

First-Class Phone Cards to postal service would appear to be tenuous at best.<sup>179</sup>

**United Parcel Service comments.** UPS proposes that the term postal service be defined to mean “the acceptance, collection, processing, transmission, or delivery of letters, printed matter, or packages weighing up to 70 pounds (including, but not limited to, partially or wholly electronic services), and other services supportive or ancillary thereto.”<sup>180</sup> This proposal differs from that advanced by the Commission in Order No. 1389 in two ways. First, UPS reads the Commission’s proposed definition as possibly contingent on actual delivery by the Postal Service. Consequently, UPS would define postal service to encompass the various activities performed by the Postal Service, e.g., acceptance, transmission, etc., to preclude the argument that such services, if provided by the Postal Service exclusive of delivery, are not postal services. Second, UPS would explicitly include services that are either wholly or partially electronic.<sup>181</sup>

UPS raises a valid, if largely theoretical, point. Its alternative, however, could be construed as overly broad. Entities other than the Postal Service collect, process, and transmit mail prior to its deposit with the Postal Service. The definition suggested by UPS would expand the term postal service to include activities performed by entities, such as presort bureaus and consolidators, not subject to the Commission’s jurisdiction. Inserting the phrase “by the Postal Service” after the term “delivery” would foreclose this construction and, as so modified, would represent an improvement over the definition proposed by the Commission. In lieu of adopting this language, however, the Commission concludes, for reasons previously discussed, that it would be preferable to define the term postal service based on statutorily derived terms.

#### VII. Comments

Because it declines to adopt either its initially proposed rule or those suggested by any commenter, the Commission concludes that it would be appropriate to provide any interested person an opportunity to comment on the revised proposed rule. Accordingly, comments are due December 15, 2004. Reply comments may be filed on or before January 12, 2005. It is the Commission’s expectation to review

such comments expeditiously and thereafter amend its rules as may be appropriate.

#### Ordering Paragraphs

##### *It is ordered:*

1. The Commission proposes to amend its Rules of Practice and Procedure by inserting new rule 5(s), 39 CFR 3001.5(s) as follows: *Postal service* means the receipt, transmission, or delivery by the Postal Service of correspondence, including, but not limited to, letters, printed matter, and like materials; mailable packages; or other services supportive or ancillary thereto.

2. Interested persons may submit comments by no later than December 15, 2004. Reply comments may also be filed and are due no later than January 12, 2005.

3. The Motion for Late Acceptance of Comments of Lifetime Addressing, Inc., March 16, 2004, is granted.

4. Proposed revisions suggested by commenters not adopted herein are deemed denied.

5. The Secretary shall arrange for publication of this Order in the **Federal Register**.

Dated: November 12, 2004.

By the Commission.

**Steven W. Williams,**  
*Secretary.*

#### List of Subjects in 39 CFR Part 3001

Administrative practice and procedure, Postal service.

For the reasons discussed above, the Commission proposes to amend 39 CFR part 3001 as follows:

#### PART 3001—RULES OF PRACTICE AND PROCEDURE

1. The authority citation for part 3001 continues to read as follows:

**Authority:** 39 U.S.C. 404(b); 3603; 3622–24; 3661, 3663.

#### Subpart A—Rules of General Applicability

2. Amend § 3001.5 by adding new paragraph(s) to read as follows:

##### **§ 3001.5 Definitions.**

\* \* \* \* \*

(s) *Postal service* means the receipt, transmission, or delivery by the Postal Service of correspondence, including, but not limited to, letters, printed matter, and like materials; mailable packages; or other services supportive or ancillary thereto.

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#### DEPARTMENT OF COMMERCE

#### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 041108311–4311–01; I.D. 110204B]

RIN 0648–AR52

#### Fisheries of the Northeastern United States; Proposed 2005, 2006, and 2007 Fishing Quotas for Atlantic Surfclams, Ocean Quahogs, and Maine Mahogany Ocean Quahogs

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

**ACTION:** Proposed rule.

**SUMMARY:** NMFS proposes quotas for the Atlantic surfclam, ocean quahog, and Maine mahogany ocean quahog fisheries for 2005–2007. Regulations governing these fisheries require NMFS to publish the proposed specifications for the 2005–2007 fishing years and seek public comment on such proposed measures. The intent of this action is to propose allowable harvest levels of Atlantic surfclams and ocean quahogs from the Exclusive Economic Zone and an allowable harvest level of Maine mahogany ocean quahogs from Atlantic waters north of 43° 50′ N. lat.

**DATES:** Comments must be received no later than 5 p.m., eastern standard time, on December 20, 2004.

**ADDRESSES:** Written comments on the proposed specifications should be sent to:

- Email/mailbox address: The mailbox address for providing email comments is 0648AR52@noaa.gov. Include in the subject line of the email the following document identifier: “Comments on Surfclam/Ocean Quahog Proposed Specifications.”
- Federal e-Rulemaking Portal: [www.Regulations.gov](http://www.Regulations.gov)

- Mail address for mailing paper, disk, or CD-ROM comments: Patricia A. Kurkul, Regional Administrator, Northeast Region, NMFS, One Blackburn Drive, Gloucester, MA 01930–2298. Mark on the outside of the envelope, “Comments on Surfclam/Ocean Quahog Proposed Specifications.”

- Fax number: Facsimile (fax) to (978) 281–9135. Comments on this proposed rule may be submitted via email.

Copies of supporting documents, including the Environmental Assessment, Regulatory Impact Review, Initial Regulatory Flexibility Analysis

<sup>179</sup> As the name suggests, this card is simply a prepaid phone card. The card, which is a product of an alliance between the Postal Service and AT&T, is sold at postal facilities.

<sup>180</sup> UPS Comments at 2.

<sup>181</sup> See *id.* at 2–4.

(EA/RIR/IRFA), and the Essential Fish Habitat Assessment, are available from Daniel Furlong, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115, Federal Building, 300 South New Street, Dover, DE 19904-6790. A copy of the EA/RIR/IRFA is accessible via the Internet at <http://www.nero.gov/ro/doc/nr.htm>.

**FOR FURTHER INFORMATION CONTACT:** Brian R. Hooker, Fishery Policy Analyst, 978-281-9220.

**SUPPLEMENTARY INFORMATION:** The Fishery Management Plan for the Atlantic Surfclam and Ocean Quahog Fisheries (FMP) requires that NMFS, in consultation with the Mid-Atlantic Fishery Management Council (Council), specify quotas for surfclams and ocean quahogs on an annual basis from a range that represents the optimum yield (OY) for each fishery. It is the policy of the Council that the levels selected allow sustainable fishing to continue at that level for at least 10 years for surfclams and 30 years for ocean quahogs. In addition to this constraint, the Council policy also considers the economic impacts of the quotas. Regulations implementing Amendment 10 to the FMP (63 FR 27481, May 19, 1998), added Maine ocean quahogs (locally known as mahogany quahogs) to the

management unit and provided that a small artisanal fishery for ocean quahogs in the waters north of 43° 50' N. lat. has an annual quota with an initial amount of 100,000 Maine bu (35,240 hectoliters (hL)) within a range of 17,000 to 100,000 Maine bu (5,991 hL to 35,240 hL). As specified in Amendment 10, the Maine mahogany ocean quahog quota is allocated separately from the quota specified for the ocean quahog fishery. Regulations implementing Amendment 13 to the FMP (68 FR 69970, December 16, 2003) established the ability to set multi-year quotas. An evaluation, in the form of an annual quota recommendation paper, will be conducted by the Council every year to determine if the multi-year quota specifications remains appropriate. The fishing quotas must be in compliance with overfishing definitions for each species. In proposing these quotas, the Council considered the available stock assessments, data reported by harvesters and processors, and other relevant information concerning exploitable biomass and spawning biomass, fishing mortality rates, stock recruitment, projected fishing effort and catches, and areas closed to fishing. This information was presented in a written report prepared by the Council staff.

NMFS is taking this opportunity to implement clarifications to the Atlantic surfclam and ocean quahog regulations. Sections 648.70(a), and 648.71(a) and (a)(2), removes references to the dates on which the initial allocation of surfclams and ocean quahogs shall be determined, and removes references to the dates on which the proposed and final rules for the annual specifications must be specified and published in the **Federal Register** by the Regional Administrator. References to these dates are not necessary in regulatory text. Additionally, a latitudinal coordinate identifying the "Boston Foul Ground" in section § 648.73(a)(1) is corrected through re-insertion of a digit that was dropped in a previous rulemaking. These administrative revisions are minor, non-substantive changes and do not change operating practices in the fishery.

The proposed quotas for the 2005–2007 Atlantic surfclam, ocean quahog, and Maine mahogany ocean quahog fisheries are shown in the table below. The status quo level of 2004 for Maine ocean quahog and surfclams is proposed to be maintained for 2005–2007, but the ocean quahog quota would be increased incrementally by 20 percent over the three-year period.

#### PROPOSED 2005–2007 SURFCLAM/OCEAN QUAHOG QUOTAS<sup>1</sup>

	2005		2006		2007	
	bu	hL	bu	hL	bu	hL
<sup>2</sup> Surfclams .....	3,400	1,810	3,400	1,810	3,400	1,810
<sup>2</sup> Ocean Quahogs .....	5,333	2,840	5,666	3,016	6,000	3,194
<sup>3</sup> Maine Ocean Quahogs .....	100,000	35,240	100,000	35,240	100,000	35,240

<sup>1</sup> Numerical values in table are in millions

<sup>2</sup> 1 bushel = 1.88 cubic ft. = 53.24 liters

<sup>3</sup> 1 bushel = 1.2445 cubic ft. = 35.24 liters

#### Surfclams

In 1999, the Council expressed its intention to increase the surfclam quota to OY over a period of 5 years (OY = 3.4 million bushels (181 million L)). The proposed 2005–2007 status quo surfclam quota was developed after reviewing the results of the 37th Northeast Regional Stock Assessment Workshop (SAW 37) for surfclams, held in 2003. This recommendation is consistent with the following SAW 37 recommendation: "Although the stock is above Bmsy, uncertainty in the current level of and future trend in biomass suggest that substantial increases in catch levels are not advised." Furthermore, as of the 2002 fishing year the surfclam stock in the EEZ is not overfished and overfishing is not occurring. Industry reports that the

current demand for clam products is very strong, with processors describing an inability to fill all orders due to a lack of clams. However, information reported by industry in their vessel trip reports has shown a steady reduction in the landings per unit of effort (LPUE), an important indicator that the annual quota is approaching the OY for the resource. Another factor in the low LPUE is that the majority of the surfclam catch continues to be derived from one area (northern New Jersey). Based on the information and advice from the most recent assessment for surfclams, the Council is recommending, and NMFS is proposing, to maintain the status quo for the 2005–2007 quotas of 3.4 million bushels (181 million L). This quota represents the

maximum allowable quota under the FMP.

#### Ocean Quahogs

The 2005–2007 quotas for ocean quahogs, which reflect a 20-percent increase above status quo, are based on results from the 2004 assessment conducted by the 38th Northeast Regional Stock Assessment Workshop (SAW 38) for ocean quahogs, held in January 2004. The assessment for ocean quahogs found that the current biomass is high, and the resource surveyed from southern New England to southern Virginia is not overfished and overfishing is not occurring as of the 2002 fishing year. As a result, the Council concluded that an increase in the quota is warranted. An additional reason for the recommended increase in

ocean quahog quota over the next 3 years is the continued low surfclam quota in New Jersey state waters from historically high levels. In response, the Council wants to support increased access to ocean quahogs. The best scientific advice currently available suggests that an increase in quota would be sustainable. Based on this advice, the Council is recommending, and NMFS is proposing, an ocean quahog quota for 2005 of 5.333 million bushels (284 million L), a 2006 quota of 5.666 million bushels (301.6 million L), and a 2007 quota of 6.0 million bushels (319.4 million L). In addition, the Council is recommending, and NMFS is proposing, no change to the Maine ocean quahog quota from the 2004 level of 100,000 Maine bushels (35,240 hL). Amendment 10 to the FMP allows an annual quota of 100,000 Maine bushels (35,240 hL), and specifies that a quota over 100,000 Maine bushels (35,240 hL) can be recommended only if a survey of the Maine ocean quahog stock warrants such an increase. However, a survey of this area has not been completed.

The Atlantic surfclam and ocean quahog quotas are specified in standard bushels of 53.24 L per bushel, while the Maine mahogany ocean quahog quota is specified in "Maine" bushels of 35.24 L per bushel. Because Maine ocean quahogs are the same species as ocean quahogs, both fisheries are assessed under the same ocean quahog overfishing definition. When the two quota amounts (ocean quahog and Maine ocean quahog) are added, the total allowable harvest is still lower than the level that would result in overfishing for the entire stock.

#### Classification

This action is authorized by 50 CFR part 648 and has been determined to be not significant for purposes of Executive Order 12866.

The Council prepared an IRFA in section 8.0 of the RIR that describes the economic impacts this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, the objectives and the legal basis for this action are contained in the **SUPPLEMENTARY INFORMATION** section of this Proposed Rule. This action does not duplicate, overlap, or conflict with any other Federal rules. A summary of the IRFA follows:

#### Vessels

In 2003, a total of 50 vessels reported harvesting surfclams or ocean quahogs from Federal waters under an Individual Transferable Quota (ITQ) system. Average 2003 gross income for surfclam harvesters was \$1,089,417 per vessel,

and \$865,204 per vessel for ocean quahog harvesters. In the small artisanal fishery for ocean quahogs in Maine, 35 vessels reported harvests in the clam logbooks, with an average value of \$139,890 per vessel. All of these vessels fall within the definition of a small entity. The proposed rule would maintain the 2004 status quo level for the surfclam quota, increase the ocean quahog quota by 20 percent over three years, and maintain the 2004 status quo level for the Maine ocean quahog quota. The direct impacts of any quota adjustment would be felt by the entities holding surfclam and/or ocean quahog quota allocations. The actual number of individuals or businesses holding the quota allocations will be lower than indicated below since each holder will often maintain multiple allocations. The analysis of alternatives for each fishery contains a "no action" alternative as required by the National Environmental Policy Act. The "no action" alternatives would allow unlimited harvests from the surfclam, ocean quahog, and Maine ocean quahog resources, and would be in violation of National Standard 1 of the Magnuson-Stevens Fishery Management and Conservation Act, thus these alternatives are not discussed here as reasonable alternatives.

The Council identified three surfclam quota alternatives in addition to the "no-action" alternative. The preferred alternative of 3.400 million bu (181 million L) for 2005–2007, an alternative with 45.6 percent decrease to 1.85 million bu (98.49 million L), and an alternative with a 4.4 percent decrease to 3.25 million bu (173.02 million L) were analyzed. The minimum allowable quota specified in the current OY range is 1.850 million bu (98.5 million L) of surfclams. A 45.6 percent reduction in quota of would have a substantially negative impact on overall ex-vessel revenues equaling a \$215,363 decrease per allocation. Adoption of the 4.4 percent decrease in quota would represent a \$20,781 reduction per allocation. However, given the current biological status of the surfclam resource, the Council does not believe that a quota reduction is warranted at this time. In summation, the Council determined that the 45.6 percent reduction would significantly negatively impact revenues and a smaller 4.4 percent reduction is not warranted as the stock is not overfished and overfishing is not occurring. The preferred alternative is the 2004 status quo, thus it would have no impact on revenues.

The Council analyzed four ocean quahog quota alternatives in addition to the "no-action" alternative. The

preferred alternative of a 20 percent increase over three years, an alternative with a 20 percent (1.0 million bu (53.25 million L)) decrease, an alternative with the 2004 status quo of 5.0 million bushels (266.18 million L), and an alternative with a 20 percent (1.0 million bu (53.24 million L)) increase in one year were analyzed. The minimum allowable quota specified in the current OY range is 4.000 million bu (212.94 million L) of ocean quahogs. Adoption of a 4.0 million bu (212.94 million L) quota would represent a 20 percent decrease from the current quota. This alternative would take the most conservative approach to managing the fishery that is currently available to the Council, but would result in the fewest economic benefits available to the ocean quahog fishery. Given the current biological status of the quahog resource, the Council concluded that a quota reduction is not warranted. Adoption of the 2004 status quo quota would have no impact on revenues for small entities. A 20 percent increase in quota in the first year would move directly to the maximum quota allowed in the FMP, and, if fully utilized would equate to a \$102,180 increase per allocation. However, the Council was concerned that the industry does not currently have a market available to absorb a large increase in landings that quickly. Additionally, due to uncertainty in the recent stock assessment the Council is recommending a gradual increase, with annual reviews to confirm its appropriateness. Although two alternatives would allow for increased revenues, the Council recommends a gradual 20 percent increase over three years, rather than the 20 percent increase in the first year.

The quota for Maine mahogany ocean quahogs is specified at a maximum 100,000 bu (35,240 hL). The FMP specifies that upward adjustments to the quota would require a scientific survey and stock assessment of the Maine mahogany ocean quahog resource. However, no survey or assessment has been conducted. The Council considered two alternative quotas for the Maine mahogany ocean quahog fishery, in addition to the preferred alternative of 100,000 Maine bushels (35,240 hL), including 50,000 Maine bushels and 92,500 Maine bushels (17,620 and 32,596 hL). Any quota the Council would have recommended below the 1999 landing level of 93,938 Maine bu (33,104 hL) would have resulted in a decrease in revenues to individual vessels.

## Processors

In 2003, there were 9 processors that participated in the surfclam and ocean quahog fisheries, plus 10 companies that bought ocean quahogs directly from vessels from within the State of Maine. Of the nine processors, approximately six are responsible for the vast majority of purchases in the ex-vessel market and sale of processed clam products in appropriate wholesale markets. Impacts to surfclam and ocean quahog processors would most likely mirror the impacts of the various quotas to vessels as discussed above. Revenues earned by processors would be derived from the wholesale market for clam products, and since a large number of substitute products (i.e., other food products) are available, the demand for processed clam products is likely to be price-dependent.

## Allocation Holders

As of September 2004, surfclam allocation holders totaled 82, while 56 firms or individuals held ocean quahog allocation. If the recommended quotas are accepted, i.e., status quo for surfclams, a 20 percent increase over three years for ocean quahogs, and no change from the 2003 quota for Maine mahogany ocean quahogs, it is likely that impacts to allocation holders or buyers would be minimal. Theoretically, increases in quota would most likely benefit those who purchase quota (through lower prices (values)) and negatively impact sellers of quota because of reduction in value. Decreases in quota would most likely have an opposite effect.

## Reporting and Recordkeeping Requirements

This proposed rule would not impose any new reporting, recordkeeping, or other compliance requirements. Therefore, the costs of compliance would remain unchanged.

Dated: November 12, 2004.

**Rebecca Lent,**

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

For the reasons set out in the preamble, 50 CFR part 648 is proposed to be 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 § 648.70, paragraph (a)(1) is revised to read as follows:

### § 648.70 Annual individual allocations.

(a) \* \* \*

(1) Each fishing year, the Regional Administrator shall determine the initial allocation of surfclams and ocean quahogs for the next fishing year for each allocation holder owning an allocation pursuant to paragraph (a)(2) of this section. For each species, the initial allocation for the next fishing year is calculated by multiplying the allocation percentage owned by each allocation owner as of the last day of the previous fishing year in which allocation owners are permitted to permanently transfer allocation percentage pursuant to paragraph (b) of this section (i.e., October 15 of every year), by the quota specified by the Regional Administrator pursuant to § 648.71. The total number of bushels of allocation shall be divided by 32 to determine the appropriate number of cage tags to be issued or acquired under § 648.75. Amounts of allocation 0.5 or smaller created by this division shall be rounded downward to the nearest whole number, and amounts of allocation greater than 0.5 created by this division shall be rounded upward to the nearest whole number, so that allocations are specified in whole cages. These allocations shall be made in the form of an allocation permit specifying the allocation percentage and the allocation in bushels and cage tags for each species. An allocation permit is only valid for the entity for which it is issued. Such permits shall be issued on or before December 15, to allow allocation owners to purchase cage tags from a vendor specified by the Regional Administrator pursuant to § 648.75(b).

\* \* \*

3. In § 648.71, paragraphs (a) introductory text and (a)(2) are revised as follows:

### § 648.71 Catch quotas.

(a) *Establishing quotas.* Beginning in 2005, the amount of surfclams or ocean quahogs that may be caught annually by fishing vessels subject to these

regulations will be specified for a 3-year period by the Regional Administrator. The initial 3-year specification will be based on the most recent available survey and stock assessments for Atlantic surfclams and ocean quahogs. Subsequent 3-year specifications of the annual quotas will be accomplished in the third year of the quota period, unless the quotas are modified in the interim pursuant to § 648.71(b). The amount of surfclams available for harvest annually must be specified within the range of 1.85 to 3.4 million bu (98.5 to 181 million L) per year. The amount of ocean quahogs available for harvest annually must be specified within the range of 4 to 6 million bu (213 to 319.4 million L).

\* \* \*

(2) *Public review.* Based on the recommendation of the MAFMC, the Regional Administrator shall publish proposed surfclam and ocean quahog quotas in the **Federal Register**. Comments on the proposed annual quotas may be submitted to the Regional Administrator within 30 days after publication. The Assistant Administrator shall consider all comments, determine the appropriate annual quotas, and publish the annual quotas in the **Federal Register** each year. The quota shall be set at that amount that is most consistent with the objectives of the Atlantic Surfclam and Ocean Quahog FMP. The Regional Administrator may set quotas at quantities different from the MAFMC's recommendations only if he/she can demonstrate that the MAFMC's recommendations violate the national standards of the Magnuson-Stevens Act and the objectives of the Atlantic Surfclam and Ocean Quahog FMP and other applicable law.

4. In § 648.73, paragraph (a)(1) is revised as follows:

### § 648.73 Closed areas.

(a) \* \* \*

(1) *Boston Foul Ground.* The waste disposal site known as the "Boston Foul Ground" and located at 42° 25'36" N. lat., 70° 35'00" W. long., with a radius of 1 nautical mile in every direction from that point.

\* \* \*

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