

MEMORANDUM

TO: Council, SSC and AP Members

FROM: Clarence G. Pautzke
Executive Director



ESTIMATED TIME
2 Hours

DATE: September 18, 1995

SUBJECT: Scallop Management

ACTION REQUIRED

- (a) Review status of FMP and Amendment 1.
- (b) Possible emergency action to repeal FMP if Magnuson Act changes are approved.

BACKGROUND

Status of FMP and Amendment 1

To prevent unregulated and uncontrolled scallop harvests, a fishery management plan (FMP) was approved by the Secretary on August 28, 1995. The FMP closes the EEZ to scallop fishing for up to one year, and regulations implementing this are currently in place.

In June 1995, the Council adopted Amendment 1 to the FMP. Amendment 1 allows for a federally controlled fishery to occur in the EEZ. The amendment included a suite of management measures, including: permit requirements, limited access (moratorium), regulatory and reporting areas, districts and sections, scallop catch limits, inseason adjustments, reporting requirements, observer requirements, fishing seasons, closed waters, gear restrictions, efficiency limits, and prohibited species catch limits. Regulations implementing Amendment 1 are being prepared by the NMFS regional office.

Possible emergency action to repeal FMP if Magnuson Act changes are approved

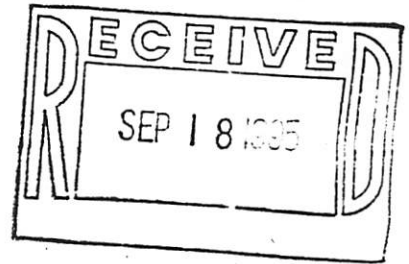
At the June meeting, the Council indicated that they would be interested in possibly repealing the federal FMP if the Magnuson Act were amended to allow state management in the EEZ. At this time, it does not look like the Magnuson Act will be reauthorized prior to the September Council meeting. At this meeting, the Council may wish to convey its intent to NMFS if the situation comes to pass.



Bill Wells, Jr.
Bill Wells III

September 14, 1995

Mr. Rick Lauber, Chairman
North Pacific Fishery Management Council
P.O. Box 103136
Anchorage, AK 99510



Dear Mr. Chairman and Members of the Council:

This letter is to request your assistance in helping the Alaskan scallop fleet stay alive until the Council's Scallop FMP is implemented (scheduled for July 1996). As you already know, the Alaska scallop fishery has been essentially shut down since last February when a lone vessel chose to operate outside the authority of the State of Alaska. Since then NMFS has approved a Council recommended Emergency Rule that closed all federal waters to scalloping. A federal FMP was approved by the Council in April which extends the closure until next summer when Amendment 1 is expected to be implemented. Under Amendment 1, federal waters can reopen under NMFS management.

In April you asked ADF&G if state waters would open that could tie the fleet over until next year. I and other fishermen have already testified that this closure is financially ruining us and that our vessels are not suited for any other kind of fisheries work. Some vessel owners (myself included) have moved their boats to other parts of the country to avoid bankruptcy. Such decisions are very expensive and do not guarantee that we will avoid foreclosure but this was the only option to tying the boats up permanently.

The Alaska Department of Fish & Game reported in April and June that some state waters would open to scalloping. Their review of catch data led them to open only a few areas with significantly reduced scallop quotas and bycatch caps. None of these areas and quotas could support a single vessel, let alone the entire fleet. The point here is that reopening federal waters to scalloping must remain a top priority with the Council. Our livelihoods are entirely in your hands and we are desperately holding on.

Under normal circumstances, the Yakutat district would open to scalloping in January 1996. As has been reported previously, this area is the largest producer of scallops in the state with the resource evenly distributed between state and federal waters. I have approached ADF&G to question whether they intend to open state waters in January. With fewer boats remaining, a January opening could provide fishermen with enough catch to carry them to next summers reopening of federal and state waters. As of September 14, the ADF&G had yet to make a commitment to reopen this area. I am afraid they don't appreciate our urgent need to know if

a fishery will occur. This information will be used by the surviving vessel owners in making their business decisions. Any direction you can give that would stimulate a favorable decision to open Yakutat in January would be greatly appreciated.

Sincerely,

A handwritten signature in cursive script that reads "Bill Wells".

Bill Wells



KODIAK FISH COMPANY

F/V Alliance F/V Provider
P. O. Box 469
Kodiak, Alaska 99615-0469



SCALLOP FISHERY MANAGEMENT PLAN AMENDMENT PROPOSAL
North Pacific Fishery Management Council
September 14, 1995

Name of Proposer: Teresa Kandianis
Kodiak Fish Company

Address: P.O. Box 1547, Kodiak, Alaska 99615

Telephone: 907-486-3309 **Fax:** 907-486-3676

Fishery Management Plan: Scallop Fishery Off Alaska

Brief Statement of Proposal: Amend the Fishery Management Plan for the Scallop Fishery Off Alaska to establish an individual transferable quota system.

Objectives of Proposal (What is the problem?): Rationalize the scallop fishery off Alaska to enable allocation of the limited harvest among participants. The scallop fishery off Alaska has been prosecuted for 28 years on a small stock of weathervane scallops. Average annual harvest over that period has been about one million pounds of meats. Actual annual harvests though have varied from the catch of record in 1969 of 1.85 million pounds to a harvest of zero in 1978. The harvest and the number of participants have fluctuated considerably in the period from 1968 through 1995. Scallop stocks worldwide are characterized by dramatic fluctuations in abundance. The weathervane scallop is a longlived species with a low natural mortality. Management measures limiting annual harvests to spread out successful year classes are effective in stabilizing the fishery.

The rapid growth, specialization and over-capitalization of the scallop fishery may have jeopardized the economic viability of the fishery. Larger vessels and crews and mandatory observer coverage have increased operating costs for scallop vessels. Shorter fishing seasons and harvest limits have constrained the earning potential in the scallop fishery. The percentage of the fleet's total Alaskan fishing income derived from the scallop fishery increased from 57.7% in 1983 to 100% by 1990. (Shirley and Kruse, 1995)

The dedicated, full-time scallop fleet doubled between 1990 and 1995. Participants with historic dependence on the fishery were reduced from a fishery of well over 200 days per year to less than one hundred in 1994. In 1995, the Mr. Big incident exploiting a loophole in the Magnuson Act prompted a complete closure of the fishery in federal waters further



eroding the financial viability of the historic participants.

The Council has taken final action on a vessel moratorium enacted in response to some of these concerns. The vessel moratorium was designed as an interim measure only which is to be supplanted by an appropriate limited access system. Amendment proposals are a lengthy process. For a limited access system to be completed in a timely manner to supplant the temporary moratorium, the process must begin immediately.

Need and Justification for Council Action: (Why can't the problem be resolved through other channels?) A plan amendment is required to establish a limited access system for the scallop fishery off Alaska.

Foreseeable Impacts of Proposal: (Who wins, who loses?) An individual transferable quota system would allow distribution of the limited annual catch among participants in such a manner that those who have dedicated themselves long term as scallopers in the waters off Alaska would receive an appropriate allocation of quota. Those who fished part time or who entered the fishery speculatively would also receive quota which recognized their level of dedication to the fishery. Recent entrants with multiple vessels under one ownership would more efficiently deploy their vessels - combining quota on one vessel and dedicating the others to the other fisheries and areas in which they participate. All participants would be better able to harvest their quota in a more efficient manner - maximizing the total value of the fishery and the net return on investment.

Are There Alternative Solutions? If so, what are they and why do you consider your proposal the best way of solving the problem? There are no alternative solutions which would address the problem of over-capitalization in the scallop fishery off Alaska. The Council has already acknowledged the need to control effort with passage of the moratorium. This temporary measure must be replaced with a permanent system. What that permanent system is and how it is structured will depend on this process as well. Though the moratorium may last for four years, it is unlikely that the historic participants who are 100% dependent on this fishery will be able to last for four years under the current derby system - even if less than the fifteen vessels authorized to fish under the moratorium participate. Rationalization of some type will occur - without Council enactment of an individual transferable quota system, that rationalization will result in historic participants' bankruptcy and a takeover of the fishery by new entrants. In this event, the Council process would have produced opposite results of those intended by the Magnuson Act's National Standards.

Supportive Data & Other Information: What data are available and where can they be found? Economic data has been submitted to the Council in the form of break even analysis by most of the current participants. The ADF&G has substantial fishery

data from their observer program and from 28 years of managing the fishery and conducting research. There is considerable data presented by NMFS in response to the lawsuit by Wanchese Fish Company regarding the Mr. Big incident.

Signature:

Terese Landianis

AGENDA D-2
SEPTEMBER 1995
SUPPLEMENTAL

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
ELIZABETH CITY DIVISION

03 - 2 1995

TRAWLER DIANE MARIE, INC.)

Plaintiff)

VS.)

RONALD H. BROWN, Secretary of)
Commerce of the United States)
of America)

Defendant)

NO. 95-15-CIV-2-D

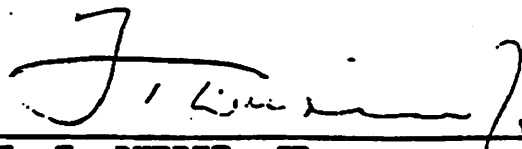
J U D G M E N T

For the reasons set forth in the court's memorandum of decision of even date, it is now


ORDERED, ADJUDGED AND DECREED:

1. That plaintiff's motion for summary judgment is denied;
2. That defendant's motion for summary judgment is granted; and
3. That the action is dismissed.

~~Let the plaintiff pay the costs.~~


 F. T. DUPREE, JR.
 UNITED STATES DISTRICT JUDGE

August 1, 1995.

I certify the foregoing to be a true and correct copy of the original.
 David W. Daniel, Clerk
 United States District Court
 Eastern District of North Carolina
 By  Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
ELIZABETH CITY DIVISION

AUG - 2 1995

TRAWLER DIANE MARIE, INC.)
)
 Plaintiff)
)
 VS.)
)
 RONALD H. BROWN, Secretary of)
 Commerce of the United States)
 of America)
)
 Defendant)

NO. 95-15-CIV-2-D
MEMORANDUM OF DECISION

Plaintiff, Trawler Diane Marie, Inc., brings this action against defendant, Ronald H. Brown, the Secretary of Commerce of the United States (Secretary), pursuant to the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1801, et seq. (Magnuson Act), and the Administrative Procedure Act, 5 U.S.C. § 551, et seq. (APA). Plaintiff is the owner and operator of the fishing vessel "Mister Big." Plaintiff seeks review of the decision by the Secretary to effect the temporary closure of the scallop fishery in the federal waters¹ off the coast of Alaska. The matter is presently before the court on cross-motions for summary judgment.

On February 23, 1995, the Secretary caused the federal waters off the Alaskan coast to be closed to scallop fishing for 90 days. The interim closure was extended for an additional 90 days effective May 31, 1995. The Secretary's decision to close the scallop fishery was prompted by the unregulated fishing in the EEZ

¹. The federal waters are those lying between 3 to 200 miles off the coast, also known as the Exclusive Economic Zone (EEZ).

on the part of the Mister Big. Plaintiff takes issue with the necessity of the closure and the procedures undertaken to accomplish it.

Prior to the emergency closure, the scallop fishery in the federal waters off the Alaskan coast had not been regulated by the federal government. Previously, the State of Alaska was able to regulate the scallop fisheries off its coast, in both state and federal waters, because all fishing vessels venturing into the waters were registered in Alaska and thus bound by the state's fishing regulations. Under the Magnuson Act, a state may only regulate fishing in federal waters if the vessel is registered under the law of that state. 16 U.S.C. § 1856(a)(3).

Alaska had regulated the scallop fisheries by, among other means, establishing opening and closing dates for harvest and setting harvest quotas. This year, Alaska closed the scallop season in the Prince William Sound area, where the Mister Big was fishing, on January 26, 1995. The state-set quota for the area, 50,000 pounds of scallops, was harvested in just sixteen days. Following the close of the scallop season, the Alaskan-registered boats returned to their Alaskan ports. However, the Mister Big continued to dredge for scallops in the area. It was soon learned that the Mister Big had sailed to the EEZ off the Alaskan coast directly from Seattle, Washington and that plaintiff had renounced its State of Alaska fishery permit in January 1995. Consequently, Alaskan authorities had no basis for asserting jurisdiction over plaintiff's fishing vessel.

Alaskan authorities pressed for federal regulation that would close the perceived loophole that enabled the Mister Big to engage in unregulated fishing. On February 17, the North Pacific Fishery Management Council (NPFMC), the body responsible for preparing proposed fishery management plans (FMP's) for the region, recommended an emergency closure of the scallop fishery in the federal waters off Alaska's coast. The NPFMC was concerned that continued unregulated dredging by the Mister Big could precipitate localized depletion of scallop stocks. The NPFMC voted by emergency teleconference on February 17, 1995 to recommend the closure of the scallop fishery in the EEZ off the Alaskan coast. The Secretary, on February 23, 1995, approved the emergency closure of the scallop fishery and, on May 31, 1995, extended the closure for an additional 90 days.

Plaintiff complains that it was not given notice and an opportunity to comment on the emergency rule, that the Secretary improperly concluded that the Mister Big's activities constituted an emergency situation, and that the Secretary assembled the administrative record to support his decision after the emergency rule had already been promulgated. Plaintiff also contends that the Magnuson Act's National Standards were not adhered to relative to the interim closure and that the dictates of the National Environmental Policy Act, 42 U.S.C. § 4321, et seq. (NEPA), and Executive Order 12866 were disregarded by the Secretary.

The Magnuson Act was enacted in 1976 with the goals of conserving and managing the nation's fisheries resources and

promoting the domestic fishing industry. 16 U.S.C. § 1801(b). The EEZ is divided into eight regions, each with a governing Regional Fishery Management Council. 16 U.S.C. § 1852. The regional Fishery Management Councils (Councils) are responsible for the preparation of proposed FMP's governing fish harvests within their respective jurisdictions for submission to the Secretary. Id. The Secretary reviews the Councils' recommendations for consistency with seven National Standards, or management principles, set forth in the Act and other applicable law. 16 U.S.C. § 1854. The Secretary then either approves or disapproves the Councils' recommendations. Id.

Under the Act, the Secretary may, upon a finding that "an emergency exists involving any fishery, . . . promulgate emergency regulations necessary to address the emergency." 16 U.S.C. § 1855(c); See, e.g., Parravano v. Babbitt, 837 F. Supp. 1034, 1041 (N.D. Cal. 1993). The Secretary can promulgate such 90-day emergency regulations even where there is not an FMP existent for the subject fishery. 16 U.S.C. § 1855(c). The judicial review provisions of the Magnuson Act are found at 16 U.S.C. § 1855(b). The Act incorporates the APA standard of review. Id. Accordingly, courts may only invalidate a challenged regulation if the regulation is (1) arbitrary and capricious or an abuse of discretion; (2) unconstitutional; (3) in excess of statutory jurisdiction; or (4) was promulgated without observance of procedure required by law. 5 U.S.C. § 706(2); Parravano, 837 F. Supp. at 1041-42; Southeastern Fisheries Association, Inc. v.

Mosbacher, 773 F. Supp. 435, 439 (D.D.C. 1991). The limited scope of judicial review applies with equal force to review of emergency regulations. Parravano, 837 F. Supp. at 1042 (citing Pacific Coast Federation v. Secretary of Commerce, 494 F. Supp. 626, 633 (N.D. Cal. 1980)).

SUPPLEMENTATION OF ADMINISTRATIVE RECORD

In support of its motion for summary judgment, plaintiff has filed two affidavits and defendant has moved to have them stricken. Plaintiff alleges that the administrative record was compiled after the decision to close the scallop fishery was made and that the record merely contains post hoc justifications for the Secretary's action. Plaintiff also contends that certain evidence was not correctly interpreted by the Secretary or his designees. Plaintiff further charges that defendant acted in bad faith and that the real reason for the closure was the lack of personnel to manage the fishery, not an emergency situation caused by plaintiff's vessel.

The law governing supplementation of an administrative record was set forth in the court's May 3, 1995 order and will not be repeated here. Suffice it to say, judicial review of agency action is ordinarily constrained to the administrative record and consideration of extra-record evidence is allowed only under exceptional circumstances. Virginia Agricultural Growers Association, Inc. v. Donovan, 774 F.2d 89 (4th Cir. 1985). The court previously granted defendant's motion for protective order so as to preclude discovery in this action, but left open the possibility of supplementation in the future if plaintiff could

make a showing of need to go outside the administrative record. Order of May 3, 1995.

The court finds that plaintiff has not proffered sufficient evidence of agency bad faith or improper motive to justify consideration of extra-record evidence. Plaintiff has merely alleged that the Secretary drew different conclusions from the evidence before him than did plaintiff's experts. The record adequately permits judicial review of the Secretary's actions and there is no need to supplement it. Accordingly, defendant's motion to strike the DuPaul-Kirkley and Fletcher affidavits is hereby granted.²

The court will proceed to consideration of the parties' cross-motions for summary judgment based on the materials before the Secretary at the time he promulgated the emergency rule. The law relating to the grant of summary judgment is so well-known that it need not be repeated here.

PROCEDURAL ISSUES

1. Finding that Emergency Situation Existed

Plaintiff first contends that the purported crisis involving the Mister Big did not constitute an emergency so that emergency action by the Secretary was unwarranted. Under applicable regulations, the Secretary cannot implement an emergency regulation to solve a long-recognized but ignored problem. 57 Fed. Reg. 375.

². The declaration of Steven T. Barry, offered to rebut the allegations contained in the affidavits submitted by plaintiff, will likewise not be considered by the court in its disposition of the summary judgment motions.

Rather, the genesis of the emergency regulation must involve "recent, unforeseen events or recently discovered circumstances" Id. For the Secretary's action to withstand judicial scrutiny, there must have been a reasonable finding that an emergency existed. Pacific Coast, 494 F. Supp. at 633.

Plaintiff first asserts that federal authorities had ample time to address any conservation concerns with respect to the scallop fishery without resorting to emergency action. As evidence of its claim, plaintiff points to the preparation by the NPFMC of a draft FMP for the scallop fishery. The proposed FMP was drafted in 1993 but was not adopted at an April 1994 meeting of the NPFMC. Plaintiff cites to portions of the FMP specifically addressing the possibility that an unregulated vessel might fish for scallops in the EEZ off the Alaskan coast as evidence that the Mister Big's activities in the area were not unforeseen. AR 8, at pp. iii-iv. Thus, plaintiff alleges, unregulated scallop fishing off the Alaskan coast could not constitute an emergency.

Defendant submits that the reason the proposed FMP was not adopted in April 1994 was because of the belief that all vessels fishing in the EEZ would be registered in Alaska and thus bound by the state's regulations. Defendant steadfastly maintains that the Mister Big's unregulated fishing did indeed rise to the level of an emergency. Conceding that the possibility of a non-Alaskan vessel fishing in the EEZ had been previously considered by the Secretary's designees, defendant argues that the potentiality of unregulated vessels was only discussed during the calendar year

preceding the Mister Big's voyage to the EEZ. This, defendant asserts, cannot amount to long-term inaction which would preclude emergency action by the Secretary.

Plaintiff next contends that one of the three requisite criteria for a finding of an emergency situation was absent with respect to the scallop fishery. See 57 Fed. Reg. 375. Plaintiff takes issue with the Secretary's finding that a serious conservation or management problem existed at the time the Secretary took emergency action. As support for its contention, plaintiff cites to an August 1, 1994 National Marine Fisheries Service (NMFS) report indicating a lack of reliable stock assessment information with respect to the weathervane scallops in the waters off the Alaskan coast. Plaintiff considers it incomprehensible that the unregulated fishing of its vessel could create a serious conservation or management problem where such concerns had not been previously voiced. Plaintiff, citing a February 22, 1995 memorandum from NMFS Director, Steven Pennoyer, to Rolland Schmitt (AR 41), posits that the true reason the scallop fishery was closed was because the NMFS did not have sufficient resources to manage the fishery.

Defendant responds that a serious conservation problem was created by the Mister Big's unregulated fishing inasmuch as state-set quotas for scallops would be exceeded were the Mister Big to continue with its activities. Another conservation issue raised by unregulated fishing, defendant posits, was the potential for excessive crab bycatch. Defendant further cites the potential for

trouble between the Mister Big and the Alaskan scallopers who were forced to return to the docks as a potential management problem.

The court agrees that the Secretary made a reasonable finding that an emergency existed. The Secretary effected the emergency closure of the scallop fishery after learning that the Mister Big, alone, had harvested more scallops than was allocated for the entire scallop fishing fleet in the Prince William Sound area. Plaintiff candidly concedes that the 50,000 pound limit for the area may have been "slightly exceeded." Plaintiff's Reply p. 17. It is immaterial how much of the Mister Big's catch came from areas outside Prince William Sound or how abundant the scallop population in Alaskan waters is. The Secretary reasonably concluded that continued unbridled dredging by the Mister Big could lead to localized depletion of the scallop stocks. AR 1, 60 Fed. Reg. 11054, 11056. At the time the Secretary promulgated the emergency rule and the 90-day extension of the rule, the Secretary knew that the 50,000 pound quota for Prince William Sound had been harvested by the Alaskan boats participating in the harvest and that the Mister Big alone had taken in some 52,000 pounds of scallops. In addition, the Secretary's concern is even more justified given that the 168-foot Mister Big is reportedly capable of harvesting 65,000 pounds of scallops per week. In light of the above facts, the Secretary could reasonably find that emergency regulation was necessary. The fact that federal authorities recognized the "management void" sometime before the Mister Big's venture to the Alaskan waters does not sway the court from this conclusion. The

above facts also support the Secretary's conclusion that continued unregulated fishing by the Mister Big posed serious conservation and management problems.

2. Notice and Opportunity to Comment

Plaintiff next contends that it was not afforded notice and an opportunity to comment with respect to the interim closure. Defendant answers that plaintiff was afforded the process it was due and that plaintiff did, in fact, submit comments. See AR 107. Although public comment on the interim emergency closure was solicited, see AR 1 at 11056, plaintiff asserts that it should have been contacted before the decision to take emergency action was made. Plaintiff takes this position due to the fact that the emergency rule was prompted by the specific activities of the Mister Big and because the Secretary and his designees were aware of how to reach plaintiff's representatives. Additionally, plaintiff avers that the NPFMC solicited comments from Alaskan fishermen, favorable to the emergency rule, in an effort to "sanitize the record." Plaintiff's Brief in Support, p. 9.

Section 1852(j)(2)(C) of Title 16 requires that the public be given timely notice of any emergency Council meeting. However, notice can be foregone under extraordinary circumstances. Parravano, 837 F. Supp. at 1048 (emergency situation constitutes "good cause" to dispense with normal notice and comment procedures). It appears from the record that federal authorities first became aware of the vessel's activities on February 10, 1995. AR 9. The court is persuaded that the Secretary acted in good

faith in reacting promptly to the bona fide emergency situation which presented itself when the Mister Big proceeded to engage in unregulated fishing in the EEZ. Faced with the possibility of localized depletion of the scallop stocks had the Mister Big been allowed to continue with its operations, the Secretary acted reasonably in foregoing normal notice and comment procedures.

There is an additional ground for not overturning the emergency rule based on the purported procedural irregularities. The court agrees with the reasoning of the Ninth Circuit in Alaska Factory Trawler Association v. Baldrige, 831 F.2d 1456, 1464 (9th Cir. 1987), where the court held that "[i]f the Secretary has followed the appropriate rulemaking procedures and has established a rational basis for his action . . . , procedural challenges for irregularities at the Council level will not provide a justification for invalidating the regulations." See also Louisiana v. Baldrige, 538 F. Supp. 625, 630 n.1 (E.D. La. 1982) (procedural irregularities not "actionable absent affirmative proof that the deviation makes the Secretary's [decision] . . . arbitrary and capricious). In the instant case, the court finds that any procedural irregularities that might have occurred at the Council level did not materially affect the Secretary's decisionmaking so as to render the emergency rule infirm.

3. Compilation of Administrative Record

Plaintiff next complains that the Secretary did not have the administrative record before him at the time he promulgated the emergency rule. Plaintiff contends that a record which would

support the Secretary's decision was simply compiled after approval of the interim closure of the scallop fishery. Defendant admits that the administrative record was assembled after promulgation of the emergency rule, but insists that all the documents therein existed at the time and were considered prior to action by the NPFMC and the Secretary. Defendant insists it is irrelevant that the documents comprising the administrative record were not actually physically bound together as of February 23, 1995.

The court finds that plaintiff's contention lacks merit. It is of no moment that the administrative record was not amassed until after the decision to close the scallop fishery was made. It is enough that a reviewing court can examine the information upon which the Secretary relied to determine whether there exists a rational connection between the evidence and the Secretary's exercise of discretion. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971). In this case, the administrative record adequately allows for the court's review of the Secretary's actions.

MERITS OF SECRETARY'S DECISION

Plaintiff also attacks the substantive merits of the Secretary's decision to close temporarily the EEZ to scallop fishing, contending that the Secretary's decision was arbitrary and capricious. Plaintiff argues that three of the seven National Standards that are to guide all action taken under the Magnuson Act were disregarded when the Secretary effected the interim closure of the scallop fishery. It is clear that the National Standards are

to be adhered to even when the Secretary takes emergency action.

57 Fed. Reg. 375; Parravano, supra.

1. National Standard One

National Standard One provides that:

Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.

16 U.S.C. § 1851(a)(1). Optimum yield is to be based on the maximum sustainable yield (MSY) for a stock. See 50 C.F.R. 602.11(b). Applicable regulations mandate that "overfishing" be defined in a manner that will facilitate monitoring and evaluation of the condition of the subject stock. See 50 C.F.R. 602.11(c).

Plaintiff argues that there was inadequate consideration of the condition of the weathervane scallop stock prior to promulgation of the emergency rule. Plaintiff points to the NPFMC's August 1, 1994 proposed FMP wherein it was reported that "numerical estimation of MSY for weathervane and other scallop species is not possible at this time." AR 8, at p. iii. According to plaintiff, the emergency rule is defective because there is no way to determine whether the optimum yield for the scallop fishery is being achieved. Plaintiff further argues that a formal cost-benefit analysis should have been conducted to determine if the complete closure of the scallop fishery was warranted.

Defendant counters that the appropriate analysis is whether the interim closure precludes the attainment of optimum yield in the future. Defendant posits that it does not for four reasons: (1) the prevention of overfishing during the interim closure will

help guarantee the long-term health of the fishery once it is re-opened; (2) the scallops not harvested during the closure will still be available upon the re-opening of the fishery because the weathervane scallop is a long-lived resource; (3) unregulated fishing could lead to stock depression; and (4) unregulated scallop fishing could result in excessive crab bycatch. Thus, defendant asserts that the Secretary reasonably concluded that the interim closure of the fishery was consistent with National Standard One.

The court agrees that the Secretary could rationally conclude that the interim closure of the scallop fishery would not hinder the long-term achievement of optimum yield for the fishery. The Secretary rationally concluded that the long-term health of scallop stock would be facilitated by an interim closure designed to avert overfishing of the species. Thus, the Secretary's decision will not be set aside on the ground that it is inconsistent with National Standard One.

2. National Standard Two

National Standard Two requires that "[c]onservation and management measures [] be based upon the best scientific information available." 16 U.S.C. § 1851(a)(2). Plaintiff contends that the Secretary's decision is not supported by the concrete analysis mandated by the Act. In particular, plaintiff insists that a Stock Assessment and Fishery Evaluation (SAFE) report, detailing the best scientific information concerning a stock or fishery, should have been prepared with respect to the weathervane scallop in the waters off the Alaskan coast. See 50

C.F.R. § 602.12(e) (dealing with details of SAFE reports for FMP's). Without a stock assessment, plaintiff reasons, there exists insufficient evidence from which the Secretary could conclude that closure of the fishery was necessary. In addition, plaintiff attacks federal officials' reliance on state guideline harvest ranges (GHR's) in considering the propriety of emergency closure of the fishery. Plaintiff also takes issue with the Secretary's working assumptions regarding the stock structure of weathervane scallops and the conclusions to be drawn from the shift to smaller and younger scallops in the harvest in recent years.

Defendant answers that the Secretary acted reasonably, albeit cautiously, in effecting the interim closure of the scallop fishery based on the information then available to him. Defendant asserts that the lack of complete information about a fishery should not preclude conservation efforts on the part of the Secretary. Defendant further explains that a stock assessment is not a prerequisite to regulation and that the Secretary did not unduly rely on the state GHR's in making his decision.

The court agrees that the Secretary rationally concluded that the closure decision was consistent with the dictates of National Standard Two. While it is true that the scientific information about the weathervane scallop is inconclusive, that fact does not preclude the Secretary from acting based upon the information that is available to him. "[T]he Magnuson Act does not force the Secretary and Councils to sit idly by, powerless to conserve and manage a fishery resource, simply because they are somewhat

uncertain about the accuracy of relevant information." National Fisheries Institute, Inc. v. Mosbacher, 732 F. Supp. 210, 220 (D.D.C. 1990); accord Southeastern Fisheries Association, 773 F. Supp. at 442; see also City of Las Vegas v. Lujan, 891 F.2d 927, 932-33 (D.C. Cir. 1989) (recognizing, in case brought under Endangered Species Act, that Secretary must sometimes act based upon inconclusive data). Since decisions simply must be based upon the best scientific information available, "the Act acknowledges that such information may not be exact or totally complete." Parravano, 837 F. Supp. at 1046 (citing Washington Crab Producers, Inc. v. Mosbacher, 924 F.2d 1438, 1448-49 (9th Cir. 1990)). It is enough that the Secretary did not disregard scientifically superior evidence. See Greenpeace Action v. Franklin, 14 F.3d 1324, 1336 (9th Cir. 1992) (faced with uncertain data, Secretary has discretion to choose which data on which to rely); City of Las Vegas, 891 F.2d at 933 (interpreting phrase under Endangered Species Act with respect to emergency action). In the case at bar, there is no evidence that the Secretary did so.

Additionally, the Secretary rationally concluded that the potential for localized depletion of scallop stocks existed given the fact that the state-set GHR for the area in which the Mister Big was fishing had been exceeded by over 100%. See AR 1, at 11055-56. The Secretary's fears concerning overfishing were further substantiated by his interpretation of data indicating that, in recent years, smaller and younger scallops were comprising a greater proportion of the harvest. See AR 1, at 11054; AR 6 at

p. 16. Based on the above information, as limited as it may be, the Secretary could reasonably conclude that continued unregulated fishing by the Mister Big could lead to overfishing and localized depletion of the scallop stocks in the EEZ off the coast of Alaska.³ The fact that the Secretary opted for a conservative approach in light of the information available to him, whereas others might draw different conclusions from the same evidence, does not render the Secretary's decision arbitrary and capricious. Greenpeace Action, 14 F.3d at 1336 (lack of dispositive evidence "does not render agency's determination 'arbitrary and capricious'"); Organized Fishermen of Florida, Inc. v. Franklin, 846 F. Supp. 1569, 1577 (S.D. Fla. 1994) (existence of conflicting data does not yield agency's decision faulty).

3. National Standard Three

National Standard Three mandates that:

To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

16 U.S.C. § 1851(a)(3). Plaintiff essentially complains that the NPFMC should have worked with the Pacific Fishery Management Council (PFMC), with jurisdiction over the waters off the coasts of Oregon and Washington, so as to ensure a comprehensive management effort with respect to the weathervane scallop.

The court agrees with defendant that plaintiff's argument is

³. The same reasoning applies with respect to the Secretary's presumption that scallops are organized into "discrete localized populations" and thus vulnerable to localized depletion even though others could proffer contradictory conclusions. See AR 6.

meritless. There is no reason to believe that the NPFMC needed to consult with the PFMC. There is no evidence that the officials responsible for the waters off the coasts of Oregon and Washington encountered the same problem which existed in the EEZ off the Alaskan coast, namely, unregulated fishing by the Mister Big. The court agrees that, absent some showing of need for uniform management, National Standard Three is simply not implicated.

The court agrees that, with respect to the National Standards, the Secretary's decision to close temporarily the scallop fishery was not arbitrary or capricious, but instead was a reasonable exercise of his discretionary authority and was supported by substantial evidence.

COMPLIANCE WITH NEPA

Plaintiff also contends that the Secretary's actions contravened the dictates of the National Environmental Policy Act. Under NEPA, federal agencies and departments are required to prepare an Environmental Impact Statement (EIS) for any "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). An EIS must be prepared "when substantial questions are raised as to whether a project may cause significant degradation of the environment." Alaska Factory, 831 F.2d at 1465 (citing Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 986 (9th Cir. 1985)). An agency's decision not to file an EIS will be upheld if reasonable. Alaska Factory, 831 F.2d at 1465 (citing Foundation for North American Wild Sheep v. Department of Agriculture, 681 F.2d 1172, 1177 (9th Cir. 1982)).

Plaintiff attacks the Secretary's decision not to prepare an EIS based upon the NMFS's Finding of No Significant Impact (FONSI). See AR 3. Plaintiff contends that the decision not to file an EIS regarding closure of a "highly-worked fishery" was unreasonable. Plaintiff's Brief in Support, p. 23.

Defendant counters that it is simply too late for plaintiff to raise this issue since the NEPA claim was not pled in the complaint. Additionally, defendant maintains that plaintiff lacks standing to raise a NEPA claim because plaintiff has alleged only economic injury, which is outside the zone of interests intended to be protected by that act. Finally, the Secretary defends the merits of the decision not to issue an EIS and contends that plaintiff has presented no evidence which would undercut that determination.

To successfully present a challenge to agency action, a plaintiff must assert an interest "arguably within the zone of interests to be protected by the statute . . . in question." Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970); Lujan v. National Wildlife Federation, 497 U.S. 871 (1990); Shanty Town Associates Limited Partnership v. Environmental Protection Agency, 843 F.2d 782, 788 (4th Cir. 1988). The "zone of interest" requirement is designed "to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives." Clarke v. Securities Industry Association, 479 U.S. 388, 397 n.12 (1987).

Accordingly, plaintiff must allege that its injury is within

the zone of interests protected by NEPA. In enacting NEPA, Congress intended to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321; Nevada Land Action Association v. United States Forest Service, 8 F.3d 713, 716 (9th Cir. 1993). Courts have uniformly held that a plaintiff who asserts solely economic injury lacks standing to challenge an agency action under NEPA. See Nevada Land Action, 8 F.3d at 716; Competitive Enterprise Institute v. National Highway Traffic Safety Administration, 901 F.2d 107, 123-24 (D.C. Cir. 1990); Portland Audubon Society v. Hodel, 866 F.2d 302, 309 (9th Cir.), cert. denied, 492 U.S. 911 (1989); Panhandle Producers & Royalty Owners Association v. Economic Regulatory Administration, 847 F.2d 1168, 1179 (5th Cir. 1988); Port of Astoria v. Hodel, 595 F.2d 467, 475 (9th Cir. 1979); Churchill Truck Lines, Inc. v. United States, 533 F.2d 411, 416 (8th Cir. 1976); Clinton Community Hospital Corporation v. Southern Maryland Medical Center, 510 F.2d 1037, 1038 (4th Cir.), cert. denied, 422 U.S. 1048 (1975); Organized Fishermen of Florida v. Watt, 590 F. Supp. 805, 815 (S.D. Fla. 1984), aff'd, 775 F.2d 1544 (11th Cir. 1985), cert. denied, 476 U.S. 1169 (1986); see also 40 C.F.R. § 1508.14 ("economic or social effects are not intended by themselves to require preparation of an environmental impact statement").

Since plaintiff has alleged no injury beyond the economic losses incurred as a result of the "grounding" of the Mister Big, the court is compelled to conclude that plaintiff has not suffered

any injury within the zone of interests protected by NEPA and, thus, does not have standing to challenge the Secretary's action under NEPA. Additionally, the court would be justified in holding that plaintiff is not entitled to summary judgment on its NEPA claim because it failed to plead such a claim in its complaint. See United States v. Weiss, 847 F. Supp. 819, 825 (D. Nev. 1994) ("defendant is not required to address an argument based upon a claim that was never pled"). Plaintiff failed to put defendant on notice that the NEPA claim would be pursued, and accordingly, fundamental fairness dictates that plaintiff cannot prevail on its summary judgment motion with respect to that claim.

Thus, as plaintiff lacks standing to assert a NEPA violation, the court will not address the merits of the Secretary's decision to file a FONSI rather than an EIS.⁴ Suffice it to say, plaintiff, based on its lack of standing, is not entitled to have the Secretary's decision overturned due to non-compliance with NEPA.

COMPLIANCE WITH EXECUTIVE ORDER 12866

Lastly, plaintiff challenges the emergency rule as violative of Executive Order 12866. E.O. 12866 requires that the Office of Management and Budget review proposed "significant regulatory action." Pursuant to pertinent guidelines, a significant regulatory action is one that may:

- (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, productivity, competition, jobs, the

⁴. The court notes, however, that there appears to be no evidence of record which would undermine the reasonableness of the Secretary's decision not to prepare an EIS.

environment, public health or safety, or State, local, or tribal governments or communities.

58 Fed. Reg. 51735. Plaintiff disputes the conclusion that the executive order was not implicated because the closure decision was not a "significant regulatory action." Plaintiff contends that the temporary closure of the scallop fishery must result in some adverse material impact on the subject economies and communities.

Plaintiff's contentions do not merit discussion. Section 10 of E.O. 12866, titled "Judicial Review," reads as follows:

Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person (emphasis added).

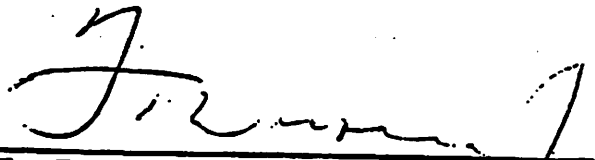
Accordingly, plaintiff has no right of action to challenge the Secretary's compliance with E.O. 12866. See State of Michigan v. Thomas, 805 F.2d 176, 187 (6th Cir. 1986) (interpreting same language as precluding judicial review of E.O. 12291). Moreover, the emergency rule does not constitute significant regulatory action so as to render it subject to the requirements of the executive order.

CONCLUSION


The court is persuaded that an emergency situation existed following the Mister Big's escapade into the federal waters off the coast of Alaska and that the Secretary acted rationally to solve the problem. The Secretary's decision to close temporarily the scallop fishery was not tainted or materially affected by

procedural irregularity. Moreover, there is no other reason to set aside the Secretary's decision. The emergency rule does not contravene the dictates of the National Standards and plaintiff is barred from challenging the emergency rule as violative of NEPA and E.O. 12866. Accordingly, plaintiff's motion for summary judgment will be denied, and defendant's granted.

Judgment embodying the rulings in this memorandum will be entered.


F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

August 1, 1995.

I certify the foregoing to be a true and correct copy of the original.
David W. Eichel, Clerk
United States District Court
Eastern District of North Carolina
By 
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

ELIZABETH CITY DIVISION
No. 2:95-cv-15-D(2)

TRAWLER DIANE MARIE, INC.)

Plaintiff,)

v.)

NOTICE OF APPEAL

RONALD H. BROWN, Secretary of Commerce)
of the United States of America)


Defendant.

NOTICE OF APPEAL

Notice is hereby given that Trawler Diane Marie, Inc., plaintiff in the above-named case, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the Memorandum of Decision and Judgment entered in this action on the 2nd day of August, 1995.

TRAWLER DIANE MARIE, INC.

By KELLOGG, EVANS & DEVEAU

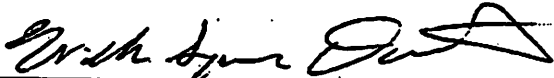

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REC'D AUG 23 1995

CERTIFICATE

I hereby certify that a true copy of the foregoing Notice of Appeal was mailed to John Marshall at the U.S. Justice Department and to Janice McKenzie Cole, U.S. Attorney, on this 24th day of August, 1995.


William Spencer Daniels

DATES: Effective September 25, 1995. The window period for filing applications will open on September 25, 1995, and close on October 26, 1995.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process for Channel 267A at Ola, Arkansas, should be addressed to the Audio Services Division, FM Branch, (202) 418-2700.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order*, MM Docket No. 94-8, adopted August 2, 1995, and released August 10, 1995. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Center (Room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., (202) 857-3800, located at 1919 M Street, NW., Room 246, or 2100 M Street, NW., Suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: Secs. 303, 48 Stat., as amended, 1082; 47 U.S.C. 154, as amended.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Arkansas, is amended by adding Ola, Channel 267A.

Federal Communications Commission.

Andrew J. Rhodes,

Acting Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 95-20115 Filed 8-14-95; 8:45 am]

BILLING CODE 6712-01-F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 673

[Docket No. 950428123-5193-02; I.D. 042595A]

RIN 0848-A100

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: Final rule.

SUMMARY: NMFS issues a final rule to implement a Fishery Management Plan for the Scallop Fishery off Alaska (FMP). The FMP specifies the optimum yield (OY) for the scallop fishery in Federal waters off Alaska as a numerical range of 0-1.1 million lbs (0-499 mt) of shucked scallop meats. The only management measure authorized under the FMP is an interim closure of Federal waters off Alaska to fishing for scallops. Federal waters will remain closed for up to 1 year. This action is necessary to prevent overfishing of scallop stocks while an amendment to the FMP is prepared that would allow the controlled harvest of scallops in Federal waters. This action is intended to prevent overfishing of scallops that could otherwise result from unregulated fishing for scallops in Federal waters.

EFFECTIVE DATE: 12:01 a.m., Alaska local time (A.l.t.), August 29, 1995.

ADDRESSES: Copies of the FMP and the Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis (EA/RIR/FRFA) prepared for the FMP may be obtained from the North Pacific Fishery Management Council, P.O. Box 103136, Anchorage, AK 99510.

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

SUPPLEMENTARY INFORMATION: Federal waters off Alaska have been closed to fishing for scallops under an emergency interim rule that expires August 28, 1995 (60 FR 11054, March 1, 1995, corrected at 60 FR 12825, March 8, 1995, and 60 FR 28359, May 31, 1995). The emergency interim closure was intended to prevent unregulated and uncontrolled fishing for scallops in Federal waters while the North Pacific Fishery Management Council (Council) prepared the FMP.

At its April 1995 meeting, the Council approved the FMP for review under

section 304(b) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.* (Magnuson Act)). A notice of availability of the proposed FMP was published in the Federal Register on April 28, 1995 (60 FR 20959), and invited comment on the FMP through June 26, 1995. A proposed rule to implement the FMP was published in the Federal Register on May 10, 1995 (60 FR 24822), and comments on the proposed rule were invited through June 19, 1995. Three letters providing written comment were received within the comment period. Written comments on the FMP and the proposed rule to implement it are summarized in the Response to Comments section, below.

The FMP was approved on July 26, 1995, under section 304(b) of the Magnuson Act. Upon reviewing the reasons for the FMP and the comments on the proposed rule to implement it, NMFS has determined that this final rule is consistent with the Magnuson Act and the FMP as adopted by the Council.

The final rule implements a maximum 1-year closure of Federal waters to fishing for scallops. The intent of this action is to prevent an unregulated and uncontrolled fishery for scallops in Federal waters that could result in overfishing of scallop stocks while an amendment to the FMP is prepared, which would authorize fishing for scallops under a Federal management regime. NMFS has pursued this approach, because it has determined that the suite of alternative management measures necessary to support a controlled fishery for scallops in Federal waters could not be prepared, reviewed, and implemented before the emergency rule expires on August 28, 1995. Instead, NMFS has approved this rule to protect the long-term productivity of scallop stocks off Alaska necessary to achieve the future harvest of OY on a continuing basis without the "boom and bust" cycle historically experienced in other scallop fisheries.

The FMP and its implementing rule are explained further in the preamble to the proposed rule. The measures set out in the final rule do not differ from the proposed rule.

Response to Comments

Three letters of comments were received within the comment period. A summary of the written comments and NMFS' response follows:

Comment 1. No information exists to support closure of Federal waters to fishing for scallops under the proposed FMP.

Response. NMFS disagrees. Fishing for scallops in Federal waters by a vessel not subject to State regulations governing the scallop fishery precipitated an emergency rule to close Federal waters to unregulated fishing for scallops (60 FR 11054, March 1, 1995, and 60 FR 28359, May 31, 1995). Based on the events that warranted the emergency interim rule, the Council has recommended that a Federal FMP is needed to authorize an interim closure of Federal waters to fishing for scallops that will continue for 1 year or until a superseding Federal management regime is implemented, whichever is earlier. In the absence of a management regime, NMFS anticipates that continued unregulated scallop fishing could result in local depletion of scallops, increasing the risk of overfishing of scallops stocks.

NMFS recognizes that an interim closure of Federal waters to fishing for scallops will result in a substantial impact on scallop fishermen. The potential foregone revenue to scallop fishermen could approach \$6 million if Federal waters remain closed for the entire year. However, this short-term impact is justified by the need to prevent overfishing of scallop stocks and ensure the long-term productivity of the scallop resource so that the OY may be achieved on a continuing basis under a future management regime that authorizes a regulated fishery in Federal waters.

Comment 2. The proposed FMP is not consistent with National Standard 1, because the FMP does not establish a quantified maximum sustainable yield (MSY); the proposed OY range does not reflect the estimated range of harvests in Federal waters relative to distribution of weathervane scallops, which is from California to Alaska; and the specified OY is not based on the best information available (see Comment 3). Furthermore, the 1-year closure authorized under the proposed FMP would interfere with the achievement of OY on a long-term, continuing basis.

Response. NMFS disagrees. See also response to Comment 3. NMFS noted in the preamble to the proposed rule that biomass estimates for scallops are limited, and the continuing expansion of this fishery into new areas make numerical estimation of MSY for weathervane and other scallop species not possible at this time. Nonetheless, an OY range (0 to 1,100,000 lb (0-499 mt)) may be established based on historical catches from Federal waters. These catches are the best information available on the long-term productivity of the scallop resource off Alaska. During the period that Federal waters

are closed to fishing for scallops, the OY is set at zero. This interim OY level is consistent with National Standard 1 and will achieve OY on a continuing basis because: (1) Prevention of overfishing during the short-term will help guarantee a healthy long-term OY from the fishery when it is reopened, (2) the scallop harvest foregone during the interim closure will be available for later harvest and will contribute to increased OY because this species is a long-lived resource, (3) uncontrolled scallop fishing (the alternative to implementing the FMP) in the EEZ may repeat the overfishing and stock depression that historically has occurred in the weathervane scallop fishery, and (4) uncontrolled scallop dredging increases the potential for increasing bycatch of crab beyond levels presently established by the State of Alaska and may interfere with achieving OY in certain crab fisheries.

If implementation of the FMP and its associated OY are delayed until more scientific information is collected and analyzed, unregulated fishing for scallops in Federal waters would continue until NMFS acquired all data necessary to refine the determination of MSY/OY. At that point, the resource might be too diminished to allow achievement of OY on a continuing basis.

Comment 3. The proposed FMP is not consistent with National Standard 2, because the FMP does not use the best information available, that includes data on landings, meat counts, resource distribution, spatial catch, and fishing effort. Furthermore, the available scientific database for the Alaska scallop fishery is thin and does not justify an interim closure of Federal waters.

Response. NMFS disagrees. The FMP and preamble to the proposed rule summarized the recent trends in scallop landings, meat counts per pound, and fishing effort that precipitated the preparation of a scallop management plan by the Alaska Department of Fish and Game (ADF&G). NMFS and ADF&G have acknowledged the limited information on scallop population structure and abundance. ADF&G is continuing to pursue analyses of biological, fishery, and resource assessment data to better understand the population structure of the Alaska scallop resource and its sustainable exploitation level. Available scientific data on the life history traits of weathervane scallops and other scallops species indicate that weathervane scallops are susceptible to localized depletion and require a cautious resource management approach. Therefore, NMFS has determined that

an interim closure of the scallop fishery in the EEZ is necessary until such time as a management regime can be implemented to manage the fishery.

Comment 4. The weathervane scallop is distributed from California to Alaska and commercial fisheries occur off the States of Oregon and Washington. National Standards 3 and 6 require that an individual stock of fish shall be managed as a unit throughout its range and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches. The proposed FMP does not indicate that any effort was made to consult with the States of Oregon and Washington or with the Pacific Fishery Management Council (Pacific Council). Given that the proposed FMP only addresses fishing activity off Alaska, the FMP does not consider a properly defined management unit and violates National Standards 3 and 6.

Response. NMFS disagrees. Comment 4 confuses geographic distribution of a species with stock management. Concentrations of adult scallops do not mingle and typically are managed as separate stocks. The geographic range of the weathervane scallops consists of a collection of stocks. Available information on resource distribution supports the management of the Alaska scallop resource as separate stock units. NMFS anticipates that future amendments to the FMP that authorize controlled fishing for scallops off Alaska will further define management units of the Alaska scallop resource in a manner very similar to the scallop management areas developed by the State of Alaska.

The FMP for the Alaska scallop fishery was precipitated by uncontrolled fishing for scallops off Alaska. A similar situation could occur off the Pacific Coast States. This situation has prompted the Pacific States Marine Fisheries Commission (PSMFC) to pursue an amendment to the Magnuson Act that would authorize the West Coast States to protect legitimate state interests in the conservation and management of fish caught in Federal waters off the coast of Washington, Oregon, or California in the absence of an approved Federal fishery management plan.

The PSMFC predicated its action on the belief that scallops are very sensitive to fishing pressure and that sudden increases in fishing effort may have long-term negative consequences to the recuperative capability of scallop stocks. The PSMFC has further acknowledged action by the Council to initiate rulemaking to control the scallop fishery off Alaska and the resulting potential for

increased effort for scallops off Washington and Oregon.

No information is available to NMFS that indicates that the interim closure of Federal waters off Alaska to fishing for scallops under either the February 24, 1995, emergency rule or the FMP will have an impact on the Washington and Oregon scallop fishery in a manner not already occurring due to increased fishing effort by vessels displaced from the East Coast of the United States. In recent years, the amount of scallops harvested off Oregon and Washington annually was not substantial relative to the Alaska fishery and averaged less than 1 percent of the Alaska harvest during 1989-1992. In 1993, the scallop landings off Oregon and Washington increased to 270,000 lb (122.47 mt) and 246,000 lb (111.58 mt), respectively, due to increased fishing effort by east coast vessels.

The Council has no authority beyond the Federal waters off Alaska. Nonetheless, the Council consists of three members from the State of Washington and two members from the State of Oregon. At least one of these members serves on both the North Pacific and Pacific Councils, as well as the PSMFC. NMFS believes this joint membership served to inform adequately the Pacific Council about scallop management actions the Council was considering. The fact that the PSMFC chose to pursue a Magnuson Act amendment to resolve Pacific coast management concerns rather than an interjurisdictional management plan and that the Alaska scallop FMP only addresses fishing off Alaska does not constitute a violation of National Standards 3 or 6.

Comment 5. The proposed FMP is not consistent with National Standard 4. An interim closure of Federal waters to fishing for scallops discriminates against residents of different States, and only Alaska State registered vessels are allowed to harvest weathervane scallops in Alaska State waters. This provides a competitive advantage to Alaskan vessels.

Response. NMFS disagrees. The interim closure to fishing for scallops authorized under the FMP does not discriminate against non-Alaska State residents. All vessels are prohibited from fishing for scallops in Federal waters off Alaska, including vessels owned and operated by Alaska State residents and vessels registered under the laws of the State of Alaska. The State of Alaska has notified the public that it will open specified State waters to limited fishing for scallops. Any vessel owner, regardless of state of residency, may choose to register his/

her vessel with the State of Alaska and abide by State regulations governing the scallop fishery in State waters. Neither inconsistency with National Standard 4 nor discrimination against non-Alaska state residents results from implementation of the FMP.

Comment 6. The proposed FMP is not consistent with National Standard 5, because the FMP seriously limits efficiency and no analysis is provided on how a 1-year closure of Federal waters will enhance long-term efficiency. Similarly, the previous acceptance by NMFS of an Alaska State scallop management program also imposed technical and economic inefficiencies.

Response. NMFS disagrees. Efficiency in terms of resource management is enhanced by providing for the long-term sustainable harvest of the scallop resource (see response to Comment 2). NMFS concurs that short-term economic gain is subordinated to the long-term health of the scallop resource. This balance is considered and allowed under National Standards 1 and 5. Furthermore, fishery resources regulations typically control efficiency to prevent stock depletion. Without such controls, fishermen might fish until it were unprofitable to do so, resulting in localized depletion of scallops, which would increase the risk of overfishing scallop stocks.

Comment 7. The proposed FMP is not consistent with National Standard 7, because the FMP does not address how NMFS would monitor the closure of Federal waters to fishing for scallops. Effective enforcement could be costly. Furthermore, the proposed FMP differs from the regulations of Washington and Oregon and would not minimize costs and avoid unnecessary duplication.

Response. NMFS disagrees. NMFS would monitor and enforce closure of Federal waters to fishing for scallops in the same manner that groundfish area closures are enforced (i.e., observer data, surveillance flights by the U.S. Coast Guard (USCG), recordkeeping and reporting documentation, other available sources of information that indicate the location of fishing operations). NMFS recognizes that some scallop stocks straddle Federal and State waters in a manner that may make the enforcement of the closure of Federal waters off Alaska difficult. NMFS also recognizes that, in recent years, most of the scallop harvest has come from Federal waters and that the State of Alaska intends to follow a conservative approach to opening State waters to fishing for scallops so that the potential for redistribution of fishing effort from Federal to State waters does not

jeopardize the resource in State waters. NMFS intends to coordinate management with the State of Alaska so that the State will consider any enforcement concerns resulting from the closure of the Federal fishery when determining whether or not to open State waters to fishing for scallops.

Comment 8. The proposed FMP is not consistent with the New England Fishery Management Council's (New England Council's) scallop fishery management plan, which provides for an industry advisory panel. The proposed FMP should allow for an industry advisory panel to provide a forum for management agencies and industry members to discuss management and data collection strategy.

Response. The management measures contained in the scallop fishery management plan prepared by the New England Council may or may not be pertinent to the management of the Alaska scallop fishery under the authority of the Council. The proposed FMP contains a single management measure, an interim closure of Federal waters, to provide the time necessary to prepare a management regime that would authorize a controlled fishery for scallops in Federal waters. This future management regime could provide for an industry advisory panel that provides input to management agencies if the Council so desires. An industry advisory panel beyond that which already exists in the normal Council process is not mandated, because the New England Council has made such a provision in its scallop management plan.

Comment 9. Concerns about localized overfishing of scallop stocks do not justify closure of Federal waters because fishermen will leave a fishing area before the stock is overharvested to the point where profit margin falls to the break even point. As a result, sufficient amounts of scallops will remain to repopulate an area.

Response. NMFS disagrees. Also see response to Comment 2. The weathervane scallop is a long-lived, slow growing species. As a result, this species is vulnerable to overfishing. Fishing a localized stock of scallops until catch-per-unit-of-effort (CPUE) drops to the point of becoming unprofitable poses conservation concerns, especially if the stock is reduced to the point where it is not able to recover or can recover only after a long period of time.

Prior to the 1990's, management of the Alaska weathervane scallop fishery was premised on the assumption that the fishery would self-regulate by

economics. The fishery was fairly small and passively managed using gear restrictions, fishing seasons, and closed areas. Experience with this management approach for weathervane scallops and other scallop species has indicated that a collapse of a scallop fishery is not uncommon following a relatively brief period of intense fishing effort. Recent expansion of fishing capacity of the Alaska scallop fleet has aggravated overfishing concerns.

The scallop resource off Alaska may have avoided overall depletion during the early years of the fishery (late 1960's and early 1970's) because scallops were widely distributed and the small fleet was economically motivated to move to new areas to maintain catch rates or to other fisheries. However, available fishery data suggest that the Kodiak and Yakutat area stocks may have been overfished.

During the early years of the Alaska scallop fishery, the scallop harvests from the Kodiak and Yakutat areas were predominated by scallops age 7 and older. By the early 1970's, 2-6 year old scallops dominated the catch. The magnitude of the age shift during the early years of the fishery, as well as subsequent poor fishery performance, indicates that high harvests during the early years of the fishery off Kodiak and Yakutat were not sustainable over the long term (Shirley and Kruse 1995). Published scientific literature provides numerous other examples where overharvesting of scallop stocks has led to long-term or permanent inability to support a commercial fishery (Young and Martin 1989, Orensanz 1986, Aschan 1991).

Comment 10. Closure of Federal waters to fishing for scallops will prevent the collection of fishery data that are needed for sound management of the fishery.

Response. NMFS recognizes the importance of fishery data in monitoring the status of the scallop resource. The FMP authorizes a 1-year closure of Federal waters, so the potential loss of commercial fishery data from Federal waters is limited. Fishery data still would be collected from State scallop fisheries authorized by ADF&G. Furthermore, ADF&G has scheduled a 1995 resource assessment for the scallop resource near Kayak Island in the Prince William Sound management area. In addition, ADF&G plans to analyze biological and fishery data already collected to assess sustainability of exploited weathervane scallop stocks off Alaska. Given the opportunity to collect data from State fisheries during the period of time Federal waters are closed, as well as ADF&G's analysis of data

already collected to estimate recruitment, growth, and mortality parameters, NMFS does not believe that a 1-year hiatus in the collection of Federal fishery data will significantly affect the future management of the fishery.

Comment 11. NMFS accepts public comment and outside data perfunctorily and for no other reason than that it is required by statute to do so. No evidence exists, especially for the scallop fishery, that the comments submitted from commercial fishing interests have had any effect whatsoever on ultimate decisions.

Response. NMFS disagrees. NMFS routinely revises final regulations in response to public comment. In the case of the proposed FMP, this public comment challenging the merits of a fishery closure or the efficacy of constraining fishing activity implies that short-term financial gain on the part of one or more vessels has priority over the long-term health of the scallop resource and sustainable yield by all participants in the fishery in future years. This perspective is counter to what NMFS believes to be wise use of the Alaska scallop resource. Nonetheless, NMFS has acknowledged and responded to such comments.

Comment 12. The implementation of the proposed FMP is being done on a fast track to prevent unregulated fishing in Federal waters by one vessel. A major concern posed by NMFS and the Council is that allowing unregulated fishing by one vessel in Federal waters could cause serious biological overfishing. Without any information on resource conditions and vessel performance measures, it is not possible to state whether or not a single vessel could endanger the resource locally or otherwise. This would be highly unlikely.

Response. NMFS disagrees. The schedule for review and implementation of the proposed FMP is established under section 304 of the Magnuson Act. NMFS has not deviated from this process to pursue an alternative "fast-track" implementation schedule. NMFS acknowledges that the preparation and review of the FMP have been given high priority. NMFS believes that the Alaska scallop fishery must be protected from uncontrolled fishing activity to better assure the long-term health of the scallop resource and sustain harvests of this resource at an optimum level. As experienced earlier in 1995, unregulated fishing by a single vessel in Federal waters exceeded an Alaska State guideline harvest level by over 100 percent. This degree of overharvesting has the potential for unrestricted crab

bycatch and the possibility that one or more vessels would continue to overharvest the scallop stocks, necessitates closure of Federal waters until a Federal management regime is prepared that authorizes a controlled fishery for scallops. Moreover, continued unregulated fishing by one or more vessels could result in conflicts with other vessels that do not choose to pursue an unregulated fishery, or those Alaska-licensed vessels that are prohibited from fishing for scallops. NMFS has determined that such conflicts represent serious management issues that should be addressed whenever possible.

Comment 13. NMFS was content to permit regulation of the scallop resource by the State of Alaska, which authorized the harvest of 1.6 million lbs (726 mt) of scallops for 1995. Furthermore, NMFS did not require the Alaska State regulations covering harvesting in Federal waters by Alaska State registered vessels to meet the national standards and purposes of the Magnuson Act. The 1995 quota under State management, which NMFS found acceptable, still has 1.5 million lbs (680 mt) available. Yet NMFS maintains that the fishery must be closed to protect the resource. The full 1995 Alaska quota should be harvested before the fishery is closed.

Response. NMFS disagrees. Comment 13 suggests that no conservation problem exists that justifies a closure of Federal waters under the proposed FMP, because the full 1.6 million lbs (726 mt) annual quota established by the State of Alaska has not been harvested. This premise is misleading and irrelevant to the basis for the interim closure authorized under the FMP. The interim closure under the FMP is necessary to address NMFS' concern for localized depletion as a result of uncontrolled dredging for scallops by one or more vessels. Experience in 1995 has shown that closure of an area to fishing for scallops under Alaska State regulations when an annual quota has been reached does not cause unregulated vessels to cease fishing operations. As a result of such action, the State's quota for its Prince William Sound registration area was exceeded by over 100 percent. This poses more than adequate evidence of a serious conservation problem. Therefore, the commenter's suggestion that scallops remain to be harvested in other Federal waters off Alaska is irrelevant to the problem faced by management agencies.

Comment 14. The determination in the preamble to the proposed rule that the rule is not significant for purposes

of E.O. 12866 is unexplained and is not legally correct.

Response. The EA/RIR/Initial Regulatory Flexibility Analysis prepared for the FMP addressed the significance of the interim closure authorized under the FMP relative to E.O. 12866. This information was not required to be repeated in the preamble to the proposed rule.

NMFS requires the preparation of a RIR for all regulatory actions that either implement a new fishery management plan or significantly amend an existing plan. The RIR is part of the process of preparing and reviewing fishery management plans and provides a comprehensive review of the changes in net economic benefits to society associated with proposed regulatory actions. The analysis also provides a review of the problems and policy objectives promoting the regulatory action and an evaluation of the major alternatives that could be used to solve the problems. The RIR addresses many of the items in the regulatory philosophy and principles of E.O. 12866.

E.O. 12866 requires that the Office of Management and Budget review proposed regulatory programs that are considered to be "significant." A "significant regulatory action" is one that is likely to:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlement, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866.

A regulatory program is "economically significant" if it is likely to result in the effects described in item (1) above. The RIR is designed to provide information to determine whether the proposed regulation is likely to be "economically significant."

NMFS believes the RIR prepared for the proposed FMP adequately assessed the costs and benefits that could result from the implementation of the proposed FMP and that the determination that the rule implementing the FMP is not significant under E.O. 12866 is justified.

Comment 15. The legal brief supporting Trawler Diane Marie, Inc.'s motion for summary judgment in its case seeking to set aside the February 24, 1995, emergency rule, as well as the associated affidavit of James E. Kirkley and William D. DuPaul commenting on both the emergency rule and the proposed FMP closure of the scallop fishery in Federal waters off Alaska are submitted as comment on the proposed FMP.

Response. The issues and complaints contained in the legal brief filed by the plaintiffs in *Trawler Diane Marie, Inc. v. Ronald H. Brown*, No. 2-95-CV-15-D(2) (E.D.N.C.), have been responded to in several subsequent memoranda of reply and are not repeated here. General comments that directly pertain to the proposed FMP and that were contained also in the Kirkley and DuPaul review of the proposed FMP are addressed above. Comments specific to the Kirkley and DuPaul review are addressed below.

Comment 16. The proposed FMP presents insufficient information to assess whether or not the FMP will improve resource conditions and benefit the nation. There has been no stock assessment of the resource in recent years. Furthermore, the structure of the stock is not defined and information is lacking on whether the resource is characterized as an open population or defined in terms of discrete, localized, and self-contained populations.

Response. NMFS acknowledges that the data on the weathervane scallop resource are not complete. ADF&G conducted an assessment of the Cook Inlet stock in 1984 and intends to conduct an assessment of the Prince William Sound stock this summer. Although stock structure of the weathervane scallop resource is not well defined, scientists generally recognize the resource to comprise megapopulations, which are discrete collections of adult animals that do not intermix but that may be connected by larval drift. Such populations are susceptible to localized depletion. Furthermore, the proposed FMP refers to scientific evidence that a number of other scallop species have megapopulations comprising multiple discrete self-sustaining populations. NMFS concludes from these studies that weathervane scallops structure may be organized similarly and be susceptible to localized overfishing. Weathervane scallops and other scallop species have a history of overexploitation that resulted in serious depletion of localized stocks, which may have led to overfishing (Shirley and Kruse 1995). Concerns about overexploitation as well as uncertainty about scallop stock

structure and abundance support a conservative interpretation of available data and development of a management regime in favor of resource protection. This approach is superior to that alluded to in Comment 16, which indicates that, in the absence of definitive information about the scallop resource, NMFS should err on the side of resource exploitation.

Comment 17. No apparent information exists on catch and effort or meat counts, although the proposed FMP refers to voluntary data submitted by members of the scallop fishery and to other anecdotal information. NMFS indicates that this information suggests a resource problem, because the number of meats per pound has increased and CPUE has declined in recent years. Contrary to NMFS' premise, increased meat counts could be the result of many factors, one of which is the fact that scallop vessels have increasingly exploited Federal waters off Alaska. The water depth is typically deeper in offshore waters and scallops from deep waters typically have lower yields or higher counts than scallops of the same size for shallow water areas because of reduced food abundance. Also, since the fishery has intensified, there has been more exploitation throughout the year. As a consequence, more scallops may now be harvested during the spawning period when meat yields typically decline or the counts increase.

Response. ADF&G has collected landings data from fish tickets from the Alaska scallop fishery since the 1960's. This information includes catch amounts and limited data on fishing effort (e.g., number of vessels, vessel size, number of tows). ADF&G also collected data from on board catch sampling and logbook interview programs from the scallop fishery during 1968-1972 and provided additional effort information (actual number of days fished) as well as data on shucked meat weights. In addition, ADF&G has conducted an on board observer program since 1993 that collects detailed data on catch and effort (e.g., duration of tows).

Published literature indicates that scallop growth can vary between inshore and offshore areas (MacDonald and Bourne 1987, *Can. J. Fish. Aquat. Sci.* 44: 152-160) and between geographic areas. A movement of vessels from inshore to offshore fishing grounds would indicate that catch rate is declining in the area the vessels are leaving. This suggests inshore scallop stocks have been fished down to the point where vessels no longer can profitably harvest them. Furthermore, age composition data from the

commercial fishery during the late 1960's and early 1970's showed a downward shift in age structure in the Kodiak and Yakutat stocks (see response to Comment 9).

Although a year-round fishery and exploitation during the spawning season could account for higher meat counts, this is not a likely explanation for increased meat counts in the Alaska scallop fishery, because most of the Alaska scallop harvest occurs in the summer months, after the spawning season.

Comment 18. The proposed FMP presents no information on pre-recruits, which would not be observed in the State's mandatory observer program and which could be extremely high. Alaska State regulations and the commercial gear configuration allow escapement of small scallops. Available data indicate the timing and frequency of spawning by weathervane scallops is highly synchronous. Consequently, scallop shell height frequency distributions could be a good indicator of year-class survival or strength for ages 1 to 4. This important information apparently is not obtained by at-sea observers.

Response. Vessels that fish under the authority of Alaska State regulations carry observers. These observers collect data on shell height frequency that is analyzed by ADF&G to assess stock condition and exploitation. Further, commercial fishery data on the abundance of age 3 or 4 scallops may provide an index of future productivity.

Although weathervane scallops can produce gametes by age 3 or 4, these ages may not contribute significantly to reproduction. Data on some related species show that adults do not produce fully viable gametes until several years after age at first maturity. Scientists in British Columbia currently are researching this phenomenon for weathervane scallops. Thus, published information on age-at-maturity may be changing. If mean age of maturity is older than previously thought, current regulations afford less protection for spawning stocks than currently believed and recruitment overfishing is more likely to occur.

Comment 19. Management agencies have not collected information on fishing effort in the Alaska scallop fishery regularly. However, the consensus of scallop researchers is that CPUE is not a valid indicator of the resource abundance of scallops.

Response. Information on CPUE in the Alaska scallop fishery has been regularly collected on ADF&G fish tickets since the 1960's. NMFS generally agrees that average CPUE may not be a valid indicator of resource abundance

for aggregative species like scallops, because concentrations are fished heavily until CPUE drops, and the fleet or a vessel then moves on to a different stock to repeat this pattern. Rather than analyze region-wide CPUE data, the State of Alaska is analyzing detailed area-specific fishery data with geographic information systems to better understand stock distribution and abundance. Further, ADF&G is analyzing biological data collected from the State's observer program to estimate recruitment, growth, and mortality parameters and to increase management agency knowledge of the sustainability of the exploited Alaska weathervane scallop stocks.

Comment 20. The management of the Alaska scallop fishery by ADF&G has contributed to a decline in CPUE. Quotas established by ADF&G are notoriously inefficient and cause vessels to engage in derby-style fishing practices. This type of fishing strategy has been shown throughout the fishery literature to cause a decline in CPUE and to create economic and technical inefficiency. This approach to fishery management violates National Standard 5, because it fails to promote efficiency in the utilization of fishery resources.

Response. NMFS finds that this comment is not relevant to the action being proposed (i.e., a 1-year closure of the scallop fishery in the EEZ). Nonetheless, NMFS notes that establishment by the State of Alaska of management area quotas is an accepted management measure used by fishery management agencies.

Comment 21. The proposed FMP reports an unreasonably high harvest capacity (65,000 lbs, or 29 mt, of shucked scallop meats per week) for the single vessel that had fished Federal waters outside the regulatory authority of the State of Alaska and which precipitated the February 24 emergency closure of Federal waters as well as the proposed FMP.

Response. NMFS disagrees. The draft FMP does not state that the vessel that precipitated the closure of Federal waters had a 65,000 lb (29 mt) harvest capacity. Rather, the FMP reported that when the U.S. Coast Guard personnel boarded the vessel, they were informed by the vessel's crew that the vessel had about 54,000 lbs (24 mt) of shucked scallop meats on board. The point stressed in the proposed FMP and the preamble to the proposed rule to implement the FMP was that this level of catch on board the vessel exceeded the quota for the management area the vessel was operating in by over 100 percent.

Comment 22. The proposed FMP states that it is necessary to close the scallop fishery in Federal waters, because insufficient information is available to regulate the fishery. Yet, scientific literature (Hillborn and Walters, 1992) has shown that little information necessary for resource management can be obtained when the fishery is managed or regulated by extremely conservative strategies (e.g., an area closure). With this in mind, it may not be possible for NMFS to ever reopen Federal waters, if the opening depends upon a plan based on sound scientific information. The interim closure proposed under the FMP limits the collection of information necessary for sound resource management.

Response. NMFS disagrees. Also see response to Comment 10. The FMP does not authorize closure of Federal waters to fishing for scallops because insufficient information is available to regulate the fishery. Rather, the FMP implements an interim closure of Federal waters to prevent overfishing while a Federal management regime is prepared to authorize a controlled fishery for scallops. Until unregulated fishing activity of a single vessel precipitated closure of Federal waters, the scallop fishery was managed with the best information available and it will continue to be managed with the best information available once Federal waters reopen to fishing under a future amendment to the FMP.

The cited reference (Hillborn and Walters, 1992) reports that key resource assessment calculations heavily depend on data that can be gathered early in a fishery's development and that a data gathering program should be developed to collect information from subsequent phases of the fishery. If a fishery is left unregulated, species that form large aggregations are easy targets for exploitation and are susceptible to depletion and collapse. This pattern of exploitation and collapse has occurred repeatedly for a number of scallop stocks.

NMFS notes that although the importance of fishery data is clear, the single vessel fishing in the unregulated fishery for scallops in early 1995 carried no observer and did not report its catch to management agencies. As a result, catch information and other fishery data from this vessel are not included in the information base being developed to manage the Alaska scallop fishery. Although the interim closure of Federal waters temporarily limits the collection of fishery data, not implementing the FMP and allowing unregulated vessels to fish for scallops in Federal waters would not guarantee that fishery data

would be provided to management agencies.

Comment 23. Given the inadequacy of biological, social, and economic information to ascertain the status of the scallop stocks or the condition of the fishery, the available data do not support closure of Federal waters to fishing for scallops. If the FMP is implemented, NMFS will have to underwrite a large and expensive research program. If the research program has not yet begun, it will be a long time before a good FMP can be developed for the fishery.

Response. For the reasons described above, NMFS acknowledges that limited information on the Alaska scallop resource justifies a conservative approach to the management of this resource. This approach is based on the premise that uncertainty should lead to greater caution, not recklessness in the hope of short-term economic gain.

ADF&G has conducted resource assessments in Cook Inlet and intends to pursue a survey of part of the Prince William Sound stock this summer. An assessment of stock condition does not necessarily require expensive and long-term research. For example, observer data on catch, effort, and age composition could be analyzed to assess a stock's sustainability to exploitation. ADF&G plans to use these observer data in a geographic information systems analysis to provide a fishery-based assessment of stock status and productivity. NMFS is considering possible cooperative arrangements with the State of Alaska to make use of the information made available from ADF&G's assessment program.

Comment 24. The proposed FMP specifies an OY of 1.1 million lbs (499 mt), which equals the highest estimated harvest from Federal waters off Alaska. NMFS inappropriately based the proposed OY on historical landings because the landings have been sporadic, not indicative of a fully exploited resource, and regulated by quotas. In fact, historical landings reflect opportunities in other fisheries as well as those in the weathervane scallop fishery. Bourne (1991) argues that the resource tends to be exploited when opportunities in other fisheries are diminished. As a result, the landings series do not coincide with periods of full exploitation and the resulting guideline harvest ranges implemented by the State of Alaska and the proposed OY is likely to be artificially low.

Response. NMFS agrees that historical landings could have been affected as opportunities in other fisheries flourished or diminished. However, available data also support the premise

of management agencies that fluctuating landings in the Alaska scallop fishery are reflective of the reduced availability of scallops resulting from the pulse nature of the fishery and the "boom and bust" cycles of resource abundance. Furthermore, the State of Alaska only recently (1993) implemented quotas for the Alaska scallop fishery. Prior to this time, scallop harvests were regulated only with gear restrictions, area closures, and fishing seasons. Last, analyses upon which ADF&G's guideline harvest ranges are based do not include very high or very low annual harvests to dampen the effect of annual variation on the calculation of sustainable yield estimates.

Comment 25. Using information contained in the draft FMP and a simple analysis of landings and number of trips using a surplus production model of the form of Schaefer (1957) indicates that the MSY for weathervane scallops off Alaska is approximately 6.3 million lbs (2,857 mt) of meats. The model is statistically significant, although the coefficient for the effort squared, measured by number of landings, is not statistically significant. This estimate is based on the best scientific information available—landings and number of trips over time. If the number of vessels is used instead of number of landings, the MSY is estimated to equal 1.3 million lbs (590 mt) of meats.

Response. The Schaefer model for estimating surplus production and MSY has been considered invalid since the 1960's (Larkin 1977). Furthermore, neither the number of landings nor the number of vessels are adequate variables to use because scallop vessel size and capacity has changed greatly over the past 20 years. Similarly, vessels have gone from a part-time engagement in the Alaska scallop fishery to full-time participation. Thus the vessels used to participate in the scallop fishery in the late 1960's and 1970's cannot be compared to the 15-17 vessels currently participating in the fishery because their levels of participation are not comparable. Even if the Schaefer model were appropriate, NMFS would seriously question the commenter's preferred alternative of using the highest MSY estimate of 6.3 million lbs (2,857 mt), instead of a more conservative amount, given the wide range (1.3 million-6.3 million lbs (590 mt-2,857 mt) calculated from the commenter's efforts, and the uncertainty of the data used by the commenter.

Comment 26. The proposed FMP states that a major reason for the interim closure and a Federal FMP is to prevent the "boom and bust" syndrome historically exhibited by other scallop

fisheries. There is absolutely no evidence that a "boom and bust" fishery is bad. In fact, many U.S. fisheries, particularly shellfish fisheries, exhibit cyclic patterns in resource abundance and fishing activity. A good example of this is the Calico scallop (*Argopecten gibbus*) fishery in the State of Florida. Moreover, pulse-fishing is a strategy often adopted by fishermen to maximize net returns over time. In general, management strategies have not been able to prevent "boom and bust" episodes in fisheries that are naturally cyclic.

Response. The Calico scallop fishery is a poor example for justifying a "boom and bust" fishery for weathervane scallops off Alaska. Contrary to the long-lived weathervane scallop, the Calico scallop has a short life span (less than 2 years). Species of short life span typically are less vulnerable to overfishing, unlike weathervane scallops, which have a long life span and are more susceptible to recruitment overfishing. Published literature cites many examples where a relatively brief intense period of fishery exploitation has resulted in stock collapse (see response to Comment 9).

Under the proposed FMP, as well as the State of Alaska management program, harvest constraints will have some effect in dampening the natural fluctuations in resource abundance. A constant supply of scallops would also dampen economic impacts on the weathervane scallop industry relative to the cyclic abundance pattern that can wreak havoc on established markets.

Comment 27. Under the proposed FMP, there will be unprecedented scallop fishing effort by vessels in State waters because Federal waters will be closed. Evidence exists that the State will allow increased harvest levels in State waters in response to the closure. Therefore, the likelihood exists that fishing activity in State waters will be unprecedented unless controlled by strict harvest quotas. Thus, the same argument used to close Federal waters will have to be used to close State waters to the harvesting of weathervane scallop fishing. The only way to guarantee that the risk of recruitment failure or growth overfishing will be minimal is to close the entire weathervane scallop fishery.

Response. Under the proposed FMP, as well as the State of Alaska management program, harvest constraints will help dampen the natural fluctuations in resource abundance, will better prevent recruitment overfishing, and will promote sustainable and predictable fishery-related employment on a

continuing basis. A constant supply of scallops would also dampen the adverse economic impacts on markets that could be caused by erratic or cyclic patterns of scallop abundance.

The State of Alaska opened only limited areas in State waters to fishing for scallops under quotas that will protect scallop stocks within State waters from any increase in fishing effort that may occur because of the closure of Federal waters. For the 1995 fishing season, only the State waters of the Dutch Harbor and Adak areas opened to scallop fishing as scheduled on July 1. Available fishing grounds are extremely limited and harvest amounts are not expected to be significant. The harvests in these areas from the 1993 and 1994 seasons were only 40,000 lbs (18 mt) and 2,000 lbs (0.9 mt), respectively. Furthermore, scallop harvests and crab bycatch rates will be assessed in-season to guide management decisions and inseason closures.

Comment 28. The proposed FMP states that weathervane scallops possess biological traits (e.g., longevity, low natural mortality rates, and variable recruitment) that render them vulnerable to overfishing. It is not clear why these traits would render scallops vulnerable to overfishing. In fact, the trait of variable recruitment is a trait that can result in resource restoration.

Response. Resource restoration is a factor of numerous variables, including recruitment and natural mortality (M). A number of biological reference points is widely accepted for the management of fishery resources. One of these points is fishing mortality (F) at a level that equals natural mortality (M). If a stock exhibits low M, then chances increase that an unknown F is actually greater than M. Lacking more definitive information, another basic premise of traditional fishery management is that species of large size, longevity, and low natural mortality tend to be vulnerable to overharvest (Adams 1980; Leaman 1991). Moreover, published literature (Murphy 1967) shows that species that reproduce at multiple ages with variable reproductive success are very vulnerable to overharvest when fishing alters the age structure such that the population approaches a single reproduction. In the case of scallops, fishing-induced shifts in age structure to ages 2-6, as occurred in the early 1970s, reduce the stock's ability to maintain itself under periods of poor recruitment.

Comment 29. Management alternatives exist to a closure of Federal waters to fishing for scallops. For example, NMFS could impose a quota of 1.1 million lbs (499 mt) in Federal waters and require an observer aboard

every vessel. When the quota will be reached, NMFS could close the fishery. Concerns about a derby-style fishery could be addressed through daily or weekly quotas or vessel specific quotas or allocations.

Response. NMFS disagrees with the commenter's approach. NMFS does not at this time have information to justify how the harvest of a particular quota (e.g., 1.1 million lbs) should be spread among potential management areas to prevent localized depletion of scallops. If a single harvest amount were specified and allowed to be fished without this information, scallop stocks could be adversely impacted. Requiring an observer on board every vessel would not ameliorate this situation. The Council is in the process of preparing an amendment to the FMP that would establish a Federal management regime authorizing a controlled fishery for scallops in Federal waters as soon as possible. In addition to quotas and levels of observer coverage, the Council will likely consider measures such as area closures and prohibited species bycatch allowances to protect other fish species (e.g. crabs). Also, the Council will likely consider measures necessary for inseason management of the scallop fishery (e.g., gear configurations, crew sizes, recordkeeping and reporting requirements). The Council will consider carefully each of these measures as to whether it is necessary for conservation and management of the scallop fishery. Public comments will be invited, responded to, and if necessary, adjustments to particular management measures might be developed. Once the Council recommends its preferred alternative for each particular measure, NMFS will determine whether it comports with the national standards and other applicable laws, and decide whether to approve it. This process, although lengthy, is essential to provide a rational regime that responds to NMFS's responsibilities under the Magnuson Act to conserve and manage the scallop fishery off Alaska.

Comment 30. In recent years, the catch capacity and capitalization in the Alaska scallop fishery has become excessive due to speculative entry. The result has been severe financial pressure on fishery participants. The only way to reduce this pressure is to reduce excessive capacity to a rational level. The management of this fishery must proceed as soon as possible towards a comprehensive system that will optimize the fleet at a more rational level.

Response. NMFS agrees. See response to Comment 29.

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Classification

The Director, Alaska Region, NMFS, determined that the FMP is necessary for the conservation and management of the Gulf of Alaska and the Bering Sea and Aleutian Islands management area fisheries and that it is consistent with the Magnuson Act and other applicable laws.

NMFS prepared an FRFA as part of the RIR. A copy of this analysis is available from the Council (see ADDRESSES).

To avoid a regulatory hiatus when the February 23, 1995, emergency rule expires and to address conservation concerns resulting from uncontrolled fishing for scallops, this rule must be effective on 12:01 a.m., A.l.t., August 29, 1995. In addition, because this rule will continue the emergency rule's prohibition on fishing for scallops, the fishing industry will not need any additional time to adjust to the requirements imposed by this rule. These reasons constitute good cause under authority contained in 5 U.S.C. 553(d)(3) for waiving all or part of the 30-day delay in effective date.

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

List of Subjects in 50 CFR Part 673

Fisheries.

Dated: August 8, 1995.

Gary Matlock,

Program Management Officer, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 673 is added as follows:

1. Part 673 is added to Chapter VI of 50 CFR to read as follows:

PART 673—SCALLOP FISHERY OFF ALASKA**Sec.**

673.1 Purpose and scope.

673.2 Definitions.

673.3 Prohibitions.

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

§ 673.1 Purpose and scope.

(a) These regulations implement Federal authority under the Magnuson

Act to manage the scallop fishery in the exclusive economic zone off Alaska.

(b) Regulations in this part govern commercial fishing for scallops in the exclusive economic zone off Alaska.

§ 673.2 Definitions.

In addition to the definitions in the Magnuson Act and in 50 CFR part 620, the terms in 50 CFR part 673 have the following meanings:

Exclusive Economic Zone (EEZ) (see § 620.2 of this chapter)

Scallop(s) means any species of the family Pectinidae, including without limitation weathervane scallops (*Patinopecten caurinus*).

§ 673.3 Prohibitions.

In addition to the general prohibitions specified in § 620.7 of this chapter, it is unlawful for any person to retain any scallops in the EEZ seaward of Alaska during the period that extends through the earlier of August 28, 1996, or until superseded by other management measures.

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