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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 170301213-7213-01]

RIN 0648-BG70

Fisheries of the Northeastern United States; Atlantic Sea Scallop Fishery; State Waters Exemption

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations to allow an exemption to enable vessels with Federal Limited Access General Category Individual Fishing Quota permits from the State of Maine and Commonwealth of Massachusetts to continue fishing in their respective state waters once NMFS has announced that the Federal Northern Gulf of Maine total allowable catch has been fully harvested in a given year. Additionally, Massachusetts has requested that Federal Limited Access General Category Northern Gulf of Maine permits also be included in its exemption. Both states have requested this exemption as part of the Scallop State Water Exemption Program. This proposed rule is necessary to solicit comments on the state requests and to inform the public that NMFS is considering granting the requests.

DATES: Comments must be received by 5 p.m., local time, on [*INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER*].

ADDRESSES: Documents supporting this action, including the State of Maine’s and Commonwealth of Massachusetts’ requests for the exemption and Framework Adjustment 28 to the Atlantic Sea Scallop Fishery Management Plan (FMP) are available upon request from John K. Bullard, Regional Administrator, NMFS, Greater Atlantic Regional Fisheries Office, 55 Great Republic Drive, Gloucester, MA 01930.

You may submit comments on this document, identified by NOAA-NMFS- 2017-0042, by any of the following methods:

- **Electronic Submission:** Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2017-0042*, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.
- **Mail:** John K. Bullard, Regional Administrator, NMFS, Greater Atlantic Regional Fisheries Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope, “Comments on Maine and Massachusetts State Waters Exemption Program.”

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Shannah Jaburek, Fishery Management Specialist, 978-282-8456.

SUPPLEMENTARY INFORMATION:

Background

The Scallop State Waters Exemption Program has been in place as an element of the Scallop FMP since 1994 (Amendment 4 to the FMP, Final Rule published January 19, 1994, 59 FR 2757). At that time, the purpose of the program was to allow Federal permit holders to fish in the state waters fishery (where Federal and state laws are inconsistent) and alongside state-only permitted vessels. The program specifies that a state with a scallop fishery may be eligible for state waters exemptions if it has a scallop conservation program that does not jeopardize the biomass and fishing mortality/effort limit objectives of the FMP. Amendment 11 to the FMP (April 14, 2008, 73 FR 20089) and Framework 26 to the FMP (April 21, 2015, 80 FR 22119) expanded the program to include the Northern Gulf of Maine (NGOM) measures. If we find that a state is eligible for the Program, we can exempt federally permitted scallop vessels fishing in state waters from a limited number of Federal scallop regulations as follows: Limited access scallop vessels may fish in state waters outside of scallop days-at-sea; limited access and limited access general category (LAGC) individual fishing quota (IFQ) vessels may be exempt from Federal gear and possession limit restrictions; and vessels with selected scallop permit types may be exempted from regulations pertaining to the NGOM management area.

Originally, we authorized exemptions for Maine, New Hampshire, and Massachusetts under Amendment 4 to the Scallop FMP. When we implemented Amendment 11 to the FMP in 2008, we suspended the original exemptions pending additional information from the states

regarding their state waters fisheries. Maine was the only state to request a new exemption, and has received the state waters exemptions from gear and effort control restrictions for vessels issued Federal scallop permits and fishing exclusively in Maine waters since August of 2009.

Framework 26 to the FMP specifically added the exemption that would enable some scallop vessels to continue to fish in state waters within the NGOM management area after the Federal NGOM total allowable catch (TAC) is reached. Any state interested in applying for this new exemption must identify the scallop-permitted vessels to which this would apply (i.e., limited access, LAGC IFQ, LAGC incidental, or LAGC NGOM). Vessels would still not be able to fish for scallops in the Federal portion of the NGOM once the TAC is harvested. Maine subsequently revised its exemption in 2015 to allow NGOM vessels to fish in state waters after the NGOM closes. This exemption was issued in November 2015, and will remain in place for the foreseeable future. Maine has requested an additional exemption for the upcoming season. Massachusetts has requested its first state waters exemption since we suspended it with the implementation of Amendment 11.

We received a request from Maine on December 9, 2016, to expand its current exemption to allow the four IFQ-permitted vessels with Maine state-waters permits to fish in the Maine state-waters portion of the NGOM management area. Maine's scallop fishery restrictions have not changed from 2015; therefore, they remain either equally or more restrictive than Federal scallop fishing regulations and would still limit mortality and effort.

Massachusetts also sent a request on November 10, 2016, to exempt LAGC IFQ federally permitted vessels that also hold a state permit. Massachusetts also requested that NGOM federally permitted vessels be exempt as well; this is the same exemption that was granted to

Maine in 2015. Only the northern portion of Massachusetts state waters, approximately Boston and north, fall within the NGOM management area. The fishery in this area has traditionally been split between a handful of state-only vessels and 12 vessels with both Federal and state permits to fish for scallops. Of these vessels with dual permits, six traditionally fish in both Federal and state waters while the other six only fish in Federal waters.

After reviewing Massachusetts's request, we required some additional information, which we received on December 19, 2016. After further review, we determined that Massachusetts has a robust management program with controls in place that are equal to or more restrictive than Federal regulations when fishing for scallops in state waters. Massachusetts restricts scallop fishing activity in its waters with limited entry by requiring the state Coastal Access Permit, for which there is currently a moratorium and is only transferrable with the State Director of Marine Fisheries approval. Therefore, increased fishing effort in the future is not a significant concern. Vessels fishing for scallops in Massachusetts state waters also have a daily scallop possession limit of 200 lb (90.7kg). This possession limit is equivalent to the NGOM management area, but more restrictive than the 600-lb (272.1-kg) Federal possession limit for IFQ vessels south of the NGOM area in Federal waters.

Scallop effort has increased in the NGOM in recent years as the stock has improved in both state and Federal waters. In 2016, the NGOM management area TAC was fully harvested and was closed for the first time since the management area was created in 2008. In 2017, the area was closed on March 23, just over three weeks into the new fishing year and approximately two months earlier than in 2016. State-only permitted scallop vessels are able to fish in state waters after the Federal closure, and this provision would allow those vessels with the requested

Federal permit to continue to fish in state waters along with vessels without Federal permits. Based on the information Maine and Massachusetts have submitted regarding their scallop conservation programs, NMFS has preliminarily determined that Massachusetts qualifies for the NGOM state waters exemptions under the Scallop FMP as requested and Maine qualifies for the expansion of the state waters exemption for Maine waters. As required by the scallop fishery regulations, exemptions can only be granted if the state's scallop fishery would not jeopardize the biomass and fishing mortality/effort limit objectives of the FMP.

Allowing for this NGOM exemption would have no impact on the effectiveness of Federal management measures for the scallop fishery overall or within the NGOM management area because the NGOM Federal TAC is set based only on the Federal portion of the resource. Maine and Massachusetts are the only states that have requested a NGOM closure exemption, and only for state permit holders that also hold a Federal LAGC IFQ or NGOM scallop permit. As such, all other federally permitted scallop vessels would be prohibited from retaining, possessing, and landing scallops from within the NGOM management area, in both Federal and state waters, once the NGOM hard TAC is fully harvested.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

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

The Chief Council for Regulation of the Department of Commerce certified to the Chief Council for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities.

The ability for states with territorial waters located within the NGOM management area to apply for this specific exemption was included into the Scallop FMP through Framework 26, which was implemented in May 2015.

Entities that own vessels with Federal LAGC NGOM and IFQ permits are the business entities affected by this action. The Small Business Administration (SBA) defines a small business in shellfish fishery as a firm that is independently owned and operated with receipts of less than \$11 million annually (see NMFS final rule revising the small business size standard for commercial fishing, 80 FR 81194, December 29, 2015). NMFS issued 217 LAGC IFQ permits in 2015, and 119 of these vessels actively fished for scallops that year. Of the 217 vessels issued LAGC IFQ permits, 88 are homeported in Massachusetts and 6 are homeported in Maine. NMFS issued 99 LAGC NGOM permits in 2015, and 24 of these vessels actively fished. However, out of the 99 LAGC NGOM permitted vessels, 44 are homeported in Massachusetts and 40 are homeported in Maine. NMFS has determined that all 84 LAGC NGOM permitted vessels and 94 LAGC IFQ permitted vessels from both states could benefit from this action. Fishing year 2015 data were used for this certification because these data are the most recent complete data set for a fishing year. Although any of these 119 LAGC IFQ and 44 LAGC NGOM vessels could be impacted, Maine and Massachusetts estimated that the action would impact 4 Maine vessels and 12 Massachusetts vessels. The discussion therefore focuses on the

impacts to these 16 vessels, but the impacts described below would increase with additional vessels.

Individually-permitted vessels may hold permits for several fisheries, harvesting species of fish that are regulated by several different fishery management plans, even beyond those impacted by the proposed action. Furthermore, multiple permitted vessels and/or permits may be owned by entities with various personal and business affiliations. For the purposes of this certification, “ownership entities” are defined as those entities with common ownership as listed on the permit application. Only permits with identical ownership are categorized as an “ownership entity.” For example, if five permits have the same seven persons listed as co-owners on their permit applications, those seven persons would form one “ownership entity,” that holds those five permits. If two of those seven owners also co-own additional vessels, that ownership arrangement would be considered a separate “ownership entity” for the purpose of this certification.

On June 1 of each year, ownership entities are identified based on a list of all permits for the most recent complete calendar year. Matching the potentially impacted 2015 fishing year LAGC IFQ permits to calendar year 2015 ownership data results in 87 distinct ownership entities for the LAGC IFQ fleet. Of these, and based on the SBA guidelines, 84 of the LAGC IFQ entities are categorized as small. The remaining 3 entities were determined to be large businesses classified as a shellfish business. Based on available information for LAGC NGOM permits, NMFS has determined that all 44 NGOM permitted vessels from Massachusetts that would be impacted by this rule are small entities under the SBA guidelines.

If vessels harvest the full NGOM TAC before the end of a given fishing year, this exemption allowing vessels to continue to fish in their state's respective waters would positively impact 4 LAGC IFQ-permitted vessels home ported in Maine, and up to 12 vessels home ported in Massachusetts that have either an LAGC IFQ or NGOM Federal permit. When Framework 26 added the exemption in 2015, using fishing year 2013 data the average landings value was determined to be \$240,159 per LAGC IFQ permit and \$39,693 per LAGC NGOM permit. These values include scallops that were landed in state waters because both LAGC IFQ and NGOM vessels have the option to fish in state waters when the NGOM management area is open. When the NGOM TAC is reached and the area closes, the LAGC NGOM permitted vessels can no longer fish and the LAGC IFQ vessels must travel further from home in order to harvest scallops; therefore, the vessel's individual income is affected. Massachusetts estimates that with this exemption, vessels could harvest up to an additional 100,000 lb worth an estimated \$1.23 million dollars at a 2015 average price of \$12.26/lb. Maine estimates that with this exemption, the four vessels would save on fuel, food, and maintenance costs associated with steaming to fishing grounds outside of the NGOM management area by fishing closer to individual homeports. These cost savings would vary by individual vessel, but would have an overall positive economic benefit. If additional vessels take advantage of the proposed exemption (e.g., more of the potentially impacted small business entities as described above), the positive impacts would only increase. As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: June 23, 2017.

Samuel D. Rauch III,

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. In § 648.54, paragraph (a)(4) is revised to read as follows:

§ 648.54 State waters exemption.

(a) * * *

(4) The Regional Administrator has determined that the State of Maine and Commonwealth of Massachusetts both have a scallop fishery conservation program for its scallop fishery that does not jeopardize the biomass and fishing mortality/effort limit objectives

of the Scallop FMP. A vessel fishing in State of Maine waters may fish under the State of Maine state waters exemption, subject to the exemptions specified in paragraphs (b) and (c) of this section, provided the vessel is in compliance with paragraphs (e) through (g) of this section. In addition, a vessel issued a Federal Northern Gulf of Maine or Limited Access General Category Individual Fishing Quota permit fishing in State of Maine or Commonwealth of Massachusetts waters may fish under their respective state waters exemption specified in paragraph (d) of this section, provided the vessel is in compliance with paragraphs (e) through (g) of this section.

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