

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 050613158-5237-02; I.D. 090105A]

RIN 0648-AT48

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Modification of Emergency Fishery Closure Due to the Presence of the Toxin That Causes Paralytic Shellfish Poisoning

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

ACTION: Temporary rule; emergency action; request for comments.

SUMMARY: At the request of the U.S. Food and Drug Administration (FDA), NMFS closed portions of Federal waters of the Gulf of Maine, Georges Bank, and southern New England from June 14, 2005, through September 30, 2005, to the harvest for human consumption of certain bivalve molluscan shellfish due to the presence in those waters of the toxin that causes Paralytic Shellfish Poisoning (PSP). The FDA has determined that harvesting for human consumption of bivalve molluscan shellfish other than whole and roe-on scallops from a portion of the closed area is now safe and may be resumed. As a result, NMFS is modifying its previous closure to allow such fishing.

DATES: Effective September 9, 2005 through September 30, 2005. Comments must be received by October 11, 2005.

ADDRESSES: Comments may be submitted by any of the following methods:

- E-mail: PSPclosure2@NOAA.gov. Include in the subject line the following: "Comments on Modification of the Emergency Rule for Area Closure Due to PSP."

- Federal e-Rulemaking Portal: <http://www.regulations.gov>.

- Mail: Paper, disk, or CD-ROM comments should be sent to Patricia A. Kurkul, Regional Administrator, National Marine Fisheries Service, One Blackburn Drive, Gloucester, MA 01930. Mark the outside of the envelope "Comments on Modification of the Emergency Rule for Area Closure Due to PSP."

- Fax: (978) 281-9135.

Copies of the modified emergency rule are available from Patricia A.

Kurkul, at the mailing address specified above.

FOR FURTHER INFORMATION CONTACT: E. Martin Jaffe, Fishery Policy Analyst, phone: (978) 281-9272, fax: (978) 281-9135.

SUPPLEMENTARY INFORMATION:**Background**

Toxic algal blooms are responsible for the marine toxin that causes PSP in persons consuming affected shellfish. People have become seriously ill and some have died from consuming affected shellfish under similar circumstances. The scallop adductor muscle, or "meat," is unaffected by the toxin.

On June 10, 2005, the FDA requested NMFS issue an emergency rule to close an area of Federal waters to the harvesting of bivalve molluscan shellfish intended for human consumption because of toxic algal blooms off the coasts of New Hampshire and Massachusetts. This closure prohibited harvests of shellfish such as Atlantic surfclams and ocean quahogs, as well as scallop viscera. The emergency rule for the action, in effect from June 14 through September 30, 2005, was published in the **Federal Register** on June 16, 2005 (70 FR 35047). The emergency rule was modified on July 7, 2005 (70 FR 39192) to allow for the collection of biological samples by commercial fishing vessels issued a Letter of Authorization signed by the Regional Administrator.

The action temporarily closed all Federal waters of the Exclusive Economic Zone of the northeastern United States to any bivalve molluscan shellfish harvesting, except for Atlantic sea scallops shucked at sea for their adductor muscles, in the area bound by the following coordinates in the order stated: (1) 43°00' N. lat., 71°00' W. long.; (2) 43°00' N. lat., 69°00' W. long.; (3) 40°00' N. lat., 69°00' W. long.; (4) 40°00' N. lat., 71°00' W. long., and then ending at the first point. Further details of the original closure may be found in the June 16, 2005, and the July 7, 2005, **Federal Register** rules and are not repeated here.

As a result of tests conducted by the FDA in cooperation with NMFS and the fishing industry, FDA has determined that PSP toxin levels in a portion of the closed area (described below) are now well below those known to cause illness in humans. With the exception of whole and roe-on scallops, the FDA has determined that harvesting of bivalve molluscan shellfish for human consumption from the area described is once again safe.

As a result of FDA's findings NMFS is reopening to shellfish harvest those waters south of 41°39' N. lat., west of 69°00' W. long., north of 40°00' N. lat., and east of 71°00' W. long. Because scallop viscera and roe are capable of retaining PSP toxins longer than other species of molluscan shellfish, NMFS is retaining the limitation that scallop harvesting is only permitted in the area for the purpose of shucking at sea of the adductor muscle.

Classification

This action is issued pursuant to section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1855(c).

This rule has been determined to be not significant under Executive Order 12866.

The Assistant Administrator for Fisheries, NOAA, finds good cause pursuant to 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comments for this action, as prior notice and comment would be impractical and contrary to the public interest. The original emergency closure was in response to a public health emergency. With certain exceptions, that emergency no longer exists. Therefore to continue the closure to the harvest of shellfish through September 30, 2005, would serve no purpose and be contrary to the public interest. In addition, because this rule relieves a restriction by reopening a previously closed portion of the current closed area, it is not subject to the 30-day delayed effectiveness provision of the APA pursuant to 5 U.S.C. 553(d)(1).

Because a notice of proposed rulemaking is not required for this rule by 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: September 6, 2005.

James W. Balsiger,

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

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

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

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

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

■ 2. In § 648.14, paragraph (a)(166) is suspended and paragraph (a)(170) is added to read as follows:

§ 648.14 Prohibitions.

(a) * * *

(170) Fish for, harvest, catch, possess, or attempt to fish for, harvest, catch, or possess any bivalve shellfish, including Atlantic surfclams, ocean quahogs, and

mussels, with the exception of sea scallops harvested only for adductor muscles and shucked at sea, or a vessel issued and possessing on board a Letter of Authorization (LOA) from the Regional Administrator authorizing the collection of shellfish for biological sampling and operating under the terms and conditions of said LOA, in the area of the U.S. Exclusive Economic Zone

bound by the following coordinates in the order stated: (1) 43°00' N. lat., 71°00' W. long.; (2) 43°00' N. lat., 69°00' W. long.; (3) 41°39' N. lat., 69°00' W. long.; (4) 41°39' N. lat., 71°00' W. long., and then ending at the first point.

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