

taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic properties in accordance with section 214 of the Act.

(6) *Legal consequences.* Any undertaking that falls within an approved exempted program or category shall require no further review pursuant to subpart B of this part, unless the agency official or the Council determines that there are circumstances under which the normally excluded undertaking should be reviewed under subpart B of this part.

(7) *Termination.* The Council may terminate an exemption at the request of the agency official or when the Council determines that the exemption no longer meets the criteria of paragraph (c)(1) of this section. The Council shall notify the agency official 30 days before termination becomes effective.

(8) *Notice.* The proponent of the exemption shall publish notice of any approved exemption in the **Federal Register**.

\* \* \* \* \*

5. Amend § 800.16 by revising paragraph (y) to read as follows:

**§ 800.16 Definitions.**

\* \* \* \* \*

(y) *Undertaking* means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.

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Dated: September 17, 2003.

**John M. Fowler,**

*Executive Director.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 030908223-3223-01; I.D. 081403B]

RIN 0648-AP57

#### Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Atlantic Surfclam and Ocean Quahog Fishery; Amendment 13 to the Surfclam and Ocean Quahog Fishery Management Plan

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS proposes regulations to implement Amendment 13 to the Surfclam and Ocean Quahog Fishery Management Plan (FMP). This proposed rule would establish: A new surfclam overfishing definition; multi-year fishing quotas; a mandatory vessel monitoring system (VMS), when such a system is economically viable; the ability to suspend or adjust the surfclam minimum size limit through a framework adjustment; and an analysis of fishing gear impacts on Essential Fish Habitat (EFH) for surfclams and ocean quahogs. The primary purpose of this proposed action is to rectify the disapproved surfclam overfishing definition and the EFH analysis and rationale contained in Amendment 12 in order to comply with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), and to simplify the regulatory requirements of the FMP.

**DATES:** Comments must be received at the appropriate address or fax number, (See **ADDRESSES**), on or before 5 p.m., local time, on October 27, 2003.

**ADDRESSES:** Written comments should be sent to Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, One Blackburn Drive, Gloucester, MA 01930. Mark the outside of the envelope, "Comments on Amendment 13 to Atlantic Surfclam and Ocean Quahog Fishery." Comments also may be sent via facsimile (fax) to (978) 281-9135. Comments will not be accepted if submitted via e-mail or Internet.

Copies of the FMP, its Regulatory Impact Review (RIR), the Initial

Regulatory Flexibility Analysis (IRFA), and the Final Environmental Impact Statement (FEIS) are available from Daniel T. Furlong, Executive Director, Mid-Atlantic Fishery Management Council, 300 S. New Street, Dover, DE 19904.

#### FOR FURTHER INFORMATION CONTACT:

Susan A. Murphy, Supervisory Fishery Policy Analyst, 978-281-9252, fax 978-281-9135, [Susan.A.Murphy@noaa.gov](mailto:Susan.A.Murphy@noaa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

Amendment 12 to the FMP was prepared by the Mid-Atlantic Fishery Management Council (Council) to bring the FMP into compliance with the Magnuson-Stevens Act, as amended by the Sustainable Fisheries Act of 1996. On April 28, 1999, the Council was notified that NMFS partially approved Amendment 12. Specifically, two Amendment 12 measures were disapproved, the surfclam overfishing definition and the analysis and rationale for the status quo alternative for addressing fishing gear impacts to EFH. To rectify these disapprovals, the Council prepared, and NMFS published, a Notice of Intent to Prepare an Environmental Impact Statement (EIS) in the **Federal Register**, officially beginning the Council's scoping process for Amendment 13 (66 FR 13694, March 7, 2001). The Council held a scoping hearing on March 21, 2001, and accepted scoping comments on the amendment during the period March 7 through April 6, 2001. In addition to the surfclam overfishing definition and EFH alternatives, other issues identified for inclusion in the EIS were multi-year quotas, a mandatory VMS requirement and a permanent suspension of the surfclam minimum size limit. The Council identified a range of alternatives for each of these five issues and approved the alternatives in a public hearing document at its May, 2002 meeting. A Notice of Availability (NOA) on the DSEIS was published in the **Federal Register** on August 30, 2002 (67 FR 55838), with a comment period ending October 15, 2002. There were a series of three public hearings held (one each in the states of Maine, New Jersey and Delaware). After consideration of all public comments, the Council chose the following alternatives at its January, 2003 meeting and voted to submit the Amendment 13 document, including the draft final supplemental environmental impact statement to NMFS. The Amendment 13 measures contained in this action propose multi-year fishing quotas and the ability to suspend or adjust the surfclam

minimum size limit through a framework adjustment. The analysis of fishing gear impacts on EFH for surfclams and ocean quahogs, a new surfclam overfishing definition, and a mandatory VMS are not accompanied by regulatory text because either they are non regulatory in nature (fishing gear impacts on EFH and the new overfishing definition) or implementation is deferred (a mandatory VMS requirement). However, information on these alternatives is presented in the preamble.

### Surfclam Overfishing Definition

The surfclam overfishing definition contained in Amendment 12 was disapproved because it was based on the sustainability of that portion of the surfclam stock located in the northern New Jersey area. Although 80 percent of the surfclam fishery has taken place off northern New Jersey over the past decade, the Amendment 12 surfclam overfishing definition did not represent the entire resource, as required by National Standard 3.

The surfclam overfishing definition recommended by the Council is based on the advice of the 30th Stock Assessment Workshop (SAW 30, April 2000), which incorporated the results of a research survey that took place during the summer of 1999. In addition, the proposed overfishing definition applies to the entire resource, versus focusing on the northern New Jersey area component of this stock. The proposed surfclam overfishing definition is as follows: Biomass target ( $B_{\text{target}}$ ) =  $1/2$  of current biomass (as a proxy for the biomass level at maximum sustainable yield ( $B_{\text{msy}}$ )); biomass threshold ( $B_{\text{threshold}}$ ) =  $1/2$  the biomass target; fishing mortality threshold ( $F_{\text{threshold}}$ ) = fishing mortality at maximum sustainable yield ( $F_{\text{msy}}$ ), where the current proxy for  $F_{\text{msy}}$  is the natural mortality rate for surfclams ( $M$ ); and the fishing mortality target ( $F_{\text{target}}$ ) would always be set less than the  $F_{\text{threshold}}$  and would be equivalent to the fishing mortality rate ( $F$ ) associated with the quota selected by the Council.

### Fishing Gear Impacts on EFH

The Amendment 12 no action alternative for addressing fishing gear impacts to EFH for surfclams and ocean quahogs was disapproved because the rationale and analysis for selecting this preferred alternative was insufficient. To address this insufficiency, the Council evaluated nine alternatives to minimize fishing gear impacts to EFH, most of which focus on closed areas. The relatively recent "Workshop on the Effects of Fishing Gear on Marine

Habitats off the Northeastern United States" (Workshop, October 2001) concluded that the effects of hydraulic clam dredges were limited to sandy substrates, since this type of gear is not used on muddy or gravel substrates. The Workshop panel also agreed that hydraulic clam dredges have important habitat effects, but that only a small area is affected by this type of gear. In summary, the Workshop panel concluded that because the surfclam fishery is primarily prosecuted in sandy habitats, its effect is limited to potentially large, but localized impacts to biological and physical structure. Furthermore, because the recovery time is relatively short for this high energy environment, the impacts can be considered temporary. In addition, because these impacts potentially affect a relatively small portion (approximately 100 square nautical miles) of the overall large uniform area of high energy sand along the continental shelf, they can be considered minimal. The Workshop panel also indicated that other measures, such as reductions in effort or gear modifications, are not practicable. Thus, based on information from the Workshop, NMFS proposes that no action be taken at this time to mitigate fishing gear impacts on EFH.

### Multi-year Quotas

This proposed rule would replace the current annual specification process with a process that would allow the Council to establish specifications to be in effect for up to three fishing years, provided that an annual evaluation of the surfclam and ocean quahog status is undertaken. This multi-year specification process would allow the Council and NMFS to be more efficient by streamlining the regulatory process, and would provide the industry with greater regulatory consistency and predictability. The intent of this provision is to make the 3-year maximum quota setting process coincide with the Northeast Fisheries Science Center's clam survey and subsequent stock assessment, which occur approximately every 3 years. This would provide the Council with the most recent scientific information available in setting the specifications for these two species. However, the maximum three-year specification process is not meant to curtail the Council from setting specifications during the interim years if information obtained during the annual review indicates that the surfclam and ocean quahog specifications warrant a change, e.g., to comply fully with the Magnuson-Stevens Act.

### Mandatory VMS

Amendment 13, if approved, would authorize NMFS to implement a mandatory VMS requirement based on analysis provided by the Council. At that time, the Council would submit to NMFS the applicable paperwork to conform with the Paperwork Reduction Act, and submit a full economic analysis pertaining to this new requirement. Once these Council submissions are complete, NMFS will publish a proposed rule. The Council intends that such a program would be implemented through three phases as follows: (1) VMS notification to replace the existing surfclam/ocean quahog call-in system; (2) electronic vessel reporting that would replace the existing vessel logbook; and (3) collection of scientific information on a tow-by-tow basis. In addition, the Council could decide to monitor closed areas to better aid enforcement. However, this would be done independently of the other three phases.

### Frameworkable Measures

Finally, this proposed rule would add to the list of frameworkable management measures the ability to suspend or adjust the surfclam minimum size limit. Currently, NMFS conducts an annual analysis to determine if discards or survey data indicate that 30 percent of the surfclams are smaller than 4.75 in (12.06 cm). If it is determined that 30 percent of the surfclams are not smaller than 4.75 in (12.06 cm), NMFS publishes a notice in the **Federal Register** to suspend the surfclam minimum size limit. This suspension has been done every year since the implementation of the individual transferable quota program in 1990. However, due to concerns expressed by some industry members, as well as Council concern that it may be more difficult to implement a change rather than to suspend a current provision, the Council voted to maintain the no action alternative and add to the list of frameworkable management measures the ability to suspend or to adjust the surfclam minimum size limit.

### Classification

At this time, NMFS has not determined that the Amendment, which this proposed rule would implement, is consistent with the national standards of the Magnuson-Stevens Act and other applicable laws. NMFS, in making that determination, will take into account the data, views, and comments received during the comment period.

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

The Council prepared an initial regulatory flexibility analysis (IRFA) as required by section 603 of the Regulatory Flexibility Act. Additionally, the Council in cooperation with NMFS prepared a supplement to the IRFA. The IRFA describes the economic impact that this proposed rule, if adopted, would have on small entities. A summary of the analysis follows:

A description of the reasons why this action is being considered, and the objectives and legal basis of this proposed rule are contained in the **SUMMARY** and in the **SUPPLEMENTARY INFORMATION** of this proposed rule and are not repeated here. There are no recordkeeping, reporting, or other compliance costs resulting from this action. It would not duplicate, overlap, or conflict with any other Federal rules.

All of the affected businesses (fishing vessels) are considered small entities under the standards described by the Small Business Administration because they have annual returns (revenues) that do not exceed \$3.5 million annually.

The economic impacts of actions were analyzed by employing quantitative approaches to the extent possible. When appropriate data was lacking, or the action was administrative in nature, a qualitative approach was employed. Effects on profitability associated with the proposed management measures should be evaluated by looking at the impact the proposed measures would have on individual vessel costs and revenues. However, in the absence of cost data for individual vessels engaged in these fisheries, changes in gross revenues are used as a proxy for profitability.

In 2003, there were 1590 vessels that held permits in the surf clam fishery and 1602 that held permits in the ocean quahog fishery. Of these vessels, 1590 held both the ocean quahog and surf clam permit simultaneously. The proposed action could affect any vessel holding an active Federal permit for either species. However, the commercial use of the permit is limited to vessels fishing under an individual fishing quota or fishing in the Maine mahogany quahog fishery. In 2001, there were 51 vessels that landed either surfclams (21 vessels), ocean quahogs (16 vessels), or both (14 vessels). There were 31 vessels in 2001 that fished under the Federal limited access Maine mahogany quahog permit for Maine ocean quahogs.

Management measures contained in this proposed rule would establish multi-year quotas and add the suspension of the surfclam minimum

size limit and adjustment of the minimum size to the list of frameworkable measures under the FMP.

None of the proposed management measures in this rule would result in a substantial change in revenues or profitability of vessels comprising these fisheries. Although additional alternatives were considered for these management measures, the preferred alternative would minimize economic impacts to the greatest extent possible.

The proposal to revise the overfishing definition for surfclams does not alter the optimum yield of the fishery, a basis for determining annual quotas, and does not directly impact gross revenues. Therefore, no change to gross revenues is expected from this revision. However, an initial regulatory flexibility analysis must be prepared at the times when quotas or other management measures that control landings are proposed. The Council considered three alternative overfishing definitions, none of which would meet the requirements of National Standard 1 of the Magnuson-Stevens Act. As in the case of the preferred alternative, none of these alternatives would directly affect the profitability of individual vessels.

The proposal to establish multi-year quotas and frameworkable minimum size limits and adjustments for surfclams are administrative and will not directly impact gross revenues. However, the Council will be required to prepare an initial regulatory flexibility analysis for each quota set by the Council and for each surfclam minimum size limit adjustment, if applicable.

The Council considered two alternatives to the multi-year quota measure including the status quo and an alternative that would set multi-year quotas without annual review. The Council also considered two alternatives to the minimum size limits and adjustments including the status quo and an alternative to adjust minimum sizes when the multi-year decisions occur. All alternatives are purely administrative in nature. However, as explained above, any changes to annual quotas or adjustments to surfclam minimum size that could result from any alternatives considered would require, subject to the preparation of a proposed rule, preparation of regulatory flexibility analyses at that time.

The Council is planning to establish a vessel monitoring program at a later point in time since the implementation of a system is dependent upon the determination by the Regional Administrator of an economically viable monitoring system. If and when the

Regional Administrator determines that an economically viable monitoring system is achievable, the Council must prepare an initial regulatory flexibility analysis that fully examines the compliance costs associated with that system. A mandatory VMS requirement would be implemented through proposed and final rulemaking by a regulatory amendment.

The Council proposes no change to existing management measures to address fishing gear impacts on EFH at this time. Therefore, there are no impacts on vessel gross revenues resulting from this aspect of Amendment 13. However, the Council analyzed potential closures of three areas as alternatives to the no action measure including a closing of the Georges Bank Area, the Southern New England East Area, and the Habitat Area of Particular Concern (HAPC) for Tilefish. For Georges Bank, there would be no economic impact to vessels since this area has been closed to fishing for surfclams and ocean quahogs for over ten years. Accordingly, no landings have been recorded from that area during the closure time. For Southern New England, the Council concluded that there would be minimally negative economic impacts to surf clam vessels. However, there could be substantially negative economic impacts to ocean quahog vessels. A closure in the Southern New England area would most likely affect surf clam and ocean quahog vessels fishing out of Massachusetts and Rhode Island since increased fuel costs needed to steam to another fishable area coupled with reduced gross revenue could reduce vessel profitability. The Council estimated that this closure would reduce gross revenues for quahog vessels by \$1,065 per trip and for surfclam vessels by \$2 per trip. The Council determined that the closure of the Tilefish HAPC could result in the largest negative impact to quahog vessels, with a loss in gross revenues of \$2,637 per trip and a loss in profitability to surfclam vessels of \$71 per trip. However, economic impacts from the closure of Tilefish HAPC are likely to be grossly overestimated relative to the actual area that would be specified in any regulations. The impacts are more a function of creating complete 10-minute squares for closures and attempting to minimize the jagged nature of the 250-ft (76.2-m) bathymetric contour. Based purely on sediment preference, it is unlikely ocean quahogs and tilefish would coexist in concentrated areas.

The analysis in the IRFA indicates that there are no significant alternatives considered that would minimize

adverse economic impacts or increase economic benefits relative to the proposed management measures contained in this proposed rule.

#### List of Subjects in 50 CFR Part 648

Fishing, Fisheries, Reporting and recordkeeping requirements.

Dated: September 17, 2003.

**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. Section 648.71 is revised to read 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 three-year period by the Regional Administrator on or about December 1, 2004. 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 on or about December 1 of 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).

(1) *Quota reports.* On an annual basis, MAFMC staff will produce an Atlantic surfclam and ocean quahog annual quota recommendation paper to the MAFMC based on the latest available stock assessment report prepared by NMFS, data reported by harvesters and processors, and other relevant data as well as the information contained in

paragraphs (a)(1)(i) thru (vi) of this section. Based on that report, and at least once prior to August 15 of the year in which a three year annual quota specification expires, the MAFMC, following an opportunity for public comment, will recommend to the Regional Administrator annual quotas and estimates of DAH and DAP within the ranges specified for a three year period. In selecting the annual quotas, the MAFMC shall consider the current stock assessments, catch reports, and other relevant information concerning:

(i) Exploitable and spawning biomass relative to the OY.

(ii) Fishing mortality rates relative to the OY.

(iii) Magnitude of incoming recruitment.

(iv) Projected effort and corresponding catches.

(v) Geographical distribution of the catch relative to the geographical distribution of the resource.

(vi) Status of areas previously closed to surfclam fishing that are to be opened during the year and areas likely to be closed to fishing during the year.

(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** on or about December 1 of 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 Act and the objectives of the Atlantic Surfclam and Ocean Quahog FMP and other applicable law.

(b) *Interim quota modifications.* Based upon information presented in the quota reports described in paragraph (a)(1), the MAFMC may recommend to the Regional Administrator a modification to the annual quotas that have been

specified for a 3-year period and any estimate of DAH or DAP made in conjunction with such specifications within the ranges specified in paragraph (a)(1) of this section. Based upon the Council's recommendation, the Regional Administrator may propose surfclam and or ocean quahog quotas that differ from the annual quotas specified for the current 3-year period. Such modification shall be in effect for a period of 3 years from the year in which it is first implemented unless further modified. Any interim modification shall follow the same procedures for establishing the annual quotas that are specified for a 3-year period.

(c) The previous year's annual quotas for surfclams and ocean quahogs and three-year specifications will remain effective unless revised pursuant to this section. NMFS will issue notification in the **Federal Register** if the previous year's specifications will not be changed.

3. In § 648.77, paragraph (a)(1) is revised to read as follows:

##### § 648.77 Framework adjustments to management measures.

(a) \* \* \*

(1) *Adjustment process.* The Council shall develop and analyze appropriate management actions over the span of at least two Council meetings. The Council must provide the public with advance notice of the availability of the recommendation(s), appropriate justification(s) and economic and biological analyses, and the opportunity to comment on the proposed adjustment(s) at the first meeting, and prior to and at the second Council meeting. The Council's recommendations on adjustments or additions to management measures must come from one or more of the following categories: The overfishing definition (both the threshold and target levels), description and identification of EFH (and fishing gear management measures that impact EFH), habitat areas of particular concern, set aside quota for scientific research, vessel tracking system, optimum yield range, and suspension or adjustment of the surfclam minimum size limit.

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