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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 120330235-2014-01]

RIN 0648-BC04

Fisheries of the Northeastern United States; Atlantic Sea Scallop Fishery; Emergency Rule Extension, Closure of the Delmarva Access Area

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

ACTION: Temporary final rule; emergency action extension.

SUMMARY: NMFS extends the emergency closure of the Delmarva Access Area (DMV) published on May 14, 2012, which is scheduled to expire on November 10, 2012. Specifically, this temporary rule extends the 180-day closure of the DMV in fishing year (FY) 2012 for an additional 186 days, through May 13, 2013.

DATES: This rule is effective from November 10, 2012, through May 14, 2013. The expiration date of the temporary rule published May 14, 2012 (77 FR 28311), is extended to May 14, 2013, unless superseded by another action which will publish in the Federal Register.

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

FOR FURTHER INFORMATION CONTACT: Christopher Biegel, Fishery Management Specialist, 978-281-9112; fax 978-281-9135.

SUPPLEMENTARY INFORMATION:

Background

This temporary final rule extends the emergency measures implemented on June 13, 2012 (77 FR 28311, May 14, 2012), as authorized by section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), closing the DMV. The May 14, 2012, emergency rule included detailed information on purpose and need to close the DMV for FY 2012, as well as an announcement that NMFS intended to extend this emergency rule for an additional six months. The closure of the DMV area for FY 2012 was supported by the scallop industry, and the emergency action was recommended by the Council at its January 2012 meeting. There were no comments received on the original emergency rule.

This extension adds additional measure that could not be included in the initial emergency rule because it would not have become effective until after the statutory required expiration of the initial rule on November 10, 2012. Framework Adjustment 22 to the Scallop Fishery Management Plan (FMP) (FW 22) (76 FR 43774; July 21, 2011) set measures extending into FY 2013 as though the DMV would be opened. In particular, it allowed scallop research set-aside (RSA) pounds to be harvested in the DMV. The original emergency rule to close the DMV adjusted the regulations to eliminate the DMV from this set-aside in FY 2012. However, these changes could not be extended into FY 2013 because the original emergency rule was statutorily required to expire on November 10, 2012. Since this action will extend the DMV closure into the FY 2013, this rule adjusts the regulations by removing the DMV from the RSA

language. Framework Adjustment 24 to the Scallop FMP is expected maintain the DMV closure and is expected to be in place prior to the expiration of this rule.

The emergency rule closed the DVM because fishing in the area in FY 2012 could result in localized overfishing of the area. In addition, there would be no protection for small scallops in the DMV if it remains open for FY 2012. This could have negative impacts on recruitment in the short and medium term, and could reduce the long-term biomass and yield from the DMV and the Mid-Atlantic overall. The success of the entire scallop rotational management program depends on timely openings and closing of access areas in order to protect scallop recruitment and optimize yield. NMFS must extend the emergency measures because the closure must remain in place for the full FY to prevent these negative impacts.

Framework 22 to the Scallop FMP (Framework 22) used 2010 survey results to set the allocations for FYs 2011 and 2012. Based on this information, Framework 22 allocated 156 full-time (FT) vessels 1 trip each into DMV, which equated to 2.8 M lb (1,270 mt) of scallops from this area in FY 2012. However, catch rates in the DMV declined from about 2,000 lb (907 kg) per day in the start of FY 2011 to less than 1,000 lb (434 kg) per day later in the FY. Based on these 2011 catch rates, NMFS expected catch rates in DMV in 2012 to be approximately 1,000 lb (434 kg) per day, compared to about 2,200 lb (998 kg) per day or higher in CAI. With lower catch rates, vessels must fish longer to catch the allowed possession limit. This increases the amount of time and area that the scallop fishing gear is in contact with the sea floor (i.e., increased area swept), resulting in negative impacts on the scallop resource due to increased discarding of small and otherwise unprofitable scallops.

The 2011 surveys in CAI estimated scallop biomass levels that are higher than Framework 22's 2011 projections based on the 2010 survey results, and that would support additional effort. When the emergency rule reallocated FT vessel DMV trips, the total number of CAI trips increased to 313. The increase in CAI trips results in an FY 2012 CAI allocation of 5.6 M lb (2,540 mt) of scallops, which is not expected to result in excessive fishing in CAI for FY 2012.

NMFS policy guidelines for the use of emergency rules (62 FR 44421; August 21, 1997) specify the following three criteria that define what an emergency situation is, and justification for final rulemaking: (1) The emergency results from recent, unforeseen events or recently discovered circumstances; (2) the emergency presents serious conservation or management problems in the fishery; and (3) the emergency can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants to the same extent as would be expected under the normal rulemaking process. NMFS policy guidelines further provide that emergency action is justified for certain situations where emergency action would prevent significant direct economic loss, or to preserve a significant economic opportunity that otherwise might be foregone. As noted in the May 14, 2012, emergency rule, NMFS determined that it was necessary to close the DMV, consistent with new scientific advice, in a timely manner in order to avoid localized overfishing of the area and negative impacts on recruitment in the short and medium term.

Comments

No comments were received in response to a request for comments on the original emergency action.

Classification

NMFS has determined that this rule is consistent with the Magnuson-Stevens Act and other applicable law.

The Assistant Administrator for Fisheries, NOAA, finds good cause under section 553(b)(B) of the Administrative Procedure Act (APA) that it is unnecessary, impracticable, and contrary to the public interest to provide for any additional prior notice and opportunity for the public to comment. As more fully explained above, the reasons justifying promulgation of this rule on an emergency basis, coupled with the fact that the public has had the opportunity to comment on NMFS' intent to extend this emergency, make solicitation of public comment unnecessary, impractical, and contrary to the public interest. This action provides the benefit of allowing the Atlantic sea scallop fleet to avoid localized overfishing of the DMV and the associated negative impacts on recruitment in the short and medium term.

In the interest of receiving public input on this action, the EA analyzing this action was made available to the public and the original temporary final rule solicited public comment.

Pursuant to 5 U.S.C. 553(d)(3), the Assistant Administrator finds good cause to waive the full 30-day delay in effectiveness for this rule. This rule primarily extends the rule currently in place for an additional 6 months. The need for this extension was fully anticipated and announced to the public in the initial emergency rule which published on May 14, 2012. The additional measure will not become effective until after March 1, 2012. Accordingly, the entities affected by this rule and the public have no need to be made aware of or adjust to this rule by

delaying its effectiveness for 30 days. The primary reason for delaying the effectiveness of federal regulations is not present, and, therefore, such a delay would serve no public purpose. On the other hand, it would be contrary to the public interest if this rule does not become effective on November 10, 2012, because the previously established trip allocations for the DMV would become effective, with the result that overfishing could occur and the small scallops in the area would be put at risk. These measures are inconsistent with the Magnuson-Stevens Act, the stated intent of the scallop area rotation program, and the FMP. Moreover, failing to have the rule effective on November 10, 2012, may lead to confusion in the fishing community as to what regulations govern the harvest of scallops in the DMV. For these reasons, there is good cause to waive the requirement for delayed effectiveness.

For the reason above, the Assistant Administrator for Fisheries also finds good cause under section 553(d) of the APA to waive the 30-day delay in effectiveness.

NMFS has consulted with the Office of Information and Regulatory Affairs (OIRA) and due to the circumstances described above this action is exempt from review under Executive Order 12866.

This rule is exempt from the procedures of the Regulatory Flexibility Act to prepare a regulatory flexibility analysis because the rule is issued without opportunity for prior public comment.

The EA prepared for the initial emergency rule analyzed the impacts of the emergency specifications for the duration of a year (Environmental Assessment Emergency Action to the Atlantic Sea Scallop FMP: Closure of the Delmarva Scallop Access Area for 2012; March 2011).

Therefore, the impacts of this emergency action extension have been analyzed, and are within the scope of the Finding of No Significant Impact.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: October 19, 2012.

Alan D. Risenhoover, Director, Office of Sustainable Fisheries,
performing the functions and duties of the Deputy Assistant Administrator for Regulatory
Programs, National Marine Fisheries Service.

For the reasons stated 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 § 648.60, paragraph (e)(1)(iii) is suspended and paragraph (e)(1)(v) is added to read as follows:

§ 648.60 Sea scallop access area program requirements.

(e) ***

(1) ***

(v) 2013: Hudson Canyon Access Area, Nantucket Lightship Access Area, and Closed Area II Access Area.

[FR Doc. 2012-26240 Filed 10/23/2012 at 8:45 am; Publication Date: 10/24/2012]