

**PART 76—CABLE TELEVISION SERVICE**

1. The authority citation for Part 76 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303.

2. Section 76.51 is amended by revising paragraph (a)(28) to read as follows:

**§ 76.51 Major television markets.**

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(a) \* \* \*

(28) Tampa-St. Petersburg-Clearwater-Lakeland, Florida

\* \* \* \* \*

Federal Communications Commission.

**William H. Johnson,**

*Deputy Chief, Cable Services Bureau.*

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**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 673**

[Docket No. 950223058-5058-01; I.D. 022395A]

**Scallop Fishery off Alaska; Closure of Federal Waters to Protect Scallop Stocks**

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

**ACTION:** Emergency interim rule; extension of effective date; response to comments.

**SUMMARY:** An emergency interim rule that closed Federal waters off Alaska to fishing for scallops is in effect through May 30, 1995. NMFS extends the emergency rule for an additional 90-day period (through August 28, 1995) to prevent overfishing of scallop stocks in an uncontrolled fishery for scallops in Federal waters by vessels fishing outside Alaska State's regulatory authority to govern the scallop fishery. This emergency closure is intended to control an unregulated scallop fishery in Federal waters until a Federal fishery management plan can be implemented. NMFS also responds to comments submitted on the interim emergency rule as published in the **Federal Register** on March 1, 1995, for comment. No change to the emergency rule was made as a result of NMFS' response to comments.

**EFFECTIVE DATE:** The interim regulations published on March 1, 1995

(60 FR 11054, as corrected at 60 FR 12825, March 8, 1995) are extended from May 31, 1995, through August 28, 1995.

**FOR FURTHER INFORMATION CONTACT:** Susan Salveson, 907-586-7228.

**SUPPLEMENTARY INFORMATION:** NMFS published an emergency interim rule in the **Federal Register** on March 1, 1995 (60 FR 11054) that closed Federal waters off Alaska to fishing for scallops. The closure was intended to prevent unregulated and uncontrolled fishing for scallops in Federal waters during the period of time the North Pacific Fishery Management Council (Council) prepared a Fishery Management Plan for the Scallop Fishery off Alaska (FMP). Although the State of Alaska has implemented regulations to manage the scallop fishery off Alaska, these regulations can be applied by the State only to vessels registered under the laws of the State of Alaska (section 306 (a)(3) of the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.* (Magnuson Act). Continued fishing for scallops by one or more vessels not registered with the State of Alaska poses significant conservation and management concerns that can be effectively addressed in a timely manner only through emergency closure of Federal waters off Alaska. Further background and descriptive information is contained in the preamble to the emergency rule published in the **Federal Register** March 1, 1995.

The Council has submitted a proposed FMP to the Secretary of Commerce for review and approval. Proposed regulations to implement the FMP were published in the **Federal Register** May 10, 1995 (60 FR 24822). Given the statutory review and implementation schedule for FMPs set out under sections 303 and 304 of the Magnuson Act, the Council requested NMFS to reimplement the emergency closure of Federal waters off Alaska for an additional 90 days as authorized under section 305(c)(3)(B) of the Magnuson Act. NMFS concurs that this period of time is necessary for the preparation and implementation of a Federal management program for scallops in Federal waters and reimplements this emergency rule for the maximum period of time authorized under the Magnuson Act.

Two letters of comments on the emergency rule as published in the **Federal Register** March 1, 1995, were received within the comment period and are summarized in the Response to Comments section, below. After review of the comments received, NMFS

determined that no change to the emergency rule is warranted.

This emergency interim rule has been determined to be not significant for purposes of E.O. 12866.

**Response to Comments**

Two letters of comments were received within the comment period that ended March 10, 1995. A summary of the comments and NMFS' response follows.

*Comment 1.* NMFS' implementation of the emergency rule was based upon a recommendation from the Council that was contrived at an illegally constituted teleconference meeting in violation of specific procedural requirements set forth in the Magnuson Act, 16 U.S.C. 1852(j).

*Response.* The Chairman of the North Pacific Fishery Management Council (Council) had very little time to respond to the emergency situation resulting from uncontrolled fishing for scallops off Alaska that precipitated the emergency rule. If necessary, NMFS was prepared to take action to promulgate emergency regulations without Council involvement to address the emergency in as timely manner as possible. The Council's ability to convene an emergency meeting and its recommendation to proceed with the emergency rule simply lent further indication of the widespread support for closure of Federal waters to protect scallop stocks.

Furthermore, NMFS conducted an independent review of the emergency action recommended by the Council. Based on the administrative record, NMFS concurred with the Council's determination that immediate closure of Federal waters off Alaska was necessary to address the scallop management void and to address concerns of localized overfishing of scallop stocks. NMFS followed the appropriate procedures and established the rational basis for the decision to implement the emergency rule. Any alleged procedural irregularities at the Council level did not affect the Agency's independent determination to proceed with this action.

*Comment 2.* Absolutely no justification exists for issuance of an emergency rule closing Federal waters off Alaska to fishing for scallops given that a single vessel operating outside Alaska State's regulatory authority could not cause overfishing of the scallop resource off Alaska.

*Response.* NMFS disagrees. Recent participation in the scallop fishery by at least one vessel not registered with the State of Alaska, contemplation by other vessel owners of fishing in Federal

waters outside State regulations governing the scallop fishery, and the possibility uncontrolled fishing for scallops could occur anywhere off Alaska by the highly mobile scallop processor fleet, justified emergency rule action to prevent localized overfishing of scallop stocks. This approach is warranted given the limited information on stock structure and biological productivity of scallops off Alaska, coupled with recent scientific evidence that suggests that scallop resources may consist of multiple, discrete, self-sustaining populations that should be viewed as separate stock units for management. If this is the case, prudent management of these stocks is necessary to prevent localized depletion in order to maintain the integrity of these stocks and protect their long-term productivity.

The single vessel used to participate in the unregulated fishery for scallops that precipitated the emergency rule was fishing in the Prince William Sound (PWS) area, for which the State's guideline harvest level (GHL) was 50,000 lb (22.68 mt) shucked scallop meat. The 1995 harvest amounts of scallops reported by observers on board other vessels fishing in this area under the laws of the State resulted in closure of the area to fishing for scallops on January 26, 1995, when the State's GHL was reached. The single vessel fishing outside the State's regulatory authority did not have an observer on board to monitor catch and continued to fish once the PWS area was closed. When the vessel was boarded by the U.S. Coast Guard almost a month later, the vessel operator informed the Coast Guard that 54,000 lb (24.49 mt) of shucked scallop meat was on board. This amount exceeded Alaska State's GHL for PWS by over 100 percent. Exceeding the GHL by this order of magnitude, combined with the potential for discrete stock structure, creates a very real concern for localized overfishing of scallop stocks that the emergency rule was intended to prevent.

*Comment 3.* The issuance of the emergency rule was based on political and personal assumptions which were unreasonable and not based on reliable scientific data as required by the Magnuson Act.

*Response.* NMFS disagrees. See the response to Comment 2. NMFS has acknowledged that information on scallop stock structure, abundance, and population dynamics are limited. However, as stated in the preamble to the emergency rule, reasons exist to manage the Alaska scallop stocks with special caution given evidence that these stocks are susceptible to overfishing. NMFS expects that careful

management of this resource will be necessary until more information becomes available to improve understanding of the dynamics of the scallop resource and the effect of exploitation on the biological productivity of scallop stocks off Alaska.

*Comment 4.* The emergency rule is not consistent with any of the national standards. In particular National Standard 1 is violated given that NMFS has not taken any action to achieve the optimum yield (OY) from the Alaska scallop fishery. Furthermore, NMFS has no idea what the OY for this fishery should be because no scientific data exist upon which to base the OY.

*Response.* NMFS disagrees. The emergency interim closure of Federal waters to fishing for scallops was intended as a short-term conservation measure to control fishing effort and prevent overfishing of scallop stocks until an alternative management regime may be implemented. The interim closure could be effective for up to a 180-day period. Prevention of overfishing during this interim period would help guarantee achievement of OY from a healthy, productive scallop resource when the fishery is authorized to open under a future management regime. Furthermore, OY would be achieved on a continuing basis, given that Weathervane scallops, the primary commercial species off Alaska, are a long-lived species with a low natural mortality rate. As a result, NMFS believes the scallop harvest foregone during the period Federal waters are closed largely would be available to the fishery once Federal waters are opened to fishing for scallops under a future FMP.

NMFS recognizes that the economic impact of the closure of Federal waters to fishing for scallops will be substantial to participants in the scallop fishery. The State of Alaska has announced that it will open up State waters in its Dutch Harbor and Adak registration areas on July 1 to fishing for scallops, although available fishing grounds are limited and harvest amounts are not expected to be significant. The harvest amounts from these two registration areas in 1993 and 1994 totaled only 40,000 lb and 2,000 lb, respectively. The short-term foregone opportunity to harvest scallops in Federal waters is justified by the need to prevent overfishing of the scallop resource and ensure the long-term productivity of the scallop resource necessary to support the harvest of OY on a continuing basis under a future management regime that authorizes a regulated fishery in Federal waters.

The emergency rule did not specify an OY for the scallop fishery off Alaska and comments on the appropriateness of any OY level for this fishery is outside the scope this action. Nonetheless, the preamble to the proposed rule to implement the FMP (60 FR 24822, May 10, 1995), presents a discussion on an appropriate OY for the scallop fishery in Federal waters off Alaska. The preamble also discusses the consistency of an interim closure of these waters to fishing for scallops with the national standards.

Although scientific data are limited, no evidence suggests that an unregulated and uncontrolled harvest of scallops off Alaska is supportable as a means of achieving OY. The Council is scheduled to consider alternative options for an OY for the scallop fishery off Alaska at its June 1995 meeting, as well as a suite of other management measures under consideration by the Council for a Federally managed fishery.

*Comment 5.* The emergency rule meets none of the criteria for emergency rulemaking set out in NMFS policy guidelines, which define an emergency situation as one that (1) results from unforeseen events; (2) presents serious conservation and management problems; and (3) can be addressed through emergency regulations for 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 rule making process. Furthermore, these guidelines preclude NMFS from using emergency rulemaking to close a fishery if the action is controversial and has serious economic effects.

*Response.* NMFS disagrees. NMFS policy guidelines for emergency rulemaking published in the **Federal Register** January 6, 1992 (57 FR 375), would authorize controversial emergency action with serious economic effects under certain circumstances. NMFS believes that the events and overfishing concerns leading up to the emergency interim closure of Federal waters to fishing for scallops are such circumstances that warranted emergency rulemaking.

Although the potential always existed for one or more vessels to fish for scallops in Federal waters outside Alaska State's regulatory authority, no vessel had ever done so. Neither NMFS nor the Council anticipated this activity when it occurred, nor the conservation concerns that ensued from uncontrolled and unregulated fishing for scallops in Federal waters. Although closure of Federal waters to fishing for scallops

poses substantial costs to current participants in this fishery, these costs are justified to prevent localized overfishing of scallop stocks and protect the long-term productivity of the Alaska scallop resource. NMFS believes that the time it would have taken to complete notice-and-comment rulemaking would have jeopardized severely NMFS' ability to take action to prevent overfishing of scallop stocks.

*Comment 6.* The emergency interim rule should be rescinded as an illegal action. No scientific evidence exists that can prove overfishing concerns are warranted and the vessel fishing in Federal waters outside Alaska State laws and regulations had a Federal scallop permit and was fishing legally.

*Response.* NMFS disagrees that the emergency interim rule was an illegal action. Rather, this action was justified to prevent overfishing of scallop stocks and protect the long-term productivity of this resource. NMFS concurs that fishing for scallops in Federal waters outside the laws and regulations of the

State of Alaska did not, in itself, constitute illegal activity. Prior to the emergency rule, however, no Federal regulations existed to control fishing for scallops in Federal waters. NMFS believes that unregulated fishing, including the potential for other vessels joining an uncontrolled fishery, poses a serious overfishing concern (see responses to comments 2 and 3). NMFS does not claim that it has "proved" overfishing is occurring in this fishery; rather, the emergency rule is an attempt to prevent such a problem from occurring while long-term management measures are being developed. Finally, the vessel used to fish for scallops in Federal waters outside Alaska State's regulatory authority was not issued a Federal permit to fishing for scallops off Alaska. The fact that the vessel may have been issued a Federal permit to fish for scallops in Federal waters elsewhere off the continental United States is immaterial to the legality of the closure of Federal waters off Alaska.

*Comment 7.* Under section 306(a)(3) of the Magnuson Act, NMFS should not rely on the Alaska State scallop management program as a basis for managing the fishery in Federal waters.

*Response.* Any future Federal management program for the scallop fishery of Alaska would consider State management measures for the scallop fishery and the justification for those measures. However, neither the Council nor NMFS would automatically incorporate State management measures into Federal regulations without adequate assessment and justification. Such measures must be consistent with the national standards set out in the Magnuson Act and other applicable law.

Dated: May 24, 1995.

**Richard H. Schaefer,**

*Acting Assistant Administrator for Fisheries,  
National Marine Fisheries Service.*

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