

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 648**

[Docket No. 980212038-8038-01; I.D. 020298A]

RIN 0648-AF41

Fisheries of the Northeastern United States; Amendment 10 to the Fishery Management Plan for the Atlantic Surf Clam and Ocean Quahog Fisheries

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

ACTION: Proposed rule; request for comments.

SUMMARY: NOAA proposes regulations to implement Amendment 10 to the Fishery Management Plan for the Atlantic Surf Clam and Ocean Quahog Fisheries (FMP). Amendment 10 would establish management measures for the fishery for small ocean quahogs (mahogany quahogs) which occurs off the coast of Maine, north of 43°50' N. latitude.

DATES: Comments must be received on or before April 13, 1998.

ADDRESSES: Send comments on this proposed rule to Andrew Rosenberg, Ph.D., Regional Administrator, Northeast Region, NMFS, 1 Blackburn Drive, Gloucester, MA 01930-3799. Mark the outside of the envelope "Comments on Amendment 10 to the Surf Clam and Ocean Quahog FMP."

Copies of Amendment 10 and its supporting documents, including the environmental assessment, and the regulatory impact review (RIR), are available from David R. Keifer, Executive Director, Mid-Atlantic Fishery Management Council (Council), Room 2115 Federal Building, 300 S. New Street, Dover, DE 19904-6790.

FOR FURTHER INFORMATION CONTACT: Myles Raizin, Fishery Policy Analyst, 978-281-9104.

SUPPLEMENTARY INFORMATION:**Background**

Proposed Amendment 10 was prepared by the Mid-Atlantic Fishery Management Council (Council), in cooperation with the New England Fishery Management Council and the Maine Department of Natural Resources. A notice of availability of the amendment was published in the **Federal Register** on February 9, 1998 (63 FR 6510), soliciting public comments on the amendment through

April 10, 1998. All comments received by the end of the comment period on the proposed amendment, whether specifically directed to Amendment 10 or to the proposed rule, will be considered in the approval/disapproval decision on Amendment 10. Comments received after that date will not be considered in the approval/disapproval decision of Amendment 10.

While the surf clam and ocean quahog fisheries have been managed under an individual transferable quota (ITQ) system since 1990 when Amendment 8 to the FMP was approved, the Maine mahogany quahog fishery operated under a series of experimental fishery authorizations from October 1990 through September 1997. These experimental fisheries allowed vessels to fish in the exclusive economic zone (EEZ), north of 43°50' N. latitude without being subject to the ITQ program requirements. These requirements include the use of 32-bushel (1,700-L) metal cages to offload quahogs, and the placement of tags on cages to indicate that the harvest is counted toward the appropriate individual allocation. The requirement to use 32-bushel (1,700-L) metal cages is infeasible for the smaller Maine mahogany quahog vessels and docks due to the cage size. Additionally, Maine mahogany quahog vessels harvest relatively few bushels of mahogany quahogs on any trip. Therefore, the use of a 32-bushel (1,700-L) container to measure landings was considered inappropriate.

For the past several years, NMFS has informed the Council and the State of Maine that it was inappropriate to continue authorizing the experimental fishery after compilation of all necessary data to profile the fishery. In response, the Council and staff from the Maine Department of Marine Resources cooperatively developed Amendment 10 to specify management measures for the historical Maine mahogany quahog fishery that recognizes the traditional small scale, small vessel characteristics of the fishery. They were unable to come to a consensus on management measures prior to the expiration of the experimental fishery authorization on September 30, 1997. Since that time, the participants in the Maine mahogany quahog fishery have been required to comply with the ITQ management measures in order to fish in the EEZ. Some participants were able to obtain ocean quahog allocations and fish under the ITQ regime. Others may have continued to harvest ocean quahogs in state waters. The fishery is relatively inactive in the winter, with only 10

percent of the landings historically occurring during this period.

Management Measures

Amendment 10 would (1) establish a Maine mahogany quahog management zone north of 43°50' N. latitude (zone); (2) establish a Maine mahogany quahog permit; (3) establish an initial annual quota of 100,000 Maine bushels (35,150 hectoliters (hL)); (4) require the Council to establish a Maine Mahogany Quahog Advisory Panel to make management recommendations; (5) allow for the revision of the annual quota within a range of 17,000 to 100,000 Maine bushels (5,975 to 35,150 hL); (6) require vessels harvesting ocean quahogs from the zone to fish only in areas that have been certified by the State of Maine to be within Interstate Shellfish Sanitation Conference (ISSC) limits for the toxin responsible for paralytic shellfish poisoning (PSP); (7) require vessels fishing under a Maine mahogany quahog permit to land ocean quahogs in Maine; (8) require vessels fishing in the zone under an ITQ and landing their catch outside of Maine to land at a facility participating in an overall program that utilizes food safety-based procedures including sampling and analyzing for PSP toxin consistent with those food safety-based procedures used by the State of Maine for such purpose; and, (9) give the Regional Administrator the authority to suspend the existing vessel notification requirement for vessels possessing a Maine mahogany quahog permit and fishing in the zone, if it is determined that notification is unnecessary for enforcement. A Maine bushel would be defined as 1.2445 cubic ft (35.24 L).

In addition to these management measures, all vessels prosecuting the Maine mahogany quahog fishery would have to continue to abide by the vessel and dealer reporting and recordkeeping requirements set forth in 50 CFR part 648.

NMFS herein publishes all of the regulations submitted by the Council to implement Amendment 10 despite concern about the provision concerning future replacement of a vessel issued a Maine mahogany quahog permit. This provision is inconsistent with similar provisions in other fishery management plans in the region, including recent plans enacted by the Council for the black sea bass and summer flounder fisheries. However, because the New England and Mid-Atlantic Fishery Management Councils have expressed their intent to address this issue in upcoming amendments, NMFS is publishing the provision as proposed by

the Council. However, this issue must be resolved.

Maine Mahogany Quahog Permit

The Maine mahogany quahog permit would be available only to vessels that reported the harvest of at least one Maine bushel (35.24 L) of ocean quahogs from the zone while enrolled in the Maine mahogany quahog experimental fishery. The Maine mahogany quahog permit would authorize such vessels to fish in the EEZ within the zone without complying with the ITQ requirements set forth in 50 CFR 648.70 and 648.75. Other vessels would have to comply with ITQ requirements to fish in the EEZ within the zone.

Maine Mahogany Quahog Quota

Recorded landings from the Maine mahogany quahog fishery have varied from a high of 125,000 Maine bushels (43,937 hL) in 1986 to a low of 17,000 bushels (5,975 hL) in 1993. In Amendment 10, the Council proposed that the initial quota for the fishery be specified at 100,000 bushels (35,150 hL), which may be modified within the range of 17,000 to 100,000 bushels (5,975 to 35,150 hL). This quota is consistent with the range of landings over the history of the fishery. The quota could be adjusted in future years as part of the annual quota-setting process for surf clams and ocean quahogs. The Council would consult with the Maine Mahogany Quahog Advisory Panel and would review available information to determine whether the quota level requires adjustment.

Amendment 10 notes that the next ocean quahog stock assessment will be conducted in June 1998. The status of ocean quahogs in the zone has never been formally assessed. However, limited non-random sampling in the area has shown evidence that there is substantial recruitment of ocean quahogs in the areas sampled. The June 1998 stock assessment may provide some additional management advice for the Council.

The 100,000 Maine bushel (35,150 hL) quota for the Maine fishery is in addition to the 4.0 million bushel (2,122,000 hL) quota specified for the ITQ fishery. The ITQ fishery quota is specified in standard bushels of 1.88 cubic ft/bushel (53.24 L/bushel). When the two quota amounts are added together, the total allowable harvest is lower than the level that would result in overfishing for the entire stock, as defined in the FMP.

Landings of ocean quahogs made by vessels fishing under the Maine

mahogany quahog permit or those fishing exclusively in State waters within the zone would count against the Maine quota. Landings made by vessels fishing under an ITQ allocation permit would count against the ocean quahog quota allocated to the ITQ fishery.

PSP Management Issues

Amendment 10 provides for the protection of the public health by establishing procedures designed to ensure that marketed shellfish do not exceed tolerances for PSP toxins accepted by the ISSC. These procedures include seasonal harvesting restrictions for vessels, selected sampling and analysis of clams at the dealer level, and restricting the harvest of mahogany quahogs in the zone to those areas tested by the State of Maine and deemed to be within ISSC acceptable limits for the toxin that causes PSP. All ocean quahogs harvested by vessels fishing under a Maine mahogany quahog permit or under a State of Maine fishing permit would have to be landed in Maine and would be subject to the State's shellfish safety controls in place for the zone. Other vessels fishing in the zone under an ITQ could land their catch outside of Maine. However, the shellfish would have to be sampled and analyzed consistent with the safety-based procedures for shellfish harvested from the zone and landed in Maine.

Suspension of Notification Requirements

The Regional Administrator would be authorized by Amendment 10 to suspend the call-in requirements found at 50 CFR 648.15 (b)(1) and (2) for vessels issued a Maine mahogany quahog permit fishing within the zone if it is not deemed necessary for enforcement. Based on advice from NMFS Law Enforcement, the Regional Administrator announces his intent to suspend the call-in requirements if Amendment 10 is approved. The vessel notification requirement would remain in effect for vessels fishing under an ITQ allocation permit within the zone.

Maine Mahogany Quahog Advisory Panel

The Maine Mahogany Quahog Advisory Panel would be established by the Council consisting of representatives of harvesters, dealers, and the Maine Department of Marine Resources. The panel would be responsible for making management recommendations, including revisions to the annual quota, through the Surf Clam and Ocean Quahog Committee of the Council. Quota adjustments would occur through

the annual quota-setting process for surf clams and ocean quahogs.

Classification

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

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities as follows:

The analysis of impacts relative to the Regulatory Flexibility Act indicates that, while a substantial number of small entities may be impacted by this action, the proposed regulatory actions or regulations in Amendment 10 would not result in a significant economic impact on such entities. A significant economic impact would occur if gross revenues decreased more than 5 percent as a result of this action.

The initial quota of 100,000 Maine bushels (35,150 hL) in 1998 may potentially allow landings to increase by 30,933 Maine bushels (10,873 hL) from the 1996 level. The potential increase in revenues in the fishery would depend on the increase in the landing level. Using 1996 as the base year, effects were examined assuming an increase in landings in 1998 of 0 percent, 10 percent, 25 percent, up to the entire 100,000 Maine bushel quota (35,150 hL) of the Maine mahogany quahog quota. Estimated gross revenue effects are increases of \$0, \$199,258, \$408,146, and \$892,417, respectively. The Council estimates that 83 vessels will qualify for the Maine mahogany quahog permit. Revenue effects were estimated based on the 43 vessels that landed mahogany quahogs in 1996. If the gross revenue increases are evenly shared among these vessels, each business unit would potentially gain from \$0 to \$20,754. However, the sensitivity analysis conducted in the RIR, showed that ex-vessel price was constant regardless of the amount of ocean quahogs landed. In reality, it would be expected that, as the quantity of ocean quahogs landed increased, the ex-vessel price for this commodity would decrease. Therefore, the increase in revenues shown above may be considerably lower. This action should not have a significant affect on a substantial number of small entities. Ex-vessel revenues are not expected to decrease by as much as 5 percent for 20 percent or more of the vessels. No vessels currently in the mahogany quahog fishery are expected to cease business operations as a result of this action.

The establishment of the proposed zone would allow for the continual monitoring of harvest of ocean quahogs from areas that are tested by the State of Maine and deemed to be within ISSC acceptable limits for PSP. It is not possible to quantify this benefit due to lack of information. However, it is expected that positive economic benefits will be derived from preventing the costs associated

with an occurrence of PSP contamination in landings of mahogany quahogs. Such costs would be those associated with medical costs, costs of lost time, and decreases in profits to the fishery due to a decrease in demand for mahogany quahogs that could result.

The provision dealing with the implementation of a new vessel permit will provide positive benefits to the historical participants of the fishery by avoiding potential dissipation of revenues due to a future increase in the number of non-ITQ entrants. At the same time, this would also reduce the potential of overcapitalization in the fishery. This provision is expected to provide positive benefits to the overall management system.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act (PRA), unless that collection of information displays a currently valid OMB control number.

This rule contains collection-of-information requirements subject to the PRA. These requirements have been submitted to the Office of Management and Budget for approval. The public reporting burdens for these collections of information is estimated to average 30 minutes for a new vessel permit, 30 minutes for an appeal, 15 minutes for a renewal application for a permit, and two minutes for a call-in. These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The notification requirement is not a new reporting requirement. The requirement was implemented in 1993 and applied to all federally permitted ocean quahog vessels. It was not, however, determined to be a necessary condition for vessels participating in the Maine mahogany quahog experimental fisheries so these vessels were never reflected in the estimated number of affected entities. Since the Regional Administrator intends to suspend notification requirements for those fishing under the new Maine mahogany quahog permit if Amendment 10 is approved, there will be no additional burden hours required under the call-in provision. Public comment is sought regarding whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility: the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to

be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology.

Send comments regarding these burden estimates or any other aspect of the data requirements, including suggestions for reducing the burden, to NMFS (see ADDRESSES) and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 (ATTN: NOAA Desk Officer).

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: February 20, 1998.

Rolland A. Schmitt, Jr.

Assistant Administrator for Fisheries,
National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648, is proposed to be amended as follows:

PART 648—FISHERIES OF NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

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

2. In § 648.2, definitions for "Maine bushel" and "Maine mahogany quahog zone" are added in alphabetical order to read as follows:

§ 648.2 Definitions.

* * * * *

Maine bushel means a standard unit of volumetric measurement equal to 1.2445 cubic feet (35.24 L) of ocean quahogs in the shell.

Maine mahogany quahog zone means the area bounded on the east by the U.S.-Canada maritime boundary, on the south by a straight line at 43°50' N. latitude, and on the north and west by the shoreline of Maine.

* * * * *

3. In § 648.4, paragraph (a)(4)(i) is added and (a)(4)(ii) is reserved to read as follows:

§ 648.4 Vessel and individual commercial permits.

(a) * * *

(4) * * *

(i) *Maine mahogany quahog permit.*

(A) A vessel is eligible for a Maine mahogany quahog permit to fish for ocean quahogs in the Maine mahogany quahog zone if it meets the following eligibility criteria:

(1) The vessel was issued a Federal Maine Mahogany Quahog Experimental Permit during one of the experimental fisheries authorized by the Regional

Administrator between September 30, 1990, and September 30, 1997; and,

(2) The vessel landed at least one Maine bushel of ocean quahogs from the Maine mahogany quahog zone as documented by fishing or shellfish logs submitted to the Regional Administrator prior to January 1, 1998.

(B) *Application/renewal restriction.*

No one may apply for a Maine mahogany quahog permit for a vessel after [insert date one year after effective date of the final rule].

(C) *Replacement vessels.* To be eligible for a Maine mahogany quahog permit, a replacement vessel must be replacing a vessel of substantially similar harvesting capacity that is judged unseaworthy by the USCG, for reasons other than lack of maintenance, or that involuntarily left the fishery. Both the entering and replaced vessels must be owned by the same person. Vessel permits issued to vessels that involuntarily leave the fishery may not be combined to create larger replacement vessels.

(D) *Appeal of denial of a permit.*

(1) Any applicant denied a Maine mahogany quahog permit may appeal to the Regional Administrator within 30 days of the notice of denial. Any such appeal shall be in writing. The only ground for appeal is that the Regional Administrator's designee erred in concluding that the vessel did not meet the criteria in paragraph (a)(4)(i)(A) of this section. The appeal must set forth the basis for the applicant's belief that the decision of the Regional Administrator's designee was made in error.

(2) The appeal may be presented, at the option of the applicant, at a hearing before an officer appointed by the Regional Administrator.

(3) The hearing officer shall make a recommendation to the Regional Administrator.

(4) The Regional Administrator will make a final decision based on the criteria in paragraph (a)(4)(i)(A) of this section and the available record, including any relevant documentation submitted by the applicant and, if a hearing is held, the recommendation of the hearing officer. The decision on the appeal by the Regional Administrator is the final decision of the Department of Commerce.

(ii) [Reserved]

* * * * *

4. In § 648.14, paragraphs (a)(23), (24), and (25) are revised, paragraphs (a)(105) through (109) are added, and paragraph (x)(1)(ii) and the first sentence of paragraph (x)(1)(iii) are revised to read as follows:

§ 648.14 Prohibitions.

(a) * * * (23) Land unshucked surf clams or ocean quahogs harvested in or from the EEZ outside of the Maine mahogany quahog zone in containers other than cages from vessels capable of carrying cages.

(24) Land unshucked surf clams and ocean quahogs harvested in or from the EEZ within the Maine mahogany quahog zone in containers other than cages from vessels capable of carrying cages unless, with respect to ocean quahogs, the vessel has been issued a Maine mahogany quahog permit under this part and is not fishing for an individual allocation of quahogs under § 648.70.

(25) Fail to comply with any of the notification requirements specified in § 648.15(b).

* * * * *

(104) [Reserved]

(105) Offload unshucked surf clams or ocean quahog harvested in or from the EEZ outside of the Maine mahogany quahog zone from vessels not capable of carrying cages other than directly into cages.

(106) Offload unshucked surf clams harvested in or from the EEZ within the Maine mahogany quahog zone from vessels not capable of carrying cages other than directly into cages.

(107) Offload unshucked ocean quahogs harvested in or from the EEZ within the Maine mahogany quahog zone from vessels not capable of carrying cages other than directly into cages unless the vessel has been issued a Maine mahogany quahog permit under this part and is not fishing for an individual allocation of quahogs under § 648.70.

(108) Purchase, receive for a commercial purpose other than transport to a testing facility or process or attempt to purchase, receive for commercial purpose other than transport to a testing facility or process outside of Maine, ocean quahogs harvested in or from the EEZ within the Maine mahogany quahog zone except at a facility participating in an overall food safety program that utilizes food safety-based procedures including sampling and analyzing for PSP toxin consistent with procedures used by the State of Maine for such purpose.

(109) Land or possess ocean quahogs harvested in or from the EEZ within the Maine mahogany quahog zone after the effective date published in the Federal Register notifying participants that Maine mahogany quahog quota is no longer available, unless the vessel is fishing for an individual allocation of ocean quahogs under § 648.70.

* * * * *

(x) * * *

(1) * * *

(ii) Surf clams or ocean quahogs landed from a trip for which notification was provided under § 648.15(b) or § 648.70(b) are deemed to have been harvested in the EEZ and count against the individual's annual allocation unless the vessel has a valid Maine mahogany quahog permit issued pursuant to § 648.4(a)(4)(i) and is not fishing for an individual allocation under § 648.70.

(iii) Surf clams or ocean quahogs found in cages without a valid state tag are deemed to have been harvested in the EEZ and to be part of an individual's allocation unless the vessel has a valid Maine mahogany quahog permit issued pursuant to § 648.4(a)(4)(i) and is not fishing for an individual allocation under § 648.70; or, unless the preponderance of available evidence demonstrates that he/she has surrendered his/her surf clam and ocean quahog permit issued under § 648.4 and he/she conducted fishing operations exclusively within waters under the jurisdiction of any state. * * *

* * * * * 5. In § 648.15, paragraph (b)(4) is added to read as follows.

§ 648.15 Facilitation of enforcement.

* * * * *

(b) * * *

(4) Suspension of notification requirements. The Regional Administrator may suspend notification requirements for vessels fishing under a Maine mahogany quahog permit issued pursuant to § 648.4(a)(4)(i). If he determines that such notification is not necessary to effectively enforce the management measures in the Maine mahogany quahog zone, the Regional Administrator may rescind such suspension if he concludes that the original determination is no longer valid. A suspension or rescission of suspension of the notification requirements by the Regional Administrator shall be published in the Federal Register.

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6. In § 648.73, paragraph (d) is added to read as follows.

§ 648.73 Closed areas.

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(d) Areas closed due to the presence of paralytic shellfish poisoning toxin— (1) Maine mahogany quahog zone. The Maine mahogany quahog zone is closed to fishing for ocean quahogs except in those areas of the zone that are tested by the State of Maine and deemed to be within Interstate Shellfish Sanitation Conference acceptable limits for the toxin responsible for paralytic shellfish

poisoning. Harvesting is allowed in such areas during the periods specified by the Maine Department of Marine Resources during which quahogs are safe for human consumption. For information regarding those areas contact the State of Maine Division of Marine Resources at (207-624-6550).

(2) [Reserved]

7. In § 648.75, introductory text is added to read as follows:

§ 648.75 Cage identification.

Except as provided in § 648.76, the following cage identification requirements apply to all vessels issued a Federal fishing permit for surf clams and ocean quahogs:

* * * * *

8. Section § 648.76 is added to subpart E to read as follows.

§ 648.76 Maine mahogany quahog zone.

(a) Landing requirements. (1) A vessel fishing under a valid Maine mahogany quahog permit pursuant to § 648.4(a)(4)(i), fishing for or possessing ocean quahogs within the Maine mahogany quahog zone, must land its catch in the State of Maine.

(2) A vessel fishing under an individual allocation permit, regardless of whether it has a Maine mahogany quahog permit, fishing for or possessing ocean quahogs within the zone, may land its catch in the State of Maine, or, consistent with applicable state law, any other state that utilizes food safety-based procedures including sampling and analyzing for PSP toxin consistent with those food safety-based procedures used by the State of Maine for such purpose, and must comply with all requirements in §§ 648.70 and 648.75. Documentation as required by the state and other laws and regulations applicable to food safety-based procedures must be made available by federally-permitted dealers for inspection by NMFS.

(b) Quota monitoring and closures— (1) Catch quota. (i) The annual quota for harvest of mahogany quahogs from within the Maine mahogany quahog zone is 100,000 Maine bushels (35,150 hL). The quota may be revised annually within the range of 17,000 to 100,000 Maine bushels (5,975 to 35,150 hL) following the procedures set forth in § 648.71.

(ii) All mahogany quahogs landed for sale in Maine by vessels issued a Maine mahogany quahog permit and not fishing for an individual allocation of ocean quahogs under § 648.70 shall be

applied against the Maine mahogany quahog quota, regardless of where the mahogany quahogs are harvested.

(iii) All mahogany quahogs landed by vessels fishing in the Maine mahogany quahog zone for an individual allocation of quahogs under § 648.70 will be counted against the ocean quahog allocation for which the vessel is fishing.

(iv) The Regional Administrator will monitor the quota based on dealer reports and other available information

and shall determine the date when the quota will be harvested. NMFS shall publish notification in the **Federal Register** advising the public that, effective upon a specific date, the Maine mahogany quahog quota has been harvested and notifying vessel and dealer permit holders that no Maine mahogany quahog quota is available for the remainder of the year.

(2) *Maine Mahogany Quahog Advisory Panel.* The Council shall

establish a Maine Mahogany Quahog Advisory Panel consisting of representatives of harvesters, dealers, and the Maine Department of Marine Resources. The Advisory Panel shall make recommendations, through the Surf Clam and Ocean Quahog Committee of the Council, regarding revisions to the annual quota and other management measures.

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