

## 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.

On June 10, 2005, the FDA requested that 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, published in the **Federal Register** on June 16, 2005 (70 FR 35047), stated it would be in effect from June 14 through September 30, 2005, unless extended. 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. The scallop adductor muscle, or "meat," is unaffected by the toxin. 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, it was determined that toxin levels in a portion of the closure area (described below) were well below those known to cause human illness. With the exception of whole and roe-on scallops, the FDA determined that harvesting of bivalve molluscan shellfish for human consumption from the area described was once again safe.

At the FDA's request, on September 9, 2005, NMFS reopened 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. (70 FR 53580). Because scallop viscera and roe are capable of retaining PSP toxins longer than other species of molluscan shellfish, scallop

harvesting was only permitted in the reopened area for the purpose of shucking of the adductor muscle.

In the absence of further notice from the FDA, the entire temporary closure would have expired on October 1, 2005. At this time, however, the FDA has insufficient analytical data to support the scheduled reopening of the entire area to all bivalve molluscan shellfish on October 1, 2005, and has requested that NMFS continue the regulations through December 31, 2005.

## 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).

The original emergency closure was in response to a public health emergency. Pursuant to section 305(c)(3)(C) of the Act, the closure to the harvest of shellfish, as modified on September 9, 2005, may remain in effect until the circumstances that created the emergency no longer exist, provided that the public has an opportunity to comment after the regulation is published, and, in the case of a public health emergency, the Secretary of Health and Human Services concurs with the Commerce Secretary's action. The public had opportunities to comment on the published regulations and one comment was received. The commenter expressed her reluctance to agree with reopening a portion of the closure without seeing the results of the FDA's tests. While NMFS is the agency with authority to promulgate the emergency regulations, it modified the regulations on September 9, 2005, at the behest of the FDA after the FDA had determined that the results of its tests warranted such action. Accordingly, the Secretary of Health and Human Services and the Secretary of Commerce concur that the emergency regulations, as modified, should continue through December 31, 2005. Subsequently, if warranted, the regulations may be terminated at an earlier date, pursuant to section 305(c)(3)(D), by publication in the **Federal Register** of a notice of termination.

The September 9, 2005, rule was determined to be not significant under Executive Order 12866.

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

Dated: September 27, 2005.

**James W. Balsiger,**  
*Acting Deputy Administrator for Regulatory Programs, National Marine Fisheries Service.*  
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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 679

[Docket No. 041126332-5039-02; I.D. 092805A]

### Fisheries of the Economic Exclusive Zone Off Alaska; Pacific Ocean Perch in the Western Aleutian District of the Bering Sea and Aleutian Islands Management Area

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

**ACTION:** Temporary rule; modification of a closure.

**SUMMARY:** NMFS is opening directed fishing for Pacific ocean perch in the Western Aleutian District of the Bering Sea and Aleutian Islands Management Area (BSAI). This action is necessary to allow the Pacific ocean perch fishery in the Western Aleutian District of the BSAI to resume.

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), September 28, 2005, through 2400 hrs, A.l.t., December 31, 2005.

**FOR FURTHER INFORMATION CONTACT:** Josh Keaton, 907-586-7228.

**SUPPLEMENTARY INFORMATION:** NMFS manages the groundfish fishery in the BSAI exclusive economic zone according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

NMFS closed directed fishing for Pacific ocean perch in the Western Aleutian District of the BSAI under § 679.20(d)(1)(i) on July 18, 2005 (70 FR 42280, July 22, 2005).

NMFS has determined that as of September 26, 2005, approximately 1,422 metric tons of Pacific ocean perch remain in the 2005 Pacific ocean perch total allowable catch (TAC) in the Western Aleutian District of the BSAI. Therefore, in accordance with §§ 679.25(a)(2)(i)(C) and (a)(2)(iii)(D), and to allow the Pacific ocean perch fishery to resume, NMFS is terminating the previous closure and is reopening directed fishing for Pacific ocean perch in the Western Aleutian District of the BSAI.

**Classification**

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public

interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the opening of the fishery, not allow the full utilization of the Pacific ocean perch TAC in the Western Aleutian District of the BSAI, and therefore reduce the public's ability to use and enjoy the fishery resource.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of

prior notice and opportunity for public comment.

This action is required by § 679.25 and is exempt from review under Executive Order 12866.

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

Dated: September 28, 2005.

**Alan D. Risenhoover,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*  
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