to reduce finfish bycatch because the information available was inadequate to clearly demonstrate that specific area closures would be effective. In addition, in view of closed areas already established under the Multispecies FMP and rotational closures implemented by Amendment 10, additional closures for bycatch protection would not be practicable because, while the bycatch reduction was not quantifiable, the negative impacts on the fishery were, and the impacts were determined to be significant. Future area access programs may establish TAC levels for bycatch species that would stop scallop fishing in an access area when the TAC for the bycatch species is attained. The Council has adopted such a provision for yellowtail flounder as part of Joint Frameworks 16/39, which has been submitted to NMFS for review and implementation.

The Council considered several alternatives to minimize bycatch, including skate species and barndoor skate in particular. Although information supported measures designed to minimize finfish bycatch overall, the Council, did not have information available to identify measures specifically to reduce the bycatch of skates. Amendment 10 therefore relies on reductions in fishing time associated with increased fishing efficiency with 4-inch (10.2-cm) rings in the long-term and area rotation. Skates are also known to be less susceptible to discard mortality than other species. Nevertheless, the Council and NMFS remain concerned about bycatch of skate species and will continue to seek ways to minimize their catch in the scallop fishery.

*Comment 29.* One group commented that the FSEIS failed to adequately develop and analyze an area-based management and rotation plan based bycatch protection.

*Response:* The effects of area rotation is expected to also provide benefits for finfish species caught as bycatch. Area rotation is expected to improve scallop fishing efficiency which would in turn reduce bycatch as tow times decrease. The Council did not consider an alternative that would have resulted in rotational area management based in part on bycatch, because there is insufficient information to support such a management approach at this time.

*Comment 30:* One commenter supported measures to reduce bycatch, specifically the 10-inch (25.4-cm) twine-top requirement, and the proactive protected species program.

*Response:* NMFS agrees that the 10-inch (25.4-cm) twine top requirement will reduce bycatch in the scallop fishery. The proactive protected species program will enable the Council to address new information regarding interactions between the scallop fishery and sea turtles it becomes available.

*Comment 31:* Two groups commented that Amendment 10 fails to establish a standardized bycatch reporting methodology to assess the amount and type of bycatch occurring in the scallop fishery.

*Response:* In accordance with the Magnuson-Stevens Act, NMFS is developing a nationwide bycatch protocol that describes common elements of a standardized bycatch reporting methodology (SBRM) for fisheries under NMFS's jurisdiction. Consistent with this protocol, the FMP and Amendment 10 contain many measures that satisfy the elements of the SBRM, which will further develop the bycatch reporting methodology to assess the amount and type of bycatch in the scallop fishery. To assess bycatch, the scallop fishery relies mainly on mandatory data collection program (vessel trip reporting and dealer reporting) that has been in effect since 1994, combined with a fishery observer program. The Fisheries Observer Program provides the most reliable bycatch information and is the foundation of bycatch estimates used in Amendment 10. Amendment 10 provides for enhanced sea sampling by expanding the scallop TAC and DAS set-aside program that compensates vessels for carrying an observer when fishing outside of access areas under DAS. The set-aside program therefore would increase the number of observers that can be dedicated to the scallop fishery by supplementing NMFS's observer funding. The additional data will improve estimates of the amount and type of bycatch occurring in the scallop fishery. The mechanism for establishing observer set asides of TAC and DAS is a permanent measure, but future framework actions could adjust the amount of the set-asides, if necessary to provide more data. The vessel trip report (VTR) requires vessel operators to report discards by species, although the VTRs alone are not sufficient to adequately estimate bycatch. Scallop vessels are fully equipped to report bycatch through their vessel monitoring systems and would be required to do so if hard TACs are enacted for scallops or yellowtail flounder under Joint Frameworks 16/39. Further, new electronic dealer reporting requirements are in place and will improve real-time data for landed components of catch in scallop and other fisheries.

*Comment 32:* One commenter stated that the bycatch assessment analysis relies on incomplete and outdated data.

*Response:* The analysis of bycatch is based on the best available data, including observed sea scallop trips and VTR. The Amendment 10 analysis relies on observed trips pooled over several years (for a total of 28,000 observed tows) and observer data from the controlled access programs in groundfish closed areas and the Hudson Canyon Access Area. Although these data could be significantly augmented, no other reliable data was available for use in Amendment 10. The analyses are included in the Amendment 10 FSEIS in Section 7.2.4.1, Section 8.3, and Appendix IX.

*Comment 33:* Two commenters stated that the level of observer coverage expected in the scallop fishery, including coverage resulting from the TAC and DAS set-asides, is insufficient to characterize bycatch and bycatch mortality, including takes of threatened and endangered sea turtles. The commenters recommended that NMFS require 50 percent observer coverage in the MA and 20 percent coverage on GB based on a study conducted in 2003 on the level of observer coverage needed to estimate bycatch.

*Response:* The cited study (conducted in 2003 on the level of observer coverage needed to estimate bycatch) recommended that in the absence of available data, coverage rates of 20 to 50 percent were appropriate, based on results of two simulation studies. The study also recommended that when information about expected rarity, distribution, and variability of bycatch species is available, it should be used to construct appropriate stratification schemes to reduce the amount of sampling effort required to achieve a given level of precision. Because existing observer data are available from the sea scallop fishery, these data were used to design a stratified random sampling regime. Sampling is expected to provide estimates of sea turtle bycatch with a coefficient of variation of 30 percent. This coverage, combined with coverage anticipated from the TAC and DAS set-asides, will substantially reduce the coefficient of variation for species of finfish caught as bycatch in the scallop fishery, but the amount of the reduction will vary from stock to stock. Results from the current plan will be used to refine or revise the sampling design in future years, and adjust set-aside amounts, as appropriate.

*Comment 34:* One commenter stated that Amendment 10 does not consider an adequate range of alternatives and mitigating measures to protect sea turtles and that NMFS would likely take no action to protect sea turtles in the next 3 years.

*Response:* The Council considered the interactions between the scallop fishery and sea turtles throughout its development of Amendment 10, which is fully documented in the amendment and the biological opinion (BO) conducted regarding impacts of the FMP and the scallop fishery on sea turtles. Although the Council considered alternatives that would have closed areas in the MA to scallop fishing, it could not be determined whether the resulting redistribution of effort throughout the rest of the MA would increase or decrease fishery interactions with sea turtles, which occur seasonally throughout the MA.

The ''Proactive Protected Species Program'' included in Amendment 10 provides an abbreviated mechanism for the Council to use to recommend management measures based on new information obtained about sea turtle and scallop fishery interaction. The increased observer coverage in the scallop fishery as a result of Amendment 10 should provide additional data on sea turtle takes that could be used to develop future measures. On February 23, 2004, NMFS completed a BO under Section 7 of the Endangered Species Act (ESA) that concluded that the continued operation of the scallop fishery, including measures proposed in Amendment 10, is expected to adversely affect endangered and threatened sea turtles (loggerhead, Kemp's ridley, green, and leatherback), but would not jeopardize the continued existence of these species. In the incidental take statement (ITS), the BO considered new information that identified 12 sea turtles taken in the scallop fishery outside of the MA Access Areas through October 2003. The BO anticipates the take of up to 111 animals of the affected species annually in the scallop fishery. Sea turtle takes in excess of the ITS, or new information that reveals effects of the fishery that were not previously considered during consultation, would require NMFS to reinitiate Section 7 consultation and would trigger the Council's development of measures to mitigate takes under the Proactive Protected Species Program.

As part of the TAC set-aside program under Framework 15 to the FMP, NMFS

authorized a research project to be conducted during the 2004 fishing year which were designed to identify gear modifications that may reduce captures of sea turtles in scallop dredges. Preliminary results reported by the participants are promising, indicating that increasing the amount of chain gear used in the opening on the bottom of the dredge is reducing sea turtle captures. The BO utilized some of the new information acquired through this research. Final work and analysis of the research is being conducted, and could, following review, be used to develop a management action under the Proactive Protected Species Program.

*Comment 35:* Twenty-eight comments were received in opposition to the proposed restriction on limited access scallop vessels fishing outside of DAS. U.S. Representatives Saxton (NJ); LoBiondo (NJ); Smith (NJ); and Pallone (NJ); Senators Lautenberg (NJ) and Corzine (NJ); the Mid-Atlantic Fishery Management Council (Mid-Atlantic Council); several fishermen; and industry representatives commented that NMFS should disapprove the proposed measure because limited access scallop vessel owners from NJ, who account for the majority of the landings of scallops by limited access scallop vessels fishing outside of scallop DAS, would be severely and unequally impacted by the measure. They stated that the 400-lb (181.4-kg) limit contributes to these vessels' economic viability and allows them to maintain crews between DAS trips and that no other similar restrictions were planned for general category vessels or for vessels fishing under combination permits. Comments also stated that the measure was not supported by the best available scientific information.

*Response:* For the reasons stated in the Background section of the preamble of this final rule, the proposed restriction on limited access vessels fishing outside of scallop DAS was disapproved.

*Comment 36:* One commenter supported the area rotation program and the measures to ensure flexibility under area rotation.

*Response:* NMFS agrees that area rotation and the measures to promote flexibility are appropriate for scallop management and is implementing this system through this final rule.

*Comment 37:* One commenter opposed area rotation because it would result in confusion about where vessels can fish.

*Response:* Rotational area management will apply only to vessels issued scallop permits. No new restrictions will be placed on vessels fishing for other species within the regulations for that fishery. Scallop vessel owners will receive a Small Entity Compliance Guide that will adequately explain the new provisions implemented by this final rule. In the future, scallop vessel owners will be informed of any changes to the area rotation management scheme so that they will be prepared for new area openings and closures.

*Comment 38:* One commenter supported the Hudson Canyon access program and encouraged swift closure of the Elephant Trunk area.

*Response:* NMFS has approved these measures in Amendment 10 and is implementing them through this final rule.

*Comment 39:* One commenter stated that access to groundfish closed areas is vital to the success of Amendment 10.

*Response:* Scallop fishing within the groundfish closed areas would provide long-term benefits to the scallop fishery by allowing scallop fishing effort to occur on large concentrations of scallops within the areas. However, access to the groundfish areas must be approved through an action consistent with and promulgated under the Northeast Multispecies FMP. The Council has recently approved and submitted to NMFS for review Joint Frameworks 16/39 for this purpose.

*Comment 40:* The Council recommended that the name of the closed area in the MA remain the Elephant Trunk closed area.

*Response:* NMFS received no other comments on this issue indicating that the use of the name ''Elephant Trunk'' would be confusing. Therefore this final rule does not rename that area.

*Comment 41:* One commenter expressed concern about allowing general category vessels to retain 400 lb of scallops within Sea Scallop Access Areas.

*Response:* NMFS determined that the intent of the Council was to allow general category vessels to retain up to 400 lb (181.4 kg) of shucked scallops or 50 U.S. bu (17.6 L) of in-shell scallops per trip inside Sea Scallop Access Areas and that such access was adequately justified in the Amendment 10 FSEIS. Therefore, this measure was approved in Amendment 10 and is implemented through this final rule.

*Comment 42:* Two commenters opposed the DAS allocation system in Amendment 10 that specifically allocates DAS to the access areas. One of the comments stated that, for larger vessels that typically harvest more than 18,000 lb (8,164.7 kg) of scallops per trip, the new access area possession limit would result in a significant decrease in scallop supply for the processing company. Requiring vessels to fish within the access areas may reduce product quality and may jeopardize the safety of the crews. One commenter stated that economic impacts of area-specific DAS is not well explained and that significant economic impacts would result. Nevertheless, the commenter supported the area-specific effort allocation scheme because it would stabilize the management program and provide for OY on a continuing basis. The commenter urged NMFS to implement the broken trip provision to offset negative impacts of the new program.

*Response:* The economic impacts of area rotation and effort allocation schemes are presented in Section 8.7 of the FSEIS. The analysis thoroughly compares alternatives. It is expected that most limited access scallop vessels will fish within the Sea Scallop Access Areas so that they make use of all of the available fishing opportunities. Social impacts are more difficult to assess, since the impacts would depend on preferences of vessel owners and the ability for vessel owners to adapt to the new measures. The social impacts are described in Section 8.8 of the FSEIS.

The 18,000 lb (8,164.7 kg) possession limit was determined by the Council to meet the fishing mortality objectives of the area rotation program and allow effort to be spread evenly among the scallop fleet. A higher possession limit would have resulted in fewer trips because it would take less time to harvest the TAC. Variable trip limits by vessel size was not considered.

NMFS agrees that the broken trip provision, as well as the one-for-one trip exchange provision, will offset the potential adverse effects of the more rigid effort allocation system.

*Comment 43:* One commenter stated that requiring DAS use in access areas is not in the best interest of the resource or the industry and that area management should be to protect juvenile scallops and groundfish only, not to manage the way that vessels fish.

*Response:* Amendment 10 implements an area-based management program that directs scallop fishing effort into areas where carefully considered levels of fishing effort is allowed. Therefore, management of scallop fishing effort in the areas is critical to prevent overfishing and promote achievement of OY.

*Comment 44:* One commenter expressed concern that the broken trip provision eliminated the ability for vessel operators to determine the need to terminate a Sea Scallop Access Area trip.

*Response:* It was not NMFS's intent to eliminate such flexibility, and this final rule clarifies that vessel operators will have the discretion to terminate Sea Scallop Access Area trips as necessary.

*Comment 45:* One commenter supported the provision that allows vessels to be compensated for trips that were terminated early. The commenter expressed concern that the provision included in the proposed rule did not allow the flexibility for the vessel captains to determine the need to terminate trips.

*Response:* The broken trip provision is included in this final rule, with some modifications as identified in the Changes from Proposed Rule to Final Rule section of this preamble. NMFS did not intend to eliminate captain discretion in determining whether or not it is appropriate to leave an access area. This final rule clarifies this issue.

*Comment 46:* One Commenter stated that there should be no compensation for vessels that terminate trips early and that, if included, the process would complicate administration and enforcement of the FMP measures.

*Response:* The measure is necessary to mitigate the constraints of the more inflexible system of area-specific effort allocation and to enhance the ability of the scallop fishery to achieve OY. While the measure that allows vessels to resume trips that have been terminated early may make the FMP somewhat more difficult to administer, NMFS has determined that the measure is feasible.

*Comment 47:* One Commenter expressed concern about the regulations pertaining to Sea Scallop Access Area one-for-one trip exchanges. The Commenter suggested that vessel owners should be allowed to conduct the exchanges and simply notify NMFS when the exchange has been made.

*Response:* NMFS must retain administration responsibilities for the one-for-one trip exchange program in order to ensure that vessels involved in an exchange have adequate trips to exchange. This administration will be particularly important in 2004 because numerous vessels have already taken trips into the Hudson Canyon Access Area, limiting trip exchange availability.

*Comment 48:* One Commenter opposed the program that allows one-for-one exchanges of Sea Scallop Access Area trips because it is confusing.

*Response:* While the trip exchange provision may appear to be somewhat complicated, it is necessary to provide flexibility for vessel owners that may not be able to make long trips to fish in distant Sea Scallop Access Areas. Such vessel owners could exchange a trip in an area inaccessible to them for a trip in a more accessible area. There would be no net change in the total number of trips for each area. NMFS will fully explain the trip exchange program in its Small Entity Compliance Guide for Amendment 10, which will be sent to all permit holders in the fishery.

*Comment 49:* Two Commenters urged NMFS to change the DAS default trigger date in Amendment 10 to September, to avoid confusion and complications when/if Joint Frameworks 16/39 are implemented.

*Response:* Because changing the default date in the final rule to September 15, 2004, is an administrative matter based on timing of Joint Frameworks 16/39, with no conservation impacts, the suggested change has been made in the final rule.

*Comment 50:* One Commenter stated that the increase in the dredge gear ring size from 3.5 to 4 inches (8.9 to 10.2 cm) in the Open Areas is not supported by analyses in the FSEIS and would cause significant economic harm to the scallop industry.

*Response:* The Amendment 10 analyses show that, over the long-term, 4-inch (10.2-cm) rings would improve yields from the scallop resource, reduce bottom area swept, and increase revenues. Amendment 10 establishes a long-term management approach that incorporates a wide range of measures to improve yield from the scallop resource while protecting EFH and minimizing bycatch to the extent practicable. The analysis shows that revenues for the first several years of management under Amendment 10 may be negatively affected by the ring size increase. However, the higher escapement of small scallops due to the use of 4-inch (10.2-cm) rings means that over time, more scallops will grow to a larger size. Over time, the composition of the scallop catch with 4-inch (10.2-cm) rings will be predominated by larger, more valuable scallops than would be possible using 3.5-inch (8.9-cm) rings. Over the long-term, therefore, the use of 4-inch (10.2-cm) rings would increase efficiency and catch of larger scallops, improve yields from the scallop resource, and increase revenues. More fishing effort may be spent initially by vessels to make up for potential losses in catch associated with the larger dredge ring size increase, thereby decreasing the short-term benefits to EFH and the insustry. However, this measure is consistent with achievement of the long-term goals of Amendment 10, and is supported by the Amendment 10 analyses.

*Comment 51:* The Council recommended a 4 to 6-week delay in the effective date of the 4-inch (10.2-cm) ring requirement in the Hudson Canyon Access Area and a 6-month delay for all other areas, as proposed in Amendment 10.

*Response:* This final rule reflects the Council's recommended delay in effectiveness.

*Comment 52:* One Commenter stated that the reasons for not adopting 12-inch (30.5-cm) twine top mesh size was due to projected economic losses resulting from a loss of scallop catch, and an increase in tow times resulting from reduced catch efficiency.

*Response:* This rationale is provided in the Amendment 10 FSEIS. NMFS has therefore decided to approve the Council's recommendation and implement the 10-inch (25.4 cm) twine top mesh size.

*Comment 53:* One Commenter supported observer and research TAC and DAS set-asides, but cautioned NMFS to not let the research TAC and DAS set-aside program to delay research.

*Response:* NMFS will make efforts to ensure that research is not impeded by the review process involved in the research TAC and DAS set-aside program. The Request for Proposals was published on April 15, 2004 (69 FR 19983) and NMFS has initiated the review process for submitted projects.

*Comment 54:* The Council recommended that the amount of DAS compensation for vessels carrying an observer should not be uniform for all trips.

*Response:* NMFS agrees and has clarified the requirement in this final rule.

*Comment 55:* One commenter stated that the full costs of observers should be paid by industry, that there should not be an allowance for extra DAS for vessels with observers, and that a high fee for vessels to fish should be established to help build funds for observers.

*Response:* NMFS cannot provide adequate observer coverage on scallop fishing trips without supplementary funding and industry payment of observer costs. Therefore, the FMP has effectively incorporated TAC set-asides to help defray the cost of observers incurred by scallop vessels. With the DAS and TAC set-aside system, the industry can be compensated for the costs of observers at no detriment to the scallop resource. Both the amount of DAS and TAC allowed to compensate for the cost of observers are factored into the estimation of the overall TAC and DAS estimated to achieve the fishing mortality and biomass goals of the FMP.

*Comment 56:* One commenter expressed concern that the cost of

observers included in the proposed rule was excessive and that the compensation program is poorly explained and would likely not provide sufficient compensation for vessels carrying observers. The commenter urged NMFS to clarify the costs of observers and the administration of the DAS set-aside program in the final rule, and suggested that trips with observers be charged a reduced rate of DAS. If the TAC and DAS set-asides are fully utilized prior to the end of the fishing year, NMFS notes that vessel owners requested to carry observers will have to bear the costs.

*Response:* The proposed rule indicated a cost of $1,100 per day for observers based on information available at the time the proposed rule was published. However, after the proposed rule was published, NMFS determined that the daily cost of observers is $719.12 in 2004 rather than the previous estimate of $1,100 per day. The Council provided an example of how the DAS set-aside compensation system would work in a hypothetical example in Section 5.1.8.1 of the FSEIS. This example used a daily cost of observers equal to $800 and estimated that a DAS adjustment factor of about 0.14 would be sufficient for vessel owners to pay for the cost. The analysis included in Section 8.2.4.2 of the FSEIS was used to determine the appropriate DAS adjustment factor that would provide sufficient observer coverage, while providing sufficient funds for vessels to receive compensation for carrying an observer. NMFS has again reviewed the information and taken the commenter's suggestions into consideration. NMFS has revised the regulations in this final rule such that vessels carrying an observer will initially be charged DAS at a rate of 0.86 DAS per actual DAS fished. This system, rather than adding DAS to a vessel's allocation, will be easier to administer with respect to trips taken at the end of the year, and will allow carry over DAS to be calculated more easily.

*Comment 57:* One commenter urged NMFS to eliminate the framework process from the FMP because the framework process ignores the requirements of the Magnuson-Stevens Act and other applicable law and is not consistent with Congress's intent.

*Response:* The framework process is a valid and legal method of adjusting fishery management measures. The FMP includes a set of management measures that can be adjusted through the abbreviated framework process which allows for more timely modifications in response to changing fishery, resource, and/or environmental conditions.

*Comment 58:* One commenter recommended that the framework process not include a consideration of the impacts of measures on EFH.

*Response:* The Council and NMFS are required by the Magnuson-Stevens Act to evaluate the impacts of management measures on EFH and the consistency of the measures with the Magnuson-Stevens Act EFH requirements. A framework action, however, need not implement management measures to minimize the impacts of fishing on EFH if the Council determines that such measures are not necessary or are outside of the scope of the framework it is developing, and the framework measures are consistent with Magnuson-Stevens Act EFH requirements. Mitigating measures should be considered if adverse effects of the fishery on EFH are potentially increased by a management action (*e.g.*, opening a closed area with highly sensitive EFH).

*Comment 59:* One commenter opposed the 2-year framework cycle stating that the Council's intent was to adjust DAS and area rotation every year.

*Response:* The Council recommended that the scheduled framework actions should occur every 2 years and that scheduled annual adjustments would be eliminated. However, this final rule allows that Council the flexibility to develop framework actions more frequently, as necessary.

*Comment 60:* One commenter expressed concern regarding the framework process that requires the Council's scallop PDT to recommend measures to ensure OY. The commenter stated that the process is illegal and is an attempt by NMFS to impose the new overfishing definition that was considered but rejected by the Council in development of Amendment 10.

*Response:* Because of the potential effect of long-term area closures, the existing overfishing definition is not sufficient by itself to assure OY from the areas open to fishing. The framework process approved in Amendment 10 and implemented through this final rule will allow the PDT and the Council the flexibility to take the existing status of the resource into account, determine optimum yield-per-recruit based on the condition of the scallop resource, and devise appropriate measures to assure that OY is achieved on a continuing basis. The achievement of optimum yield-per-recruit from the resource as available for harvest in the upcoming fishing years could result in differential fishing mortality rates for various spatial components, as long as OY is achieved for the resource as a whole. This process is intended to be more flexible than the new overfishing definition that was considered but rejected by the Council.

*Comment 61:* The Council commented that the cooperative industry survey is an integral part of the area rotation program adopted by the Council and must be used to provide data at the level of detail necessary for use in recommending adjustments to the rotation program. The Council commented that there is no precedent for including the details of a survey in an amendment or framework, and that such details would only constrain the survey. The Council commented that the research TAC set-aside would provide sufficient funds and ability for the surveys to be completed.

*Response:* For the reasons described in the ''Disapproved Measures'' section of the preamble to this final rule, NMFS disapproved the cooperative industry resource survey provision.

*Comment 62:* One commenter recommended that the scallop research section of the scallop regulations classify cooperative industry resource surveys as scientific research.

*Response:* The cooperative industry resource survey provision was disapproved.

*Comment 63:* One commenter stated that the scallop fishing industry should not be allowed to conduct cooperative research.

*Response:* The scallop industry has been actively involved in research aimed at assisting management decisions for more than 4 years through formal research set-aside programs. The industry has assisted NMFS and academics in conducting research with results that have been used frequently by fishery managers. It is critical that industry remain involved as active participants in the research process. Amendment 10 therefore establishes a research set-aside of TAC and DAS to help fund research while taking into consideration the amount of biological removal from the scallop resource.

*Comment 64:* One commenter stated that the cooperative industry survey is critical to the success of the fully adaptive area rotation program, but there is no detailed plan to implement the program. However, the commenter stated that the failure to establish protocols for the cooperative industry research program is not critical.

*Response:* NMFS agrees that surveys with more resolution than the NMFS Scallop Survey would help refine fishing area definitions areas to apply management measures more precisely. However, NMFS disapproved the measure for the reasons discussed in the ''Disapproved Measures'' section of the preamble of this final rule.

*Comments on Economic Impacts*

*Comment 65:* One commenter stated that the social and economic impacts analyses are insufficient and are misleading because they use 1996 dollar values to evaluate impacts. The commenter urged NMFS to incorporate more recent economic data.

*Response:* At the time that Amendment 10 was completed, existing guidance from the Office of Management and Budget was that analyses should use 1996 dollars as a baseline, with subsequent year's dollar values discounted to be consistent with the value of 1996 dollars. The Council's economic analysis complied with this guidance by using 1996 dollars to evaluate the economic impacts of measures. Comparisons of all of the considered alternatives is facilitated by the use of a single dollar value, taking out the effect of inflation. Nevertheless, the FSEIS includes some references to more recent values, so reasonable comparisons can still be made.

*Comment 66:* The Council suggests that the estimated compliance cost to the industry for the broken trip provision is an upper limit, and would not likely be exceeded.

*Response:* For the purpose of estimating compliance cost, the proposed rule estimated the maximum number of respondents to evaluate compliance costs. Otherwise, compliance costs would be underestimated.

*Comment 67:* The Council commented that the differential effects of area rotation are expected to vary, because areas of varying recruitment would result in varying closed and access area designations, not, as explained in the proposed rule, because of the different mobility of vessels and different reactions by the industry.

*Response:* While NMFS does not disagree, the discussion in the proposed rule was taken from the Council's discussion of distributional impacts included in Section 9.2.3 of the FSEIS.

*Comment 68:* The Council commented that the economic impacts analysis of the proposed restriction on limited access scallop vessels fishing outside of the DAS program might be strengthened by estimating the potential loss of DAS and revenues for limited access vessels if there were reductions in DAS caused by an increase in scallop landings by vessels fishing outside of DAS.

*Response:* NMFS disapproved the proposed restriction on limited access scallop vessels for the reasons specified in the ''Disapproved Measures'' section of the preamble of this final rule.

*Comment 69:* The Council considers increased efficiency of 4-inch (10.2-cm) rings to be the primary reason for selecting the 4-inch ring alternatives over the 3.5-inch (8.9-cm) ring alternatives rather than the reductions in bycatch and epifaunal displacement.

*Response:* The Council comment focused on only one portion of the discussion of economic impacts included in the IRFA. The discussion of increased efficiency of the 4-inch (10.2-cm) rings was included in the discussion of the impacts of the 4-inch (10.2-cm) ring requirement. In addition to that discussion, NMFS relied on the discussion provided by the Council in its IRFA in Section 9.0 of the FSEIS.

*Comment 70:* The Council stated that fishing by multispecies and monkfish vessels in closed areas has been prohibited since 1994, rather than 2001, as specified in the IRFA section of the proposed rule.

*Response:* NMFS agrees and notes this correction.

*Comment 71:* One commenter supported the collection-of-information requirements included in the proposed rule.

*Response:* NMFS agrees that the collection-of-information requirements are necessary for the management of the scallop fishery and implements them through this final rule.

*Comment 72:* The Small Business Administration, Office for Advocacy (Advocacy) expressed concerns about the economic impacts presented in the IRFA relative to the increase in scallop dredge minimum ring size, the cost of observer coverage and compensation through the DAS set-aside, and the potential effects of the regulations on vessels ending access area trips early.

*Response:* The FRFA included in this final rule clarifies the impacts of the Amendment 10 management measures on small businesses. Specific responses to the comments related to the IRFA are included in the FRFA and in responses to Comments 65 through 71.

*Comments on the Proposed Regulatory Text*

*Comment 73:* One commenter and the Council expressed concern that the proposed rule contained regulations that continued to refer to required effort reductions and rebuilding, despite the finding that the scallop resource is rebuilt and that additional effort reductions are not required for rebuilding.

*Response:* This final rule revises the regulatory text to include a more general characterization of the requirements so that they will be appropriate under any resource and fishing condition.

*Comment 74:* Two commenters requested that the final rule provide a definition of ''Open Areas.''

*Response:* NMFS has clarified the final rule by including definitions of ''Open Areas,'' ''Sea Scallop Access Areas,'' and ''Rotational Closed Areas.''

*Comment 75:* The Council provided suggestions on how to clarify the regulations in this final rule. Those changes that NMFS agreed are necessary and appropriate are described in the ''Changes from Proposed Rule to Final Rule'' section of the preamble of this final rule. The following suggested changes were not made for the reasons described below.

*Comment 75a:* The Council recommended that the prohibitions regarding possession of scallops within Rotational Closed Areas, Sea Scallop Access Areas, and EFH Closed areas be changed to allow transiting of the areas with scallops on board.

*Response:* NMFS has clarified the prohibition in this final rule. Section 648.14(a)(110) prohibits the possession of scallops that were caught in the areas, not possession of scallops caught in other areas. Section 648.14(a)(111) allows vessels to transit the areas with scallops on board.

*Comment 75b:* The Council suggested that the 4-inch (10.2-cm) ring requirement may require a modification to the regulation that requires a minimum number of rows of rings specified in § 648.51(b)(4) and that NMFS should obtain expert advice to determine if a change is appropriate.

*Response:* NMFS consulted with a gear research expert, who recommended against such a change. Given the lack of further advice from the Council, NMFS has not changed the requirement.

*Comment 75c:* The Council recommended changes to the regulatory text in relation to the proposed restriction on limited access scallop vessels fishing outside the scallop DAS program.

*Response:* Because NMFS disapproved this measure, all regulations included in the proposed rule relative to this measure were eliminated from this final rule.

*Comment 75d:* The Council recommended that § 648.56 include data collection requirements associated with scallop research.

*Response:* The recommended requirement would duplicate the reporting requirements specified in the TAC and DAS set-aside Request for Proposal and Federal Grant process. It is therefore not necessary to include the reporting requirement in the scallop regulations.

*Comment 75e:* The Council recommended that this final rule contain regulations associated with the cooperative industry survey.

*Response:* NMFS disapproved this measure for the reasons described in the ''Disapproved Measures'' section of the preamble of this final rule.

*Comment 75f:* The Council recommended that this final rule include, in the Framework Adjustment section of the scallop regulations at § 648.55, a detailed description of the area rotation process that would provide the Council with guidance for future actions to develop area rotation schemes.

*Response:* NMFS has made one change regarding this issue in the final rule to specify that Rotational Closed Areas will be considered where projected annual change in the scallop biomass exceeds 30 percent and that Sea Scallop Access Area openings will be considered where the projected change in the scallop biomass is less than 15 percent. All of the other factors referred to by the Council remain specified as guidelines, as described in Section 5.1.3.2.1 of the Amendment 10 FSEIS. Therefore, they are not included in this final rule as specific regulatory requirements for the Council to consider. The Council should refer back to the Amendment 10 document for guidance for development of future area rotation schemes.

*Comment 75g:* The Council recommended that this final rule include the Council's research priorities in § 648.56.

*Response:* NMFS believes that inclusion of research priorities in the scallop regulations would unnecessarily constrain the Council's future modification of priorities and they are therefore not included in this final rule. Research priorities may be modified by the Council at any time, and changes will be reflected in future RFP's published in association with research TAC and DAS set-aside program.

**Changes From the Proposed Rule**

NMFS has made several changes to the proposed rule as a result of public comment and because of the disapproval of two of the management measures proposed in Amendment 10. Other changes are technical or administrative in nature and clarify or otherwise enhance administration and/or enforcement of the fishery management program. These changes are listed below in the order that they appear in the regulations.

In § 648.2, definitions for ''Open areas,'' ''Rotational Closed Areas,'' and ''Sea scallop Access Areas'' are added in response to comments from the Council and the public to clarify references to these categories of areas in the regulations.

In § 648.10, paragraph (b) is reformatted, consistent with the final rule published for Amendment 13 to the Northeast Multispecies FMP (69 FR 22906, April 27, 2004).

Several changes were made in § 648.14 to eliminate changes to the prohibitions included in the proposed rule that would have resulted from the implementation of the disapproved restriction on limited access scallop vessels. Other changes to § 648.14 from the proposed rule were necessary to clarify the prohibitions and resulted in minor reformatting of the prohibitions.

In § 648.51, paragraph (b)(3)(ii) is modified based on public comment to ensure that the minimum ring size required under § 648.60(a)(6) is consistent with the minimum ring size restriction in § 648.60(b)(3).

In § 648.52, restrictions on the possession limit that would have been imposed by the disapproved restriction on limited access vessels have been removed.

In § 648.53, paragraph (b)(3) is redesignated as paragraph (b)(2) and paragraph (b)(2) is redesignated as paragraph (b)(3) to provide clarity in the transition between the emergency action currently in place and Amendment 10.

In § 648.53, the table in redesignated paragraph (b)(2) is revised to include the 2006 DAS allocations as recommended by the Council.

In § 648.53, paragraph (b)(4) is revised to move the DAS default date from August 15, 2004, to September 15, 2004, as requested by the Council and public comment.

In § 648.53, paragraph (c) is revised to better reflect the Council's recommendation that limited access vessels be allocated a maximum number of total trips in Sea Scallop Access Areas that can be taken in each Sea Scallop Access Area, provided the number of trips taken in an area does not exceed the maximum allowed number of trips for that area.

In § 648.53, paragraph (d) is revised to require that the Council adjusts the 2006 DAS allocations included in the table in § 648.53(b)(2) to ensure that management measures including DAS achieve OY.

In § 648.53, paragraph (e) clarifies the end-of-year carry-over for open area DAS at the request of the Council.

In § 648.53, paragraph (f) makes a technical change for determining how to account for DAS accrual for vessels that are carrying an at-sea observer by reducing DAS charge, rather than adding DAS.

In § 648.53, paragraph (h)(1) clarifies the DAS set-aside mechanism to clarify that DAS for research and observer coverage are deducted from the total available DAS, as recommended by the Council and public comment. This paragraph also incorporates an increase in the DAS set-aside amount if the 2004 DAS default is enacted on September 15, 2004, consistent with the recommendation of the Council.

In § 648.54, references to ''fishing mortality and effort reduction objectives'' have been changed to ''biomass and fishing mortality/effort limit objectives'' consistent with the recommendation of the Council and public comment.

In § 648.55, paragraph (a) is modified to better reflect the Council's recommendation that the selection of Rotational Closed Areas and Sea Scallop Access Areas be based on biomass growth rate, as approved by the Council and recommended in the Council's comment letter on the proposed rule.

In § 648.55, the proactive protected resources program in paragraph (e) is described in more detail, as recommended by the Council.

In § 648.55, the conversion from square miles to square kilometers is corrected in paragraph (g), as recommend by the Council and public comment.

In § 648.57, the area designations are clarified in paragraph (a) consistent with the area definitions in § 648.2. The reservation of paragraph (b) is not necessary and is deleted.

In § 648.59, the coordinates for the Hudson Canyon Sea Scallop Access Area have been corrected in paragraph (a)(2), as recommended by the Council.

In § 648.59, paragraph (c) is added to clarify the maximum number of trips, out of the total number of Sea Scallop Access Area trips, that can be taken in the Hudson Canyon Sea Scallop Access Area, as recommended by the Council.

In § 648.60, paragraph (a)(3) is reformatted and a table is included to clarify the trip and DAS charge per trip for Sea Scallop Access Areas, as recommended by the Council.

In § 648.60, the May 1 deadline for one-for-one trip exchanges in paragraph (3)(ii) (which was paragraph (3)(iv) in the proposed rule) has been changed to June 1, consistent with Amendment 10, as submitted, and the Council's recommendation in its comment letter. In addition, the review process for trip exchanges has been clarified based on public comment.

In § 648.60, based on the Council's and other commenters'

recommendations, paragraph (c) is changed to eliminate reasons for terminating a Sea Scallop Access Area trip to allow vessel operators the discretion to determine if a Sea Scallop Access Area trip should be terminated early. In addition, the regulations in paragraph (c) are clarified to reflect that DAS will be charged for the additional trip, but that vessels are not restricted to the reduced number of DAS, and that vessels are restricted by a reduced possession limit on the additional trip.

In § 648.61, the coordinates for the NLCA EFH Closure in paragraph (c) are corrected, as requested by the Council.

In § 648.61, paragraph (d) is re-designated as the Western Gulf of Maine EFH Closure, which was inadvertently omitted from the proposed rule, as identified by the Council. Paragraph (e) is added as the provision allowing transiting of the EFH closures by vessels with scallops on board.

In § 648.80(b)(11)(ii)(C), the minimum dredge gear twine top mesh size for scallop vessels fishing in the Southern New England Scallop Dredge Exemption is changed from 8 inches (20.3 cm) to 10 inches (25.4 cm), consistent with measures implemented for scallop vessels in this final rule.

In § 648.81(g)(2)(iii), the minimum dredge gear twine top mesh size for scallop vessels fishing in the Georges Bank Seasonal Closed Area is changed from 8 inches (20.3 cm) to 10 inches (25.4 cm), consistent with measures implemented for scallop vessels in this final rule.

Pursuant to the Paperwork Reduction Act (PRA), Part 902 of title 15 CFR displays control numbers assigned to NMFS information collection requirements by OMB. This part fulfills the requirements of section 3506(c)(1)(B)(i) of the PRA, which requires that agencies display a current control number, assigned by the Director of OMB, for each agency information collection requirement. This final rule codifies OMB control numbers for 0648–0491 for §§ 648.53 and 648.60.

**Classification**

The Regional Administrator determined that the FMP amendment implemented by this rule is necessary for the conservation and management of the Atlantic sea scallop fishery and is consistent with the Magnuson-Stevens Act and other applicable law.

The DAS allocations implemented in this final rule are less restrictive than the DAS allocations currently in effect through emergency action implemented on March 1, 2004 (69 FR 9970). Among other measures, this action implements DAS allocations of 42, 17, and 4 DAS for full-time, part-time, and occasional scallop vessels, respectively. Scallop vessels are precluded from exceeding the DAS that are allocated to the vessel based on its permit category. If continued in effect, limited access scallop vessels would only be able to continue fishing under the 34 full-time, 14 part-time, and 3 occasional DAS allocations, compared to 42 full-time, 17 part-time and 4 occasional DAS allocations approved in Amendment 10 and that are included in this final rule. NMFS is aware that some vessels are nearing the utilization of all of their DAS and cannot make additional trips until the DAS are increased under this final rule implementing Amendment 10. There are no conservation risks associated with the higher DAS allocations implemented under Amendment 10. Therefore the 30-day delay in effectiveness for the DAS allocations included in § 648.53(b)(2) under 5 U.S.C. 553(d)(1) is not applicable because this portion of the final rule relieves a restriction.

A notice of availability of the FSEIS, which analyzed the impacts of all of the measures under consideration in Amendment 10, was published on February 20, 2004 (69 FR 7941). Through the FSEIS, NMFS analyzed all reasonable alternatives to the measures being implemented, associated environmental impacts, the extent to which the impacts could be mitigated, and considered the objectives of the action in light of statutory mandates, including the Magnuson-Stevens Act. NMFS also considered public and agency comments received during the EIS review periods. In balancing the analysis and public interest, NMFS has decided to partially approve the Council's recommended measures. NMFS also concludes that all practicable means to avoid, minimize, or compensate for environmental harm from the proposed action have been adopted. A copy of the Record of Decision as required by NEPA for Amendment 10 is available from the Regional Administrator (*see* **ADDRESSES**).

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

The National Marine Fisheries Service (NMFS), pursuant to section 604 of the Regulatory Flexibility Act (RFA), has prepared this final regulatory flexibility analysis (FRFA) in support of Amendment 10. The FRFA describes the economic impact that this final rule along with other non-preferred alternatives will have on small entities.

The FRFA incorporates the economic impacts and analysis summarized in the initial regulatory flexibility analysis (IRFA) for the proposed rule to implement Amendment 10 (69 FR 8915, February 26, 2004), the comments and responses in the final rule, and the corresponding economic analyses prepared for Amendment 10 (*e.g.*, the FSEIS and the Regulatory Impact Review (RIR)). The contents of these incorporated documents are not repeated in detail here. A copy of the IRFA, the RIR and the FSEIS are available from NMFS, Northeast Regional Office and on the Northeast Regional Office Website (*see* **ADDRESSES**). A description of the reasons why this action is being considered, the objectives of, and legal basis for, the final rule is found in Amendment 10 and the preamble to the proposed and final rules.

*Description of Small Entities to Which the Rule Will Apply*

The measures included in Amendment 10 could impact any commercial vessel issued a Federal sea scallop vessel permit. All of these vessels are considered small business entities for purposes of the RFA because all of them grossed less than $3.5 million according to the dealer reports for the 2001 and 2002 fishing years. There are two main components of the scallop fleet: Vessels eligible to participate in the limited access sector of the fleet and vessels that participate in the open access General Category sector of the fleet. Limited access vessels are issued permits to fish for scallops on a Full-time, Part-time or Occasional basis. In 2001, there were 252 Full-time permits, 38 Part-time permits, and 20 Occasional permits. In 2002, there were 270 Full-time permits, 31 part time permits, and 19 Occasional permits. Because the fishing year ends on the last day of February of each year, 2003 vessel permit information was incomplete at the time the Amendment 10 analysis was completed. Much of the economic impacts analysis is based on the 2001 and 2002 fishing years; 2001 and 2002 were the last 2 years with complete permit information. According to the most recent vessel permit records for 2003, there were 278 Full-time limited access vessels, 32 Part-time limited access vessels, and 16 Occasional vessels. In addition, there were 2,293, 2,493, and 2,257 vessels issued permits to fish in the General Category in 2001, 2002, and 2003, respectively. Annual scallop revenue for the limited access sector averaged from $615,000 to $665,600 for Full-time vessels, $194,790 to $209,750 for Part-

time vessels, and $14,400 to $42,500 for Occasional vessels during the 2001 and 2002 fishing years. Total revenues per vessel, including revenues from species other than scallops, exceeded these amounts, but were less than $3.5 million per vessel.

Two criteria, disproportionality and profitability, were considered in determining the significance of regulatory impacts. The disproportionality criterion compares the effects of the regulatory action on small versus large entities. Because all of the vessels permitted to harvest sea scallops are considered to be small entities, there are no disproportional impacts on these entities. Due to a lack of individual vessel cost data, the analyses performed for this proposed rule use increases in fleet revenue as a proxy for vessel profitability.

*A Summary of the Significant Issues Raised by the Public Comments in Response to the IRFA, a Summary of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made in the Proposed Rule as a Result of Such Comments*

NMFS received several comments on the proposed rule including comments on the IRFA and comments that directly or indirectly dealt with economic impacts to small entities (vessels) resulting from the management measures presented in the proposed rule to implement Amendment 10.

Two commercial fishermen and an industry representative submitted comments regarding the efficacy of the area rotation program in regard to increasing economic returns to the scallop fleet, as follows:

*Comment A:* Commenters supporting the program stated that area rotation would contribute to continued high yield and value from the scallop fishery.

*Response:* The economic analysis concludes that the area rotation program will allow individual vessels to be more profitable by allowing them to increase their landings per unit of effort and to harvest scallops of higher yield that may have higher value in the marketplace, in the long-term.

*Comment B:* One member of the public opposed area rotation because of its complexity.

*Response:* Although Amendment 10 creates, on a comprehensive basis, a new management concept, NMFS does not believe that the new measures are overly complex. Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 requires the agency to explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a small entity compliance guide was prepared. The guide will be sent to all holders of permits issued for the Atlantic scallop fishery which sufficiently explains the area rotation and other measures implemented by the final rule. A NMFS contact person is listed on the guide for further assistance.

*Comment C:* Two scallop industry members commented that the area access effort allocation system that allocates DAS specifically for vessels to use within the access areas eliminates vessel flexibility.

*Response:* While the restrictions may limit flexibility in area choice, the program is necessary to protect the scallop resource while allowing vessels to increase their profitability in both the short and long term by allowing vessels to fish in areas that are known to have higher catch per unit of effort and yield associated with maintenance of stocks comprised of larger scallops. DAS is the management vehicle which will allow area allocation to be successful.

*Comment D:* Several commenters including the Mid-Atlantic Fishery Management Council urged NMFS to disapprove the measure that would restrict landings of scallops to 40 lb (18.14 kg) from 400 lb (181.4 kg) for limited access scallop vessels not fishing under DAS.

*Response:* NMFS has disapproved the 40 lb limit and will continue to allow limited access scallop vessels to retain up to 400 lb (181.4 kg). The economic impact of the disapproval will be positive vis-a-vis the proposed rule. However, there is no change from the status quo where 400 lb (181.4 kg)is currently allowed.

The Small Business Administration's Office of Advocacy (Advocacy) submitted comments on the proposed rule pertaining to the IRFA. These comments were similar to comments submitted by an industry representative organization. Comments E through G below describe the comments submitted by both Advocacy and the industry representative organization.

*Comment E:* In regard to the gear modifications required under Amendment 10, 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 economic impact is beneficial. The IRFA states that the change in ring size from 3.5 inches (8.9 cm) to 4 inches (10.2 cm) could result in a loss of about a million pounds over the first ten years of the requirement by allowing escapement of scallops, increased tow times, and increased bycatch. Advocacy questioned the conclusion that the overall benefits will be positive and questioned the conclusion that the long term impact will be beneficial if the industry is losing revenue while incurring costs. Advocacy suggests that NMFS clearly delineate its assumption 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. Instead of implementing this requirement without fully understanding its impact, Advocacy recommends that NMFS make the requirement optional rather than mandatory until NMFS can perform an analysis that will provide the industry with verifiable data regarding potential economic impact to small scallop vessels.

*Response:* When combined with the area rotation program, management measures under Amendment 10 including 4-inch (10.2-cm) rings, are expected to result in a zero to one million-pound (453.6-mt) increase in landings compared to the status quo in the first year with increases in successive years as the average scallop size increases. However, the 4-inch (10.2-cm) ring size results in landings from the scallop fleet of approximately 1 million pounds (452.6 mt) lower per year with a concomitant decrease in revenues (depending upon price) when compared to the same management measures with 3.5-inch (8.9-cm) rings. With access to groundfish closed areas, landings could increase by 7–24 million lb (3,175—10,886 mt) with 4-inch (10.2-cm) rings when compared to the status quo. The status quo option estimates a harvest of thirty-two million pounds (14,515 mt) per year (not thirty-two million pounds (14,515 mt) over the ten-year period as reported in footnote 9 of Advocacy's comments). Therefore, the resulting reduction in poundage from the increase to 4-inch (10.2-cm) rings compared to the same measures with 3.5-inch (8.9-cm) rings would be approximately 3.1 percent in the first year of the program. NMFS therefore agrees with Advocacy that 3.5-inch (8.9-cm) rings combined with a rotation program could represent a significant alternative. However, in the first ten years of the rotation plan, producer surplus, as measured in cumulative present value, is expected to be approximately $805 million for 3.5-inch (8.9-cm) rings vs $801 million for 4-inch (10.2-cm) rings (Table 305) while in

years 11 through 20 of the plan, producer surplus is expected to be $611 for 3.5-inch (8.9 cm) rings and $623 million for 4-inch (10.2-cm) rings (Table 309). While the impacts of 3.5-inch (8.9-cm) versus 4-inch (10.2-cm) rings for the 2 time periods are not significantly different because of high variability of the producer surplus estimate, the value of bycatch reduction, decreased habitat impact, and general conservation benefits of having a stock comprised of larger scallops supports the Council's determination of a more positive impact in the long-term. While Advocacy makes a valid point that increased tow times and escapement of smaller scallops may increase costs per unit of effort in the short term, the IRFA explains that the decrease in mortality on small scallops will increase the meat yield per scallop and concomitant revenues will increase since this would improve dredge efficiency in terms of scallop meats per tow in the long term. It is this potential increase in dredge productivity that Amendment 10 cites in its conclusion that the increase in ring size would have a positive economic impact in the long term. The IRFA also describes the results of recent studies that show an increase in dredge efficiency and a decrease in contact with the bottom, potentially reducing both bycatch and impacts on habitat consistent with the intent of the Magnuson-Stevens Act. The proposed alternative will have the effect of conserving the stocks of scallops by allowing the survival of smaller scallops and increasing the average size of scallop and fecundity of the stock consistent with National Standard 1 of the Magnuson-Stevens Act. The IRFA explains that the Council mitigated the effects of the 4-inch (10.2-cm) rings by coincidentally implementing an area rotation program which would allow increased annual harvest of 33 to 68 million lb (14,968 to 30,844 mt), as discussed below. In addition, there is expected to be mitigating effect by delaying this requirement for vessels fishing in the Open Areas for the first 6 months of the program. The requirement to use a 4-inch (10.2 cm) ring size is not expected to cause any vessel to retire from the fishery.

*Comment F:* Advocacy questioned NMFS observer cost estimate of $1,100 listed under the Reporting and Recordkeeping requirements section of the IRFA. NMFS also does not explain the methodology used to determine the 0.14 DAS adjustment given to vessels as compensation for observer costs.

*Response:* The $1,100 estimate was included in the proposed rule based on the estimated cost at the time the proposed rule was prepared and published. The current actual per day cost of carrying an observer, as charged by an outside contractor, is $719.12 per day. The 0.14 DAS adjustment factor was used in the proposed rule based on an analysis provided in Section 8 of the Amendment 10 FSEIS that provided a range of adjustment factors, the compensation that could be expected from the range of factors, and the DAS set-aside use rates resulting from the range of factors. The 0.14 DAS adjustment factor was selected because the resulting compensation and DAS set-aside use rate fell in the middle of the range provided in the analysis. This adjustment factor was shown to generate approximately $750 in revenue per day. The revenue calculation depends upon LPUE and the price of scallops for a given trip. Based on the analysis in Amendment 10, NMFS concludes that the 0.14 multiplier will result in an appropriate buffer between actual observer cost and revenue earned considering the variability in the harvest and price of sea scallops. However, NMFS has changed the way in which the factor will be applied. Rather than adding DAS to a vessel's DAS allocation for each DAS used, in 2004 and 2005, NMFS will apply a reduceed DAS accrual rate of 0.86 DAS for each DAS fished. This factor may change based on changing costs of observers. The resulting compensation is this same.

*Comment G:* The program to compensate for sea scallop access area trips that are terminated early alters the Council's intent because it would penalize the vessel for early termination if the Regional Administrator does not approve an adjustment request. NMFS is placing the captains in a position where they have to determine whether they should risk being penalized if the Regional Administrator decides that the situation was not an emergency. This type of dilemma could be harmful to the fishing industry from both the safety and economic standpoints.

*Response:* NMFS requires an accurate accounting system to determine the amount of DAS/poundage to be restored on a broken trip, so NMFS must maintain an oversight role for this measure. The language in the preamble to the final rule and regulations regarding broken trips clearly specify that vessel captains will have complete authority to identify the need to end a closed area trip, without any requirement for NMFS to concur in the decision. The regulatory text has been changed in this final rule to clarify that intent.

*Comment H:* An industry representative recommends against approving the use of the 4-inch (10.2-cm) rings. At a minimum, their introduction should be delayed by a minimum of six months following the implementation of the final rule.

*Response:* With the exception of the Hudson Canyon area, NMFS agrees with the recommendation to the extent that the commenter requests a 6 month delay in implementation. This would have the effect of mitigating the cost of new gear as discussed below.

*Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and Why Each One of the Other Significant Alternatives to the Rule Considered by the Agency Which Affect the Impact on Small Entities Was Rejected*

Numerous measures being implemented by this rule are being implemented in a manner that will minimize the economic impact on federal scallop permit holders. The area rotation program could allow scallop vessels to increase annual harvests from 33 to 68 million lb (14,968 to 30,844 mt) depending upon the rotation strategy and the ability to fish in multispecies closed areas. In assessing the overall economic impact to scallop vessels, the average scallop vessel should, at a minimum, break even in the first year of the rotation program because landings, even with no access to groundfish closed areas would increase to 33 to 34 million lb (14,968 to 15,422 mt) from a status quo of 32 million lb (14,514 mt). A zero to 1 million lb (453.6 mt) increase in landings would be expected from status quo even with 4-inch (10.2-cm) rings. With access to groundfish closed areas, subject to approval of Joint Frameworks 16/39, landings could increase from 32 million lb (14,514 mt) to 39–56 million lb (17,690 to 25,401 mt). In conclusion, although short term reductions in revenue are expected to result from the increase in ring size, overall economic impacts to scallop vessels from Amendment 10 are positive when considering all management measures due to increased fishing efficiency and improved yield and value from the scallop resource. The requirement to use a 4-inch (10.2-cm) ring size is not expected to cause any vessel to retire from the fishery.

The six-month delay in the implementation of the 4-inch (10.2-cm)

ring size will mitigate a large portion of the cost of new scallop ring bags since these gears are replaced frequently. The replacement of rings is more frequent if the vessel has fished in an area with a hard bottom as opposed to a soft or sandy bottom.

To mitigate the adverse impacts from area-specific controlled access trips, the final rule implements three measures: The one-to-one exchange of Sea Scallop Access Area trips; compensation for Sea Scallop Access Area trips terminated early; and compensation for the cost of carrying observers on scallop fishing trips. In addition, NMFS disapproved the measure that would have restricted limited access vessels from fishing for scallops outside of DAS. The one-to-one exchange of Sea Scallop Access Area trips is expected to provide flexibility to vessel owners in determining which areas to fish, thereby reducing costs and increasing revenues and profitability for vessels that take advantage of the voluntary trip exchange program. However, there will be some minor transaction costs associated with the exchange of the controlled area trips with another vessel, relating to the requirement to request the exchange form from NMFS. The net impacts of exchange should result in an increase in profitability for those participating vessels. Vessels that terminate a Sea Scallop Access Area trip will be compensated by being granted an additional trip, with the DAS and possession limit based on the amount of scallops landed and the number of DAS fished on the terminated trip. This will provide flexibility and promote safety at sea by allowing vessel captains to terminate a Sea Scallop Access Area trip if necessary, knowing that some compensation is possible. Providing DAS and TAC set-asides for vessels to use to help defray the cost of observers will help offset the negative effects associated with the cost to industry of carrying an observer.

The measures approved in Amendment 10 will function as a set of integrated measures that are designed to achieve a number of conservation and management objectives while minimizing the economic impacts on the industry, to the extent possible. Primarily, the measures in Amendment 10 would improve yield from the scallop resource, increase fishing efficiency, reduce fishing time, and reduce bycatch and adverse impacts on EFH. The Council NMFS considered all of the alternatives analyzed in the FSEIS and determined that the measures implemented by this final rule are preferable in terms of minimizing overall adverse impacts compared to benefits and ability to achieve the objectives of Amendment 10, the Magnuson-Stevens Act requirements, and all applicable law.

There are significant alternatives that were considered in Amendment 10 and that were described in the IRFA.The alternatives considered by the Council included the no action alternative (continuation of measures implemented by Amendment 7 to the FMP), and the status quo alternative (DAS and area management designed to meet fishing mortality and biomass objectives specified in Amendment 7 to the FMP). In addition, the Council considered alternatives with no area rotation component, as well as various rotational management alternatives with fixed area boundaries, various closure durations, and inflexible/mechanical rotation schemes. These were examined with both 3.5-inch (8.9-cm) and 4-inch (10.2-cm) ring requirements.

The area rotation program implemented in this final rule was found to have positive impacts compared to alternatives that did not include area rotation. This is because it protects small scallops during periods of their highest growth rates, and allows the boundaries of closed areas to be determined more accurately, improving both yield and fishing efficiency. The area rotation program also results in higher benefits compared to other rotational management alternatives with mechanical rotation and/or fixed boundaries.

The results also showed that area rotation combined with 3.5-inch (8.9-cm) rings could result in slightly higher economic benefits in the first 10 years of implementation, than area rotation combined with the proposed 4-inch (10.2-cm) ring size. Four-inch rings result in slightly lower landings, about a million pounds per year on the average, compared to the 3.5-inch (8.9-cm) ring options during the first 10 years from 2003 to 2013 under all scenarios. However, over the long term, the increase in ring size yields higher benefits than those achieved with the smaller ring size. In years 11 through 20 of the plan, producer surplus is expected to be $611 for 3.5-inch (8.9 cm) rings and $623 million for 4-inch (10.2-cm) rings (Table 309 in the FSEIS). While the impacts of 3.5-inch (8.9-cm) versus 4-inch (10.2-cm) rings for the 2 time periods are not significantly different because of high variability of the producer surplus estimate, the value of bycatch reduction, decreased habitat impact, and general conservation benefits of having a stock comprised of larger scallops supports the determination of a more positive impact in the long-term.

In addition, analysis of the ring size indicates that the 4-inch (10.2-cm) rings are preferable over the long-term because they reduce mortality on small scallops and, as a result improve yield and increase scallop revenues. By improving dredge efficiency in harvesting larger scallops, the use of 4-inch (10.2-cm) rings would also reduce bottom contact time, potentially reducing both bycatch of other species and impacts on habitat. Thus, the Council rejected alternatives with no area rotation and rotational management alternatives that incorporated the 3.5-inch (8.9-cm) ring size in favor of the measures implemented in this final rule.

The rotational management alternatives without access to the groundfish closed areas are estimated to result in an increase in average annual landings during the 10-year period from 32 million lb (14,515 mt) (with a value of approximately $142 million) for status quo, to 39–55 million lb (17,690–24,948 mt) (an increase of $201 million to $599 million over 10 years compared to status quo) with access to some groundfish closed areas. If the scallop fishery has access to all groundfish closed areas, the average annual landings for the period could increase to 68 million lb (30,844 mt) (an increase of $867 million over 10 years compared to status quo). Rotational management alternatives were also considered that would have utilized the groundfish closed areas as a ''stabilizing reservoir.'' These alternatives increase average landings to 40–46 million lb (18,144–20,865 mt) per year ($149 million to $172 million), while at the same time reducing the variability. While the measures included in Amendment 10 to allow access to the groundfish closed areas were not able to be implemented through Amendment 10, the Council has approved and submitted for NMFS review, Joint Frameworks 16/39 that would allow such access, if approved.

The Council considered a large number of alternatives to minimize and mitigate adverse effects of the fishery on EFH, to the extent practicable. The alternatives are briefly defined below, including the four alternatives adopted by the Council.

Alternative 1, status quo measures with no scallop access to Groundfish closed areas;

Alternative 2 (adopted by the Council), habitat benefits of other selected measures in Amendment 10 (including area rotation, effort allocation, gear restrictions, and other measures to facilitate area rotation and management of the FMP);

Alternative 3 (a and b), area closures to protect hard-bottom habitat;

Alternative 4, area closures to protect hard-bottom habitats that overlap proposed modified groundfish closed areas in Amendment 13;

Alternative 5 (a–d), area closures designed to protect EFH and balance fishery productivity;

Alternative 6 (adopted by Council), area closures within the Groundfish closed areas that maintain closure to the scallop fishery of areas that were closed to scallop fishing under Framework 13;

Alternative 7, area closures designed to protect areas of high EFH value and low scallop productivity;

Alternative 8 (a and b), area closures on the eastern portion of GB;

Alternative 9, area closures that include all of the existing year-round groundfish closed areas in southern New England, GB and the Gulf of Maine;

Alternative 10, restrictions on use of rock chains;

Alternative 11 (adopted by the Council), increase in the minimum ring size to 4 inches (10.2 cm);

Alternative 12 (adopted by the Council), habitat research funded through scallop TAC set-aside; and

Alternative 13, area based management and rotation based on habitat protection.

Many of these alternatives (1, 3a, 3b, 4, 5a–d, 6, 7, 8a, 8b, 9) proposed to close various areas and the impacts on revenues and economic benefits from various habitat closures were examined. Compared to the no action alternative of closing no areas, the impacts of the EFH closed area alternatives ranged from an average loss of total cumulative benefits of $5 million to $245 million dollars per year from 2004 through 2007. The analysis shows that Alternative 6 was ranked in the middle of the range of impacts with an average loss of total cumulative economic benefits of $32 million. Habitat alternatives, including Alternatives 5a, 5c, 5d, 8a, and 8b, would have lower negative economic impacts, with total economic benefit losses of between $5 million and $9 million. These alternatives were not chosen, however, because they either had impracticable impacts on some fishing communities that would be heavily impacted by the location of the closures and the alternatives would not satisfy the requirement to minimize adverse impacts of fishing on EFH, to the extent practicable. Due to the extent of the closures and the location relative to the scallop resource, the remainder of the EFH closed area alternatives rejected by the Council had much higher negative economic impacts, with total economic benefit losses of between $142 million and $245 million.

The alternatives considered by the Council also included measures other than closures. An alternative to restrict the use of rock chains (Alternative 10), was determined to have a neutral impact on habitat because it was not anticipated to reduce the footprint of the scallop fishery.

Finally, NMFS disapproved two provisions proposed by the Council. The disapproval of the cooperative industry resource survey provision would not have any economic impacts. The disapproval of the proposed restriction on limited access scallop vessels will allow some limited access scallop vessels to maintain revenues from the scallop catch that they have traditionally landed between scallop DAS trips. NMFS disapproved the measure because it was not based on the best available scientific information and was not necessary and appropriate. If implemented, this restriction for limited access scallop vessels may have caused undue adverse economic and social impacts to some vessels.

*Small Entity Compliance Guide*

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a small entity compliance guide was prepared. The guide will be sent to all holders of permits issued for the Atlantic Scallop fishery. In addition, copies of this final rule and guide (*i.e.*, permit holder letter) are available from the Regional Administrator and are also available at NMFS, Northeast Region (*see* **ADDRESSES**).

This rule contains three new collection-of-information requirements subject to the Paperwork Reduction Act (PRA). One measure that would have required a new collection-of-information requirement, the cooperative industry resource survey provision, has been disapproved and, therefore, no new collection-of-information requirement is included in this rule for that measure. The collection of this information has been approved by OMB.

The new reporting requirements and the estimated time for a response are as follows:

1. Broken trip adjustment, OMB #0648–0491 (0.533 hr per response);

2. One-to-one trip exchange, OMB #0648–0491 (0.083 hr per response);

3. Open area trip declaration for observer deployment, OMB #0648–0491 (0.033 hr per response); and

These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection information.

Public comment is sought regarding: Whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to NMFS and to OMB (*see* **ADDRESSES**).

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

**List of Subjects**

*15 CFR Part 902*

Reporting and recordkeeping requirements.

*50 CFR Part 648*

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: June 16, 2004.

**Rebecca Lent,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

■ For the reasons stated in the preamble, 15 CFR chapter IX, part 902, and 50 CFR chapter VI, part 648 are amended as follows: 15 CFR Chapter IX

## PART 902—NOAA INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT: OMB CONTROL NUMBERS

■ 1. The authority citation for part 902 continues to read as follows:

**Authority:** 44 U.S.C. 3501 *et seq.*

■ 2. In § 902.1, the table in paragraph (b) under 50 CFR is amended by revising the entry for § 648.53 and adding in numerical order an entry for § 648.60 with a new OMB control number to read as follows:

**§ 902.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.**

* * * * *

(b) Display.

| CFR part or section where the information collection requirement is located | Current OMB control number (all numbers begin with 0648–) |
|---|---|
| * * * * * | |
| 50 CFR: | |
| * * * * * | |
| 648.53 ..... | –0202 and –0491. |
| * * * * * | |
| 648.60 ..... | –0491. |
| * * * * * | |

**50 CFR Chapter VI**

■ 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 § 648.2, definitions for ''Open areas,'' ''Rotational Closed Areas,'' and ''Sea scallop Access Areas'' are added as follows:

**§ 648.2 Definitions.**

* * * * *

*Open areas*, with respect to the Atlantic sea scallop fishery, means any area that is not subject to restrictions of the Sea Scallop Access Areas specified in §§ 648.59 and 648.60, Rotational Closed Areas specified in § 648.58, or EFH Closed Areas specified in § 648.61.

* * * * *

*Rotational Closed Area*, with respect to the Atlantic sea scallop fishery, means an area that is closed only to scallop fishing for a period defined in § 648.58.

* * * * *

*Sea Scallop Access Area*, with respect to the Atlantic sea scallop fishery, means an area that has been designated under the Atlantic Sea Scallop Fishery Management Plan as an area with area-specific management measures that are designed to control fishing effort and mortality on only the portion of the scallop resource within the specified Sea Scallop Access Area. Such measures are not applicable in Open Areas defined above.

* * * * *

■ 3. In § 648.10, paragraphs (b)(1)(ii) and (b)(2)(ii) through (iv) are revised, and paragraph (b)(4) is added to read as follows:

**§ 648.10 DAS notification requirements.**

* * * * *

(b) * * *

(1) * * *

(ii) A scallop vessel issued an Occasional limited access permit when fishing under the Sea Scallop Area Access Program specified under § 648.60;

* * * * *

(2) * * *

(ii) Notification that the vessel is not under the DAS program must be received prior to the vessel leaving port. A vessel may not change its status after the vessel leaves port or before it returns to port on any fishing trip.

(iii) DAS for a vessel that is under the VMS notification requirements of this paragraph (b), with the exception of vessels that have elected to fish in the Eastern U.S./Canada Area, pursuant to § 648.85(a), begin with the first location signal received showing that the vessel crossed the VMS Demarcation Line after leaving port. DAS end with the first location signal received showing that the vessel crossed the VMS Demarcation Line upon its return to port. For those vessels that have elected to fish in the Eastern U.S./Canada Area pursuant to § 648.85(a)(2)(i), the requirements of this paragraph (b) begin with the first 30-minute location signal received showing that the vessel crossed into the Eastern U.S./Canada Area and end with the first location signal received showing that the vessel crossed out of the Eastern U.S./Canada Area upon beginning its return trip to port.

(iv) If the VMS is not available or not functional, and if authorized by the Regional Administrator, a vessel owner must provide the notifications required by paragraphs (b)(2)(i), (ii), and (iii) of this section by using the call-in notification system described under paragraph (c) of this section, instead of using the VMS specified in this paragraph (b).

* * * * *

(4) Atlantic Sea Scallop Vessel VMS Notification Requirements. To facilitate the deployment of at-sea observers, all sea scallop vessels issued limited access permits are required to comply with the additional VMS notification requirements specified in § 648.60(c)(2)(ii), except that scallop vessels issued Occasional scallop permits and not participating in the Area Access Program specified in § 648.60 may provide the specified information to the Regional Administrator by calling the Regional Administrator.

■ 4. In § 648.14, paragraph (a)(57)(iii) is added, and paragraphs (a)(97), (a)(110), (a)(111), (h)(5), (h)(9), and (h)(12)–(h)(24) and (i) are revised to read as follows:

**§ 648.14 Prohibitions.**

(a) * * *

* * * * *

(57) * * *

* * * * *

(iii) The scallops were harvested by a vessel that has been issued and carries on board a limited access or General Category scallop permit and the vessel is fishing under the provisions of the state waters exemption program specified in § 648.54.

(110) Fish for sea scallops in, or possess or land sea scallops from, the areas specified in §§ 648.58 and 648.61.

(111) Transit or be in the areas described in §§ 648.58 and 648.61 in possession of scallops, except when all fishing gear is unavailable for immediate use as defined in § 648.23(b), unless there is a compelling safety reason to be in such areas.

* * * * *

(h) * * *

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(5) Combine, transfer, or consolidate DAS allocations, except as allowed for one-for-one area access trip exchanges as specified in § 648.60(a)(3)(iv).

* * * * *

(9) Possess more than 40 lb (18.14 kg) of shucked, or 5 bu (176.2 l) of in-shell scallops, or participate in the DAS allocation program, while in the possession of trawl nets that have a maximum sweep exceeding 144 ft (43.9 m), as measured by the total length of the footrope that is directly attached to the webbing of the net, except as specified in § 648.51(a)(1).

* * * * *

(12) Possess or use dredge gear that does not comply with any of the provisions and specifications in § 648.51(a) or (b).

(13) Participate in the DAS allocation program with more persons on board the vessel than the number specified in § 648.51(c), including the operator, when the vessel is not docked or moored in port, unless otherwise authorized by the Regional Administrator.

(14) Fish under the small dredge program specified in § 648.51(e), with,

or while in possession of, a dredge that exceeds 10.5 ft (3.2 m) in overall width, as measured at the widest point in the bail of the dredge.

(15) Fish under the small dredge program specified in § 648.51(e) with more than five persons on board the vessel, including the operator, unless otherwise authorized by the Regional Administrator.

(16) Have a shucking or sorting machine on board a vessel that shucks scallops at sea while fishing under the DAS allocation program, unless otherwise authorized by the Regional Administrator.

(17) Refuse or fail to carry an observer after being requested to carry an observer by the Regional Administrator.

(18) Fail to provide an observer with required food, accommodations, access, and assistance, as specified in § 648.11.

(19) Fail to comply with any requirement for declaring in and out of the DAS allocation program specified in § 648.10.

(20) Fail to comply with any requirement for participating in the DAS Exemption Program specified in § 648.54.

(21) Fish with, possess on board, or land scallops while in possession of trawl nets, when fishing for scallops under the DAS allocation program, unless exempted as provided for in § 648.51(f).

(22) Fail to comply with the restriction on twine top described in § 648.51(b)(4)(iv).

(23) Fail to comply with any of the provisions and specifications of § 648.60.

(24) Possess or land more than 50 bu (17.62 hl) of in-shell scallops, as specified in § 648.52(d), once inside the VMS Demarcation Line by a vessel that, at any time during the trip, fished in or transited any area south of 42°20′ N. lat., except as provided in § 648.54.

(i) In addition to the general prohibitions specified in § 600.725 of this chapter and in paragraphs (a), (f), and (g) of this section, it is unlawful for any person owning or operating a vessel issued a general scallop permit to do any of the following:

(1) Fish for, possess, or land per trip, more than 400 lb (181.44 kg) of shucked or 50 bu (17.62 hl) of in-shell scallops.

(2) Fish for, possess, or land scallops on more than one trip per calendar day.

(3) Possess or use dredge gear that does not comply with any of the provisions or specification in § 648.51(a) or (b).

* * * * *

■ 5. Subpart D is revised to read as follows:

## Subpart D—Management Measures for the Atlantic Sea Scallop Fishery

Sec.



### § 648.50 Shell-height standard.

(a) *Minimum shell height.* The minimum shell height for in-shell scallops that may be landed, or possessed at or after landing, is 3.5 inches (8.9 cm). Shell height is a straight line measurement from the hinge to the part of the shell that is farthest away from the hinge.

(b) *Compliance and sampling.* Any time at landing or after, including when the scallops are received or possessed by a dealer or person acting in the capacity of a dealer, compliance with the minimum shell-height standard shall be determined as follows: Samples of 40 scallops each shall be taken at random from the total amount of scallops in possession. The person in possession of the scallops may request that as many as 10 sample groups (400 scallops) be examined. A sample group fails to comply with the standard if more than 10 percent of all scallops sampled are shorter than the shell height specified. The total amount of scallops in possession shall be deemed in violation of this subpart and subject to forfeiture, if the sample group fails to comply with the minimum standard.

### § 648.51 Gear and crew restrictions.

(a) *Trawl vessel gear restrictions.* Trawl vessels issued a limited access scallop permit under § 648.4(a)(2) while fishing under or subject to the DAS allocation program for scallops and authorized to fish with or possess on board trawl nets pursuant to § 648.51(f), any trawl vessels in possession of more than 40 lb (18.14 kg) of shucked, or 5 bu (176.2 L) of in-shell scallops in or from the EEZ, and any trawl vessels fishing for scallops in the EEZ, must comply with the following:

(1) *Maximum sweep.* The trawl sweep of nets shall not exceed 144 ft (43.9 m), as measured by the total length of the footrope that is directly attached to the webbing, unless the net is stowed and not available for immediate use, as specified in § 648.23.

(2) *Net requirements*—(i) *Minimum mesh size.* The mesh size for any scallop trawl net in all areas shall not be smaller than 5.5 inches (13.97 cm).

(ii) *Measurement of mesh size.* Mesh size is measured by using a wedge-shaped gauge having a taper of 2 cm (0.79 inches) in 8 cm (3.15 inches) and a thickness of 2.3 mm (0.09 inches), inserted into the meshes under a pressure or pull of 5 kg (11.02 lb). The mesh size is the average of the measurements of any series of 20 consecutive meshes for nets having 75 or more meshes, and 10 consecutive meshes for nets having fewer than 75 meshes. The mesh in the regulated portion of the net shall be measured at least five meshes away from the lacings running parallel to the long axis of the net.

(3) *Chafing gear and other gear obstructions*—(i) *Net obstruction or constriction.* A fishing vessel may not use any device or material, including, but not limited to, nets, net strengtheners, ropes, lines, or chafing gear, on the top of a trawl net, except that one splitting strap and one bull rope (if present), consisting of line and rope no more than 3 inches (7.62 cm) in diameter, may be used if such splitting strap and/or bull rope does not constrict in any manner the top of the trawl net. ''The top of the trawl net'' means the 50 percent of the net that (in a hypothetical situation) would not be in contact with the ocean bottom during a tow if the net were laid flat on the ocean floor. For the purpose of this paragraph (a)(3), head ropes shall not be considered part of the top of the trawl net.

(ii) *Mesh obstruction or constriction.* A fishing vessel may not use any mesh configuration, mesh construction, or other means on or in the top of the net, as defined in paragraph (a)(3)(i) of this section, if it obstructs the meshes of the net in any manner.

(iii) A fishing vessel may not use or possess a net capable of catching scallops in which the bars entering or exiting the knots twist around each other.

(b) *Dredge vessel gear restrictions.* All vessels issued limited access and General Category scallop permits and fishing with scallop dredges, with the exception of hydraulic clam dredges and mahogany quahog dredges in possession of 400 lb (181.44 kg), or less, of scallops, must comply with the following restrictions, unless otherwise specified:

(1) *Maximum dredge width.* The combined dredge width in use by or in possession on board such vessels shall not exceed 31 ft (9.4 m) measured at the widest point in the bail of the dredge,

except as provided under paragraph (e) of this section. However, component parts may be on board the vessel such that they do not conform with the definition of ''dredge or dredge gear'' in § 648.2, *i.e.,* the metal ring bag and the mouth frame, or bail, of the dredge are not attached, and such that no more than one complete spare dredge could be made from these component's parts.

(2) *Minimum mesh size.* The mesh size of a net, net material, or any other material on the top of a scallop dredge (twine top) possessed or used by vessels fishing with scallop dredge gear shall not be smaller than 10-inch (25.4-cm) square or diamond mesh.

(3) *Minimum ring size.* (i) Prior to December 23, 2004, the ring size used in a scallop dredge possessed or used by scallop vessels shall not be smaller than 3.5 inches (8.9 cm), unless otherwise required under the Sea Scallop Area Access Program specified in § 648.60(a)(6).

(ii) Beginning December 23, 2004, unless otherwise required under the Sea Scallop Area Access Program specified in § 648.60(a)(6), the ring size used in a scallop dredge possessed or used by scallop vessels shall not be smaller than 4 inches (10.2 cm).

(iii) Ring size is determined by measuring the shortest straight line passing through the center of the ring from one inside edge to the opposite inside edge of the ring. The measurement shall not include normal welds from ring manufacturing or links. The rings to be measured will be at least five rings away from the mouth, and at least two rings away from other rigid portions of the dredge.

(4) *Chafing gear and other gear obstructions*—(i) *Chafing gear restrictions.* No chafing gear or cookies shall be used on the top of a scallop dredge.

(ii) *Link restrictions.* No more than double links between rings shall be used in or on all parts of the dredge bag, except the dredge bottom. No more than triple linking shall be used in or on the dredge bottom portion and the diamonds. Damaged links that are connected to only one ring, *i.e.*, ''hangers,'' are allowed, unless they occur between two links that both couple the same two rings. Dredge rings may not be attached via links to more than four adjacent rings. Thus, dredge rings must be rigged in a configuration such that, when a series of adjacent rings are held horizontally, the neighboring rings form a pattern of horizontal rows and vertical columns. A copy of a diagram showing a schematic of a legal dredge ring pattern is available from the Regional Administrator upon request.

(iii) *Dredge or net obstructions.* No material, device, net, dredge, ring, or link configuration or design shall be used if it results in obstructing the release of scallops that would have passed through a legal sized and configured net and dredge, as described in this part, that did not have in use any such material, device, net, dredge, ring link configuration or design.

(iv) *Twine top restrictions.* In addition to the minimum twine top mesh size specified in paragraph (b)(2) of this section, vessels issued limited access scallop permits that are fishing for scallops under the DAS Program are also subject to the following restrictions:

(A) If a vessel is rigged with more than one dredge, or if a vessel is rigged with only one dredge and such dredge is greater than 8 ft (2.4 m) in width, there must be at least seven rows of non-overlapping steel rings unobstructed by netting or any other material between the terminus of the dredge (club stick) and the net material on the top of the dredge (twine top).

(B) If a vessel is rigged with only one dredge, and such dredge is less than 8 ft (2.4 m) in width, there must be at least four rows of non-overlapping steel rings unobstructed by netting or any other material between the club stick and the twine top of the dredge. (A copy of a diagram showing a schematic of a legal dredge with twine top is available from the Regional Administrator upon request).

(c) *Crew restrictions.* Limited access vessels participating in or subject to the scallop DAS allocation program may have no more than seven people aboard, including the operator, when not docked or moored in port, unless participating in the small dredge program as specified in paragraph (e) of this section, or otherwise authorized by the Regional Administrator.

(d) *Sorting and shucking machines.* (1) Shucking machines are prohibited on all limited access vessels fishing under the scallop DAS program, or any vessel in possession of more than 400 lb (181.44 kg) of scallops, unless the vessel has not been issued a limited access scallop permit and fishes exclusively in state waters.

(2) Sorting machines are prohibited on limited access vessels fishing under the scallop DAS program.

(e) *Small dredge program restrictions.* Any vessel owner whose vessel is assigned to either the part-time or Occasional category may request, in the application for the vessel's annual permit, to be placed in one category higher. Vessel owners making such request may be placed in the appropriate higher category for the entire year, if they agree to comply with the following restrictions, in addition to and notwithstanding other restrictions of this part, when fishing under the DAS program described in § 648.53, or in possession of more than 400 lb (181.44 kg) of shucked, or 50 bu (17.62 hl) of in-shell scallops:

(1) The vessel must fish exclusively with one dredge no more than 10.5 ft (3.2 m) in width.

(2) The vessel may not use or have more than one dredge on board.

(3) The vessel may have no more than five people, including the operator, on board.

(f) *Restrictions on use of trawl nets.* (1) A vessel issued a limited access scallop permit fishing for scallops under the scallop DAS allocation program may not fish with, possess on board, or land scallops while in possession of, trawl nets unless such vessel has on board a valid letter of authorization or permit that endorses the vessel to fish for scallops with trawl nets.

(2) *Replacement vessels.* A vessel that is replacing a vessel authorized to use trawl nets to fish for scallops under scallop DAS may also be authorized to use trawl nets to fish for scallops under scallop DAS if it meets the following criteria:

(i) Has not fished for scallops with a scallop dredge after December 31, 1987; or

(ii) Has fished for scallops with a scallop dredge on no more than 10 trips from January 1, 1988, through December 31, 1994, has an engine horsepower no greater than 450.

### § 648.52 Possession and landing limits.

(a) Except as provided in paragraph (e) of this section, owners or operators of vessels with a limited access scallop permit that have declared out of the DAS program as specified in § 648.10 or that have used up their DAS allocations, and vessels possessing a general scallop permit, unless exempted under the state waters exemption program described under § 648.54, are prohibited from possessing or landing per trip more than 400 lb (181.44 kg) of shucked, or 50 bu (17.62 hl) of in-shell scallops with no more than one scallop trip of 400 lb (181.44 kg) of shucked, or 50 bu (17.62 hl) of in-shell scallops, allowable in any calendar day.

(b) Owners or operators of vessels without a scallop permit, except vessels fishing for scallops exclusively in state waters, are prohibited from possessing or landing per trip, more than 40 lb (18.14 kg) of shucked, or 5 bu (176.2 L) of in-shell scallops. Owners or operators

of vessels without a scallop permit are prohibited from selling, bartering, or trading scallops harvested from Federal waters.

(c) Owners or operators of vessels with a limited access scallop permit that have declared into the Sea Scallop Area Access Program as described in § 648.60 are prohibited from fishing for, possessing or landing per trip more than the sea scallop possession and landing limit specified in § 648.60(a)(4).

(d) Owners or operators of vessels issued limited access or general category scallop permits fishing in or transiting the area south of 42°20′ N. Latitude at any time during a trip are prohibited from fishing for, possessing, or landing per trip more than 50 bu (17.62 hl) of in-shell scallops shoreward of the VMS Demarcation Line, unless when fishing under the state waters exemption specified under § 648.54.

**§ 648.53 DAS allocations.**

(a) *Assignment to DAS categories.* Subject to the vessel permit application requirements specified in § 648.4, for each fishing year, each vessel issued a limited access scallop permit shall be assigned to the DAS category (full-time, part-time, or Occasional) it was assigned to in the preceding year, except as provided under the small dredge program specified in § 648.51(e).

(b) *Open area DAS allocations.* (1) Total DAS to be used in all areas other than those specified in §§ 648.58 and 648.59 will be specified through the framework process as specified in § 648.55.

(2) Each vessel qualifying for one of the three DAS categories specified in the table in this paragraph (b)(2) (Full-time, Part-time, or Occasional) shall be allocated, for each fishing year, the maximum number of DAS it may participate in the limited access scallop fishery, according to its category, after deducting research and observer DAS set-asides from the total DAS allocation. A vessel whose owner/operator has declared it out of the scallop fishery, pursuant to the provisions of § 648.10, or that has used up its allocated DAS, may leave port without being assessed a DAS, as long as it does not possess or land more than 40 lb (18.14 kg) of shucked or 5 bu (176.2 L) of in-shell scallops and complies with all other requirements of this part. The annual DAS allocations for each category of vessel for the fishing years indicated, after deducting DAS for observer and research DAS set-asides, are as follows:

| DAS category | 2004[1] | 2005 | 2006 |
|---|---|---|---|
| Full-time | 42 | 117 | 152 |
| Part-time | 17 | 47 | 61 |
| Occasional | 4 | 10 | 13 |

[1] Unless additional DAS are allocated as specified in paragraph (b)(4) of this section.

(3) Prior to setting the DAS allocations specified in paragraph (b)(2) of this section, one percent of total available DAS will be set aside to help defray the cost of observers, as specified in paragraph (h)(i) of this section. Two percent of total available DAS will be set aside to pay for scallop related research, as outlined in paragraph (h)(ii) of this section.

(4) *Additional 2004 DAS.* Unless a final rule is published in the **Federal Register** by September 15, 2004, that implements a framework action allowing access by scallop vessels to portions of the Northeast multispecies closed areas specified in § 648.81(a), (b), and (c), the DAS allocations for the 2004 fishing year, beginning on September 15, 2004, shall increase by the following amounts:

| DAS category | 2004 DAS increase |
|---|---|
| Full-time | 20 |
| Part-time | 8 |
| Occasional | 1 |

(c) *Sea Scallop Access Area DAS allocations.* Limited access scallop vessels fishing in a Sea Scallop Access Area specified in § 648.59, under the Sea Scallop Area Access Program specified in § 648.60, are allocated a total of four trips, at a DAS charge of 12 DAS per trip regardless of actual trip length, to fish only within the Sea Scallop Access Areas. Limited access scallop vessels may fish a maximum number of trips and associated DAS in each Sea Scallop Access Area, as specified in § 648.60(a)(3). Trips taken in each Sea Scallop Access Area are deducted from the total trip and DAS allocation for Sea Scallop Access Areas. As an example, if the total number of trips that a scallop vessel may take is 2 trips, and there are 2 Sea Scallop Access Areas opened to controlled fishing, with Area A having a maximum of one trip and Area B having a maximum of 2 trips, the vessel may take one trip in Area A and one trip in Area B, or both of its total allocated trips in Area B.

(d) *Adjustments in annual DAS allocations.* Annual DAS allocations shall be established for 2 fishing years through biennial framework adjustments as specified in § 648.55. Except for DAS for the 2006 fishing year, if a biennial framework action is not undertaken by the Council and enacted by NMFS, the allocations from the most recent fishing year will continue. The Council must determine whether or not the 2006 DAS allocations specified in the table in paragraph (b)(4) of this section are sufficient to achieve OY. The 2006 DAS must be adjusted in the first biennial framework, initiated in 2005, if it is determined that the 2006 DAS allocations are unable to achieve OY in the 2006 fishing year. The Council may also adjust DAS allocations through a framework action at any time, if deemed necessary.

(e) *End-of-year carry-over for open area DAS.* With the exception of vessels that held a Confirmation of Permit History as described in § 648.4(a)(1)(i)(J) for the entire fishing year preceding the carry-over year, limited access vessels that have unused Open Area DAS on the last day of February of any year may carry over a maximum of 10 DAS, not to exceed the total Open Area DAS allocation by permit category, into the next year. DAS carried over into the next fishing year may only be used in Open Areas. DAS sanctioned vessels will be credited with unused DAS based on their unused DAS allocation, minus total DAS sanctioned.

(f) *Accrual of DAS.* Unless the vessel is carrying an observer and is authorized to be charged fewer DAS in Open Areas based on the total available DAS set aside under paragraph (h)(1) of this section, and unless participating in the Area Access Program described in § 648.60, DAS shall accrue to the nearest minute.

(g) *Good Samaritan credit.* Limited access vessels fishing under the DAS program and that spend time at sea assisting in a USCG search and rescue operation or assisting the USCG in towing a disabled vessel, and that can document the occurrence through the USCG, will not accrue DAS for the time documented.

(h) *DAS set-asides*—(1) *DAS set-aside for observer coverage.* As specified in paragraph (b)(3) of this section, to help defray the cost of carrying an observer, 1 percent of the total DAS will be set aside from the total DAS available for allocation, to be used by vessels that are assigned to take an at-sea observer on a trip other than an Area Access Program trip. The DAS set-aside for observer coverage for the 2004 and 2005 fishing years are 117 DAS and 304 DAS, respectively. On September 15, 2004, the 2004 DAS set-aside will increase by 54 DAS if a final rule is not published that allows access to the Georges Bank groundfish closed areas. Vessels carrying an observer will be compensated with reduced DAS accrual rates for each trip on which the vessel carries an observer. For each DAS that a vessel fishes for scallops with an observer on board, the DAS will accrue at a reduced rate based on an adjustment factor determined by the Regional Administrator on an annual basis, dependent on the cost of observers, catch rates, and amount of available DAS set-aside. The Regional Administrator shall notify vessel owners of the cost of observers and the DAS adjustment factor through a permit holder letter issued prior to the start of each fishing year. The number of DAS that are deducted from each trip based on the adjustment factor will be deducted from the observer DAS set-aside amount in the applicable fishing year. Utilization of the DAS set-aside will be on a first-come, first-served basis. When the DAS set-aside for observer coverage has been utilized, vessel owners will be notified that no additional DAS remain available to offset the cost of carrying observers. The obligation to carry an observer will not be waived due to the absence of additional DAS allocation.

(2) *DAS set-aside for research.* As specified in paragraph (b)(3) of this section, to help support the activities of vessels participating in certain research, as specified in § 648.56; the DAS set-aside for research for the 2004 and 2005 fishing years are 233 DAS and 607 DAS, respectively. Vessels participating in approved research will be authorized to use additional DAS in the applicable fishing year. Notification of allocated additional DAS will be provided through a letter of authorization, or Exempted Fishing Permit issued by NMFS, as appropriate.

### § 648.54 State waters exemption.

(a) *Limited access scallop vessel exemption.* (1) *DAS requirements.* Any vessel issued a limited access scallop permit is exempt from the DAS requirements specified in § 648.53(b) while fishing exclusively landward of the outer boundary of a state's waters, provided the vessel complies with paragraphs (d) through (g) of this section.

(2) *Gear and possession limit restrictions.* Any vessel issued a limited access scallop permit that is exempt from the DAS requirements of § 648.53(b) under paragraph (a) of this section is also exempt from the gear restrictions specified in § 648.51(a), (b), (e)(1) and (e)(2), and the possession restrictions specified in § 648.52(a), while fishing exclusively landward of the outer boundary of the waters of a state that has been deemed by the Regional Administrator under paragraph (c) of this section to have a scallop fishery and a scallop conservation program that does not jeopardize the biomass and fishing mortality/effort limit objectives of the Scallop FMP, provided the vessel complies with paragraphs (d) through (g) of this section.

(b) *General Category scallop vessel gear and possession limit restrictions.* Any vessel issued a general scallop permit is exempt from the gear restrictions specified in § 648.51(a), (b), (e)(1) and (e)(2) while fishing exclusively landward of the outer boundary of the waters of a state that has been determined by the Regional Administrator under paragraph (b)(3) of this section to have a scallop fishery and a scallop conservation program that does not jeopardize the biomass and fishing mortality/effort limit objectives of the Scallop FMP, provided the vessel complies with paragraphs (d) through (g) of this section.

(c) *State eligibility for exemption.* (1) A state may be eligible for the state waters exemption if it has a scallop fishery and a scallop conservation program that does not jeopardize the biomass and fishing mortality/effort limit objectives of the Scallop FMP.

(2) The Regional Administrator shall determine which states have a scallop fishery and which of those states have a scallop conservation program that does not jeopardize the biomass and fishing mortality/effort limit objectives of the Scallop FMP.

(3) Maine, New Hampshire, and Massachusetts have been determined by the Regional Administrator to have scallop fisheries and scallop conservation programs that do not jeopardize the biomass and fishing mortality/effort limit objectives of the Scallop FMP. These states must immediately notify the Regional Administrator of any changes in their respective scallop conservation program. The Regional Administrator shall review these changes and, if a determination is made that the state's conservation program jeopardizes the biomass and fishing mortality/effort limit objectives of the Scallop FMP, or that the state no longer has a scallop fishery, the Regional Administrator shall publish a rule in the **Federal Register**, in accordance with the Administrative Procedure Act, amending this paragraph (c)(3) to eliminate the exemption for that state. The Regional Administrator may determine that other states have scallop fisheries and scallop conservation programs that do not jeopardize the biomass and fishing mortality/effort limit objectives of the Scallop FMP. In such case, the Regional Administrator shall publish a rule in the **Federal Register**, in accordance with the Administrative Procedure Act, amending this paragraph (c)(3) to provide the exemption for such states.

(d) *Notification requirements.* Vessels fishing under the exemptions provided by paragraph(s) (a)(1) and/or (a)(2) of this section must notify the Regional Administrator in accordance with the provisions of § 648.10(e).

(e) *Restriction on fishing in the EEZ.* A vessel fishing under a state waters exemption may not fish in the EEZ during the time in which it is fishing under the state waters exemption, as declared under the notification requirements of this section.

(f) *Duration of exemption.* An exemption expires upon a change in the vessel's name or ownership, or upon notification by the participating vessel's owner.

(g) *Applicability of other provisions of this part.* A vessel fishing under the exemptions provided by paragraphs (a) and/or (b) of this section remains subject to all other requirements of this part.

### § 648.55 Framework adjustments to management measures

(a) Biennially, or upon a request from the Council, the Regional Administrator shall provide the Council with information on the status of the scallop resource. Within 60 days of receipt of that information, the Council PDT shall assess the condition of the scallop resource to determine the adequacy of the management measures to achieve the stock-rebuilding objectives. Based on this information, the PDT shall prepare a Stock Assessment and Fishery Evaluation (SAFE) Report that provides the information and analysis needed to evaluate potential management adjustments. Based on this information and analysis, the Council shall initiate

a framework adjustment to establish or revise DAS allocations, rotational area management programs, TACs, scallop possession limits, or other measures to achieve FMP objectives and limit fishing mortality. The Council's development of an area rotation program shall take into account at least the following factors: General rotation policy; boundaries and distribution of rotational closures; number of closures; minimum closure size; maximum closure extent; enforceability of rotational closed and re-opened areas; monitoring through resource surveys; and re-opening criteria. Rotational Closures should be considered where projected annual change in scallop biomass is greater than 30 percent. Areas should be considered for Sea Scallop Access Areas where the projected annual change in scallop biomass is less than 15 percent.

(b) The preparation of the SAFE Report shall begin on or about June 1, 2005, for fishing year 2006, and on or about June 1 of the year preceding the fishing year in which measures will be adjusted. If the biennial framework action is not undertaken by the Council, or if a final rule resulting from a biennial framework is not published in the **Federal Register** with an effective date of March 1, in accordance with the Administrative Procedure Act, the measures from the most recent fishing year shall continue, beginning March 1 of each fishing year.

(c) In the SAFE Report, the Scallop PDT shall review and evaluate the existing management measures to determine if the measures are achieving the FMP objectives and OY from the scallop resource as a whole. In doing so, the PDT shall consider the effects of any closed areas, either temporary, indefinite, or permanent, on the ability of the FMP to achieve OY and prevent overfishing on a continuing basis, as required by National Standard 1 of the Magnuson-Stevens Act. If the existing management measures are deemed insufficient to achieve FMP objectives and/or are not expected to achieve OY and prevent overfishing on a continuing basis, the PDT shall recommend to the Council appropriate measures and alternatives that will meet FMP objectives, achieve OY, and prevent overfishing on a continuing basis. When making the status determination in the SAFE Report, the PDT shall calculate the stock biomass and fishing mortality for the entire unit stock and consider all sources of scallop mortality to compare with the minimum biomass and maximum fishing mortality thresholds.

(d) In order to assure that OY is achieved and overfishing is prevented, on a continuing basis, the PDT shall recommend management measures necessary to achieve optimum yield-per-recruit from the exploitable components of the resource (*e.g.*, those components available for harvest in the upcoming fishing years), taking into account at least the following factors:

(1) Differential fishing mortality rates for the various spatial components of the resource;

(2) Overall yields from the portions of the scallop resource available to the fishery;

(3) Outlook for phasing in and out closed or controlled access areas under the Area Rotation Program; and

(4) Potential adverse impacts on EFH.

(e) After considering the PDT's findings and recommendations, or at any other time, if the Council determines that adjustments to, or additional management measures are necessary, it shall develop and analyze appropriate management actions over the span of at least two Council meetings. To address interactions between the scallop fishery and sea turtles and other protected species, such adjustments may include proactive measures including, but not limited to, the timing of Sea Scallop Access Area openings, seasonal closures, gear modifications, increased observer coverage, and additional research. The Council shall provide the public with advance notice of the availability of both the proposals and the analyses, and opportunity to comment on them prior to and at the second Council meeting. The Council's recommendation on adjustments or additions to management measures must include measures to prevent overfishing of the available biomass of scallops and ensure that OY is achieved on a continuing basis, and must come from one or more of the following categories:

(1) DAS changes.
(2) Shell height.
(3) Offloading window reinstatement.
(4) Effort monitoring.
(5) Data reporting.
(6) Trip limits.
(7) Gear restrictions.
(8) Permitting restrictions.
(9) Crew limits.
(10) Small mesh line.
(11) Onboard observers.
(12) Modifications to the overfishing definition.
(13) VMS Demarcation Line for DAS monitoring.
(14) DAS allocations by gear type.
(15) Temporary leasing of scallop DAS requiring full public hearings.
(16) Scallop size restrictions, except a minimum size or weight of individual scallop meats in the catch.
(17) Aquaculture enhancement measures and closures.
(18) Closed areas to increase the size of scallops caught.
(19) Modifications to the opening dates of closed areas.
(20) Size and configuration of rotation management areas.
(21) Controlled access seasons to minimize bycatch and maximize yield.
(22) Area-specific DAS or trip allocations.
(23) TAC specifications and seasons following re-opening.
(24) Limits on number of area closures.
(25) TAC or DAS set-asides for funding research.
(26) Priorities for scallop-related research that is funded by a TAC or DAS set-aside.
(27) Finfish TACs for controlled access areas.
(28) Finfish possession limits.
(29) Sea sampling frequency.
(30) Area-specific gear limits and specifications.
(31) Any other management measures currently included in the FMP.

(f) The Council must select an alternative that will achieve OY and prevent overfishing on a continuing basis, and which is consistent with other applicable law. If the Council fails to act or does not recommend an approvable alternative, the Regional Administrator may select one of the alternatives developed and recommended by the PDT, which would achieve OY and prevent overfishing on a continuing basis and is consistent with applicable law, and shall implement such alternative pursuant to the Administrative Procedure Act.

(g) The Council may make recommendations to the Regional Administrator to implement measures in accordance with the procedures described in this subpart to address gear conflict as defined under § 600.10 of this chapter. In developing such recommendation, the Council shall define gear management areas, each not to exceed 2,700 $mi^2$ (6,993 $km^2$), and seek industry comments by referring the matter to its standing industry advisory committee for gear conflict, or to any ad hoc industry advisory committee that may be formed. The standing industry advisory committee or ad hoc committee on gear conflict shall hold public meetings seeking comments from affected fishers and develop findings and recommendations on addressing the gear conflict. After receiving the industry advisory committee findings and recommendations, or at any other time, the Council shall determine whether it is necessary to adjust or add

management measures to address gear conflicts and which FMPs must be modified to address such conflicts. If the Council determines that adjustments or additional measures are necessary, it shall develop and analyze appropriate management actions for the relevant FMPs over the span of at least two Council meetings. The Council shall provide the public with advance notice of the availability of the recommendation, the appropriate justification and economic and biological analyses, and opportunity to comment on them prior to and at the second or final Council meeting before submission to the Regional Administrator. The Council's recommendation on adjustments or additions to management measures for gear conflicts must come from one or more of the following categories:

(1) Monitoring of a radio channel by fishing vessels.

(2) Fixed gear location reporting and plotting requirements.

(3) Standards of operation when gear conflict occurs.

(4) Fixed gear marking and setting practices.

(5) Gear restrictions for specific areas (including time and area closures).

(6) VMS.

(7) Restrictions on the maximum number of fishing vessels or amount of gear.

(8) Special permitting conditions.

(h) The measures shall be evaluated and approved by the relevant committees with oversight authority for the affected FMPs. If there is disagreement between committees, the Council may return the proposed framework adjustment to the standing or ad hoc gear conflict committee for further review and discussion.

(i) Unless otherwise specified, after developing a framework adjustment and receiving public testimony, the Council shall make a recommendation to the Regional Administrator. The Council's recommendation must include supporting rationale and, if management measures are recommended, an analysis of impacts and a recommendation to the Regional Administrator on whether to publish the framework adjustment as a final rule. If the Council recommends that the framework adjustment should be published as a final rule, the Council must consider at least the following factors and provide support and analysis for each factor considered:

(1) Whether the availability of data on which the recommended management measures are based allows for adequate time to publish a proposed rule, and whether regulations have to be in place for an entire harvest/fishing season.

(2) Whether there has been adequate notice and opportunity for participation by the public and members of the affected industry, consistent with the Administrative Procedure Act, in the development of the Council's recommended management measures.

(3) Whether there is an immediate need to protect the resource or to impose management measures to resolve gear conflicts.

(4) Whether there will be a continuing evaluation of management measures adopted following their promulgation as a final rule.

(j) If the Council's recommendation includes adjustments or additions to management measures, and if, after reviewing the Council's recommendation and supporting information:

(1) The Regional Administrator approves the Council's recommended management measures, the Secretary may, for good cause found pursuant to the Administrative Procedure Act, waive the requirement for a proposed rule and opportunity for public comment in the **Federal Register**. The Secretary, in doing so, shall publish only the final rule. Submission of a recommendation by the Council for a final rule does not effect the Secretary's responsibility to comply with the Administrative Procedure Act; or

(2) The Regional Administrator approves the Council's recommendation and determines that the recommended management measures should be published first as a proposed rule, the action shall be published as a proposed rule in the **Federal Register**. After additional public comment, if the Regional Administrator concurs with the Council recommendation, the action shall be published as a final rule in the **Federal Register**; or

(3) The Regional Administrator does not concur, the Council shall be notified, in writing, of the reasons for the non-concurrence.

(k) Nothing in this section is meant to derogate from the authority of the Secretary to take emergency action under § 305(c) of the Magnuson-Stevens Act.

### § 648.56 Scallop research.

(a) Annually, the Council and NMFS shall prepare and issue a Request for Proposals (RFP) that identifies research priorities for projects to be conducted by vessels using research set-aside as specified in §§ 648.53(b)(3) and 648.60(e).

(b) Proposals submitted in response to the RFP must include the following information, as well as any other specific information required within the RFP: A project summary that includes the project goals and objectives; the relationship of the proposed research to scallop research priorities and/or management needs; project design; participants other than the applicant, funding needs, breakdown of costs, and the vessel(s) for which authorization is requested to conduct research activities.

(c) NMFS shall make the final determination as to what proposals are approved and which vessels are authorized to take scallops in excess of possession limits, utilize DAS set-aside for research, or take additional trips into Access Areas. NMFS shall provide authorization of such activities to specific vessels by letter of acknowledgement, letter of authorization, or Exempted Fishing Permit issued by the Regional Administrator, which must be kept on board the vessel.

(d) Upon completion of scallop research projects approved under this part, researchers must provide the Council and NMFS with a report of research findings, which must include: A detailed description of methods of data collection and analysis; a discussion of results and any relevant conclusions presented in a format that is understandable to a non-technical audience; and a detailed final accounting of all funds used to conduct the sea scallop research.

### § 648.57 Sea scallop area rotation program.

(a) An area rotation program is established for the scallop fishery, which may include areas closed to scallop fishing defined in § 648.58, and/or Sea Scallop Access Areas defined in § 648.59, subject to the Sea Scallop Area Access program requirements specified in § 648.60. Areas not defined as Rotational Closed Areas, Sea Scallop Access Areas, EFH Closed Areas, or areas closed to scallop fishing under other FMPs, are open to scallop fishing as governed by the other management measures and restrictions in this part. The Council's development of area rotation programs is subject to the framework adjustment process specified in § 648.55, including the Area Rotation Program factors included in § 648.55(a).

### § 648.58 Rotational Closed Areas.

(a) *Mid-Atlantic (Elephant Trunk) Closed Area.* Through February 28, 2007, no vessel may fish for scallops in, or possess or land scallops from, the area known as the Elephant Trunk Closed Area. No vessel may possess scallops in the Elephant Trunk Closed Area, unless such vessel is only transiting the area as provided in

paragraph (b) of this section. The Elephant Trunk 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 |
|---|---|---|
| ET1 | 38°50′ N. | 74°20′ W. |
| ET2 | 38°10′ N. | 74°20′ W. |
| ET3 | 38°10′ N. | 73°30′ W. |
| ET4 | 38°50′ N. | 73°30′ W. |
| ET1 | 38°50′ N. | 74°20′ W. |

(b) *Transiting.* No vessel possessing scallops may enter or be in the area(s) specified in paragraph (a) of this section unless the vessel is transiting the area and the vessel's fishing gear is unavailable for immediate use as defined in § 648.23(b), or there is a compelling safety reason to be in such areas without all such gear being unavailable for immediate use.

**§ 648.59 Sea Scallop Access Areas.**

(a) *Hudson Canyon Sea Scallop Access Area.* (1) Through February 28, 2006, vessels issued limited access scallop permits may not fish for scallops in, or possess or land scallops from, the area known as the Hudson Canyon Sea Scallop Access Area, described in paragraph (a)(2) of this section, unless the vessel is participating in, and complies with the requirements of, the area access program described in § 648.60. Limited access scallop vessels may not possess scallops in the Hudson Canyon Sea Scallop Access Area, unless such vessel is participating in, and complies with the requirement of, the area access program described in § 648.60, or is transiting the area as provided in paragraph (b) of this section.

(2) The Hudson Canyon Sea Scallop Access 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 |
|---|---|---|
| H1 | 39°30′ N. | 73°10′ W. |
| H2 | 39°30′ N. | 72°30′ W. |
| H3 | 38°30′ N. | 73°30′ W. |
| H4/ET4 | 38°50′ N. | 73°30′ W. |
| H5 | 38°50′ N. | 73°42′ W. |
| H1 | 39°30′ N. | 73°10′ W. |

(b) *Transiting.* Limited access sea scallop vessels fishing under a scallop DAS that have not declared a trip into the Sea Scallop Area Access Program may not fish for or possess scallops in the Sea Scallop Access Areas described in this section, and may not enter or be in such areas unless the vessel is transiting the area and the vessel's fishing gear is unavailable for immediate use as defined in § 648.23(b), or there is a compelling safety reason to be in such areas without all such gear being unavailable for immediate use.

(c) *Number of trips.* Subject to the total number of Sea Scallop Access Area trips allowed for each limited access scallop permit category specified in § 648.60(b)(3), vessels issued limited access scallop permits may fish no more than four trips during 2004 and three trips during 2005 in the Hudson Canyon Access Area, unless the vessel has exchanged a trip with another vessel for another Sea Scallop Access Area trip, as specified in § 648.60(a)(3)(iv), or unless the vessel is taking a compensation trip for a prior Sea Scallop Access Area trip that was terminated early, as specified in § 648.60(c).

**§ 648.60 Sea scallop area access program requirements.**

(a) Vessels issued a limited access scallop permit may fish in the Sea Scallop Access Areas specified in § 648.59 and during seasons specified in § 648.59, when fishing under a scallop DAS, provided the vessel complies with the requirements specified in paragraphs (a)(1) through (a)(8) and (b) through (e) of this section. Unless otherwise restricted under this part, vessels issued General Category scallop permits may fish in the Sea Scallop Access Areas and during seasons specified in § 648.59, subject to the possession limit specified in § 648.52(b). If no season is specified in § 648.59, the Access Area is open from March 1 through February 28 of each fishing year.

(1) *VMS.* The vessel must have installed on board an operational VMS unit that meets the minimum performance criteria specified in §§ 648.9 and 648.10, and paragraph (e) of this section.

(2) *Declaration.* (i) Prior to the 25th day of the month preceding the month in which fishing is to take place, the vessel must submit a monthly report through the VMS e-mail messaging system of its intention to fish in any Sea Scallop Access Area, along with the following information: Vessel name and permit number, owner and operator's name, owner and operator's phone numbers, and number of trips anticipated for each Sea Scallop Access Area in which it intends to fish. The Regional Administrator may waive a portion of this notification period for trips into the Sea Scallop Access Areas if it is determined that there is insufficient time to provide such notification prior to an access opening. Notification of this waiver of a portion of the notification period shall be provided to the vessel through a permit holder letter issued by the Regional Administrator.

(ii) In addition to the information described in paragraph (c)(2)(i) of this section, and for the purpose of selecting vessels for observer deployment, a vessel shall provide notice to NMFS of the time, port of departure, and specific Sea Scallop Access Area to be fished, at least 72 hours, unless otherwise notified by the Regional Administrator, prior to the beginning of any trip into the Sea Scallop Access Area.

(iii) To fish in a Sea Scallop Access Area, the vessel owner or operator shall declare a Sea Scallop Access Area trip through the VMS less than 1 hour prior to the vessel leaving port, in accordance with instructions to be provided by the Regional Administrator.

(3) *Sea Scallop Access Area trips.* (i) Except as provided in paragraph (c) of this section, the table below specifies the total number of trips a limited access scallop vessel may take into all Sea Scallop Access Areas during applicable seasons specified in § 648.59:

| Limited access scallop permit | 2004 | | 2005 | |
|---|---|---|---|---|
| | Trips | DAS per trip | Trips | DAS per trip |
| Full-time | 4 | 12 | 3 | 12 |
| Part-time | 1 | 12 | 1 | 12 |
| Occasional | 1 | 12 | 1 | 12 |

A limited access scallop vessel fishing in Sea Scallop Access Areas may fish the total number of trips specified above according to the vessel's category in any Sea Scallop Access Area, provided the number of trips in any one Sea Scallop Access Area does not exceed the maximum number of trips allocated for such Sea Scallop Access Area as specified in § 648.59. Twelve (12) DAS shall be automatically deducted for each Sea Scallop Access Area trip.

(ii) *One-for-one area access trip exchanges.* If the total number of trips into all Sea Scallop Access Areas combined is greater than one trip, the owner of a vessel issued a limited access scallop permit may exchange, on a one-for-one basis, unutilized trips into one access area for unutilized trips into another Sea Scallop Access Area. A vessel owner must request the exchange of trips by submitting a completed Trip Exchange Form at least 15 days before the date on which the applicant desires the exchange to be effective, but no later than June 1 of each year. Each vessel involved in an exchange is required to submit a completed Trip Exchange Form. Trip Exchange Forms will be provided by the Regional Administrator upon request. The Regional Administrator shall review the records for each vessel to confirm the ability for the exchange to occur (*i.e.*, to determine if each vessel has trips remaining to transfer). The transfer is not effective until the vessel owner(s) receive a confirmation in writing from the Regional Administrator that the trip exchange has been made effective. A vessel owner may exchange trips between two or more vessels under his/her ownership. A vessel owner holding a Confirmation of Permit History is not eligible to exchange trips.

(4) *Area fished.* While on a Sea Scallop Access Area trip, a vessel may not fish for, possess, or land scallops from outside the specific Sea Scallop Access Area fished during that trip and must not enter or exit the specific Sea Scallop Access Area fished more than once per trip. A vessel on a Sea Scallop Access Area trip may not exit that Sea Scallop Access Area and transit to, or enter, another Sea Scallop Access Area on the same trip.

(5) *Possession and landing limits.* Unless authorized by the Regional Administrator as specified in paragraph (c) and (d) of this section, after declaring a trip into a Sea Scallop Access Area in fishing year 2004 and 2005, a vessel owner or operator may fish for, possess, and land up to 18,000 lb (9,525 kg) of scallop meats per trip. No vessel fishing in the Sea Scallop Access Area may possess shoreward of the VMS demarcation line or land, more than 50 bu (17.62 hl) of in-shell scallops.

(6) *Gear restrictions.* The minimum ring size for dredge gear used by a vessel fishing on a Sea Scallop Access Area trip is 4 inches (10.2 cm). Dredge or trawl gear used by a vessel fishing on a Sea Scallop Access Area trip must be in accordance with the restrictions specified in § 648.51(a) and (b).

(7) *Transiting.* While outside a Sea Scallop Access Area on a Sea Scallop Access Area trip, the vessel must have all fishing gear stowed and unavailable for immediate use as specified in § 648.23(b), unless there is a compelling safety reason.

(8) *Off-loading restrictions.* The vessel may not off-load its catch from a Sea Scallop Access Area trip at more than one location per trip.

(b) *Accrual of DAS.* For each Sea Scallop Access Area trip, except as provided in paragraph (c) of this section, a vessel on a Sea Scallop Access Area trip shall have 12 DAS deducted from its access area DAS allocation specified in paragraph (a)(3) of this section, regardless of the actual number of DAS used during the trip.

(c) *Compensation for Sea Scallop Access Area trips terminated early.* If a Sea Scallop Access Area trip is terminated before catching the allowed possession limit the vessel may be authorized to fish an additional trip in the same Sea Scallop Access Area based on the conditions and requirements of paragraphs (c)(1) through (5) of this section.

(1) The vessel owner/operator has determined that the Sea Scallop Access Area trip should be terminated early for reasons deemed appropriate by the operator of the vessel;

(2) The amount of scallops landed by the vessel for the trip must be less than the maximum possession limit specified in paragraph (a)(5) of this section.

(3) The vessel owner/operator must report the early termination of the trip prior to leaving the Sea Scallop Access Area by VMS email messaging, with the following information: Vessel name; vessel owner; vessel operator; time of trip termination; reason for terminating the trip (for NMFS recordkeeping purposes); expected date and time of return to port; and amount of scallops on board in pounds.

(4) The vessel owners/operator must request that the Regional Administrator authorize an additional trip as compensation for the terminated trip by submitting a written request to the Regional Administrator within 30 days of the vessel's return to port from the early terminated trip.

(5) The Regional Administrator must authorize the vessel to take an additional trip and must specify the amount of scallops that the vessel may land on such trip and the number of DAS charged for such trip, pursuant to the calculation specified in paragraphs (c)(5)(i) through (iii) of this section.

(i) The number of DAS a vessel will be charged for an additional trip in the Sea Scallop Access Area shall be calculated as the difference between the number of DAS automatically deducted for the trip as specified in paragraph (b) of this section, and the sum of the following calculation: 2 DAS, plus one DAS for each 10 percent (1,800 lb (816 kg)) increment of the overall possession limit on board. For example, a vessel that terminates a Sea Scallop Access Area trip on the 5th day of the trip with no scallops on board would be charged 2 DAS for the trip and could make an additional trip at a DAS charge of 10 DAS. Likewise, a vessel returning to port prior to the 12th DAS with 5,000 lb (2,268 kg) of scallops on board would be charged 5 DAS (2 DAS plus 3 DAS for the 3, 10 percent (1,800 lb (816 kg) increments) and could make a resumed trip with 7 DAS charged. Pounds of scallops landed shall be rounded up to the nearest 1,800 lb (816 kg).

(ii) The amount of scallops that can be landed on an authorized additional Sea Scallop Access Area trip shall equal 1,500 lb (680 kg) multiplied by the number of DAS to be charged for the resumed trip. In the second example provided in paragraph (c)(5)(i) of this section, the vessel could land up to 10,500 lb (4,763 kg) of scallops.

(iii) The vessel that terminates a Sea Scallop Access Area trip and has been authorized to take an additional trip shall have the DAS charged for that trip, as determined under paragraph (c)(5)(i) of this section, and deducted from its Sea Scallop Access Area DAS allocation specified in paragraph (a)(3) of this section, regardless of the actual number of DAS fished during the additional trip. Vessels that are authorized more than one additional trip for compensation for more than one terminated trip may combine the authorized trips into one, if all terminated trips occurred in the same Sea Scallop Access Area and provided the total possession limits do not exceed those specified in paragraph (a)(5) of this section.

(d) *Increase of possession limit to defray costs of observers*—(1) *Observer set-aside limits by area.* For the 2004 and 2005 fishing years, the observer set-aside for the Hudson Canyon Access Area is 187,900 lb (85.2 mt) and 149,562 lb (67.8 mt), respectively.

(2) *Defraying the costs of observers.* The Regional Administrator may increase the sea scallop possession limit specified in paragraph (a)(5) of this section to defray costs of at-sea observers deployed on area access trips subject to the limits specified in paragraph (d)(1) of this section. Owners of limited access scallop vessels shall be notified of the increase in the possession limit through a permit holder letter issued by the Regional Administrator. If the observer set-aside is fully utilized prior to the end of the fishing year, the Regional Administrator shall notify owners of limited access vessels that, effective on a specified date, the possession limit will be decreased to the level specified in paragraph (a)(5) of this section. Vessel owners shall be responsible for paying the cost of the observer, regardless of whether the vessel lands or sells sea scallops on that trip, and regardless of the availability of set-aside for an increased possession limit.

(e) *Adjustments to possession limits and/or number of trips to defray the costs of sea scallop research*—(1) *Research set-aside limits and number of trips by area.* For the 2004 and 2005 fishing years, the research set-aside for the Hudson Canyon Access Area is 375,800 lb (170.5 mt) and 299,123 lb (135.7 mt), respectively.

(2) *Defraying the costs of sea scallop research.* The Regional Administrator may increase the sea scallop possession limit specified in paragraph (a)(5) of this section or allow additional trips into a Sea Scallop Access Area to defray costs for approved sea scallop research up to the amount specified in paragraph (e)(1) of this section.

(f) *VMS polling.* For the duration of the Sea Scallop Area Access Program, as described under this section, all sea scallop limited access vessels equipped with a VMS unit shall be polled at least twice per hour, regardless of whether the vessel is enrolled in the Sea Scallop Area Access Program. Vessel owners shall be responsible for paying the costs for the polling.

**§ 648.61 EFH closed areas.**

Notwithstanding any other provision of this part, the following areas are closed to scallop fishing to protect EFH from adverse effects of scallop fishing:

(a) *Closed Area I EFH Closure.* No vessel may fish for scallops in, or possess or land scallops from, the area known as the Closed Area I EFH Closure. No vessel may possess scallops in the Closed Area I EFH Closure, unless such vessel is only transiting the area as provided in paragraph (e) of this section. The Closed Area I EFH Closure consists of two sections, 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 |
|---|---|---|
| **Section 1** | | |
| CAIE1 | 41°30′ N. | 69°23′ W. |
| CAIE2 | 41°30′ N. | 68°35′ W. |
| CAIE3 | 41°08′ N. | 69°4.2′ W. |
| CAIE4 | 41°30′ N. | 69°23′ W. |
| **Section 2** | | |
| CAIE5 | 41°04.5′ N. | 69°1.2′ W. |
| CAIE6 | 41°09′ N. | 68°30′ W. |
| CAIE7 | 40°45′ N. | 68°30′ W. |
| CAIE8 | 40°45′ N. | 68°45′ W. |
| CAIE5 | 41°04.5′ N. | 69°1.2′ W. |

(b) *Closed Area II EFH Closure.* No vessel may fish for scallops in, or possess or land scallops from, the area known as the Closed Area II EFH Closure. No vessel may possess scallops in the Closed Area II EFH Closure, unless such vessel is only transiting the area as provided in paragraph (e) of this section. The Closed Area II EFH Closure 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 |
|---|---|---|
| CAIIE1 | 42°22′ N. | 67°20′ W.[1] |
| CAIIE2 | 41°30′ N. | 66°34.8′ W.[2] |
| CAIIE3 | 41°30′ N. | 67°20′ W. |
| CAIIE1 | 42°22′ N. | 67°20′ W.[1] |

[1] The U.S.-Canada Maritime Boundary.
[2] On the U.S./Canada Maritime Boundary.

(c) *Nantucket Lightship Closed Area EFH Closure.* No vessel may fish for scallops in, or possess or land scallops from, the area known as the Nantucket Lightship Closed Area EFH Closure. No vessel may possess scallops in the Nantucket Lightship Closed Area EFH Closure, unless such vessel is only transiting the area as provided in paragraph (e) of this section. The Nantucket Lightship Closed Area EFH Closure 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 |
|---|---|---|
| NLSE1 | 40°50′ N. | 70°20′ W. |
| NLSE2 | 40°50′ N. | 69°29.5′ W. |
| NLSE3 | 40°30′ N. | 69°14.5′ W. |
| NLSE4 | 40°30′ N. | 69°00′ W. |
| NLSE5 | 40°20′ N. | 69°00′ W. |
| NLSE6 | 40°20′ N. | 70°20′ W. |
| NLSE1 | 40°50′ N. | 70°20′ W. |

(d) *Western Gulf of Maine EFH Closure.* No vessel may fish for scallops in, or possess or land scallops from, the area known as the Western Gulf of Maine EFH Closure. No vessel may possess scallops in the Western Gulf of Maine EFH Closure, unless such vessel is only transiting the area as provided in paragraph (e) of this section. The Western Gulf of Maine EFH Closure 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 |
|---|---|---|
| WGOM1 | 43°15′ N. | 70°15′ W. |
| WGOM2 | 43°15′ N. | 69°55′ W. |
| WGOM3 | 42°15′ N. | 69°55′ W. |
| WGOM4 | 42°15′ N. | 70°15′ W. |
| WGOM1 | 43°15′ N. | 70°15′ W. |

(e) *Transiting.* No vessel possessing scallops may enter or be in the area(s) specified in paragraphs (a) through (c) of this section, unless the vessel is transiting the area(s) as allowed in §§ 648.81(b)(2)(iv) and 648.81(i).

■ 6. In § 648.80, paragraph (b)(11)(ii)(C) is revised to read as follows:

**§ 648.80 NE Multispecies regulated mesh areas and restriction on gear and methods of fishing.**

* * * * *

(b) * * *

(11) * * *

(ii) * * *

(C) The minimum mesh size used in the twine top of scallop dredges must be 10 in (25.4 cm).

* * * * *

■ 7. In § 648.81, paragraph (g)(2)(iii) is revised to read as follows:

**§ 648.81 NE Multispecies closed areas and measures to protect EFH.**

* * * * *

(g) * * *

(2) * * *

(iii) That are fishing with or using scallop dredge gear when fishing under a scallop DAS or when lawfully fishing in the Scallop Dredge Fishery Exemption Area, as described in § 648.80(a)(11), provided the minimum mesh size of the twine top used in the dredge by the vessel is 10 inches (25.4 cm), and provided that the vessel complies with the NE multispecies

possession restrictions for scallop vessels specified at § 648.80(h).

* * * * *

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