

for existing non-emergency stationary compression ignition engines greater than 500 brake horsepower that are located at major sources, based on a new review of these engines following the first RICE NESHAP rulemaking in 2004. In addition, EPA proposed to amend the previously promulgated regulations regarding operation of stationary RICE during periods of startup, shutdown and malfunction.

Shortly after publication of the proposed rule, several industry groups formally requested that EPA extend the comment period of the proposed rule. They indicated that an extended comment period was necessary due to the complexities of the proposed regulation and the large number of existing sources that are potentially affected. Furthermore, the request letters mention that the proposed regulation has far-reaching impacts on industrial stakeholders and that those impacts cannot be properly evaluated in the 60-day comment period provided by the proposal.

The letters requesting an extension to the comment period can be found in the docket. EPA is hereby extending the comment period, which was set to end on May 4, 2009, to June 3, 2009.

#### List of Subjects 40 CFR Part 63

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: April 8, 2009.

Elizabeth Craig,

Acting Assistant Administrator.

[FR Doc. E9-8483 Filed 4-13-09; 8:45 am]

BILLING CODE 6560-50-P

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 226

[Docket No. 090224232-9334-02]

RIN 0648-AX50

#### Endangered and Threatened Species: Advance Notice of Proposed Rulemaking to Designate Critical Habitat for Cook Inlet Beluga Whales

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

**ACTION:** Advance notice of proposed rulemaking; request for information.

**SUMMARY:** We, the National Marine Fisheries Service (NMFS), will be designating critical habitat for the endangered Cook Inlet beluga whale (*Delphinapterus leucas*) under the Endangered Species Act (ESA). The designation will involve areas within Cook Inlet, Alaska. This advance notice of proposed rulemaking (ANPR) identifies issues for consideration and evaluation and solicits comments regarding these issues.

**DATES:** Comments and information regarding the suggested designation process and areas being considered for designation may be sent to NMFS (See **ADDRESSES**) by May 14, 2009.

**ADDRESSES:** Comments may be sent to Chief, Protected Resources Division, NMFS, P.O. Box 21668, Juneau, AK, 99802-1668.

**FOR FURTHER INFORMATION CONTACT:** Brad Smith, (907-271-3023) or Kaja Brix (907-586-7235).

#### SUPPLEMENTARY INFORMATION:

##### Rulemaking Background

We are responsible for determining whether species, subspecies, or distinct population segments (DPSs) are threatened or endangered and for designating critical habitat for them under the ESA (16 U.S.C. 1531 *et seq.*). To be considered for listing under the ESA, a group of organisms must constitute a "species" which is defined in section 3 to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." We consider a group of organisms to be a DPS for purposes of ESA listing when it is both discrete from other populations and significant to the species to which it belongs (61 FR 4722; February 7, 1996). We found the Cook Inlet beluga whale population segment to be reproductively, genetically, and physically discrete from the four other known beluga populations in Alaska, and significant because it is in a unique ecological setting for the taxon, and its loss would result in a significant gap in the taxon's range. Following completion of a Status Review of the Cook Inlet beluga whale under the ESA, we published a proposed rule to list this DPS as an endangered species on April 20, 2007. We subsequently extended the date for final determination on the proposed action by 6 months, until October 20, 2008, as provided for by the ESA (section 4(b)(6)(B)(i)). A Final Rule to list the Cook Inlet beluga whale as an endangered species was published on October 22, 2008.

#### Critical Habitat

Section 4(b)(2) of the ESA requires us to designate critical habitat for threatened and endangered species "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." This section grants the Secretary of Commerce (Secretary) discretion to exclude any area from critical habitat if he determines "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." The Secretary's discretion is limited, as he may not exclude areas that "will result in the extinction of the species."

The ESA defines critical habitat under section 3(5)(A) as: "(i) the specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species."

Once critical habitat is designated, section 7 of the ESA requires Federal agencies to ensure they do not fund, authorize, or carry out any actions that will destroy or adversely modify that habitat. This requirement is in addition to the section 7 requirement that Federal agencies ensure their actions do not jeopardize the continued existence of listed species.

#### Issues for Consideration and Evaluation

Section 4(a)(3) of the ESA requires us to designate critical habitat for threatened and endangered species. We are currently in the information-gathering phase, compiling information to propose critical habitat for the Cook Inlet beluga whale. Sections 3, 4(a), and 4(b) of the ESA suggest a number of questions the agency should consider when designating critical habitat:

- What areas were occupied by the species at the time of listing?
- What physical and biological features are essential to the species' conservation?
- Are those essential features ones that may require special management considerations or protection?
- Are there any areas outside those currently occupied that are "essential for conservation?"

- What are the benefits to the species of critical habitat designation?
- What economic and other relevant impacts would result from a critical habitat designation?
- What is the appropriate geographic scale for weighing the benefits of exclusion and benefits of designation?
- Will the failure to designate any particular area as critical habitat result in the extinction of the species?

Answering these questions involves a variety of biological and economic considerations. To ensure that we have the best scientific data available, we are issuing this ANPR to solicit information before issuing a proposed rule. During the information-gathering phase, we are seeking public input and information (see "Information Solicited" below) and will gather and analyze the best available scientific data to inform critical habitat designations. We will then initiate rulemaking with the publication of a proposed designation of critical habitat, opening a period for public comment and the opportunity for public hearings.

#### *Cook Inlet Beluga Whale Biology and Habitat Use*

The beluga whale is a small, toothed whale in the family Monodontidae, a family it shares with only the narwhal. Belugas are also known as "white whales" because of the white coloration of the adults. The beluga whale is a northern hemisphere species, ranging primarily over the Arctic Ocean and some adjoining seas, where it inhabits fjords, estuaries, and shallow water in Arctic and subarctic oceans. Five distinct stocks of beluga whales are currently recognized in Alaska: Beaufort Sea, eastern Chukchi Sea, eastern Bering Sea, Bristol Bay, and Cook Inlet. The Cook Inlet population is numerically the smallest of these, and is the only one of the five Alaskan stocks occurring south of the Alaska Peninsula in waters of the Gulf of Alaska.

A detailed description of the biology of the Cook Inlet beluga whale may be found in the Proposed Listing Rule (72 FR 19854; April 20, 2007). Belugas generally occur in shallow, coastal waters, and while some populations make long seasonal migrations, Cook Inlet belugas reside in Cook Inlet year round. Data from satellite tagged whales documented that Cook Inlet belugas concentrate in the upper Inlet at rivers and bays in the summer and fall, and then tend to disperse into deeper waters moving to mid Inlet locations in the winter. The Traditional Ecological Knowledge (TEK) of Alaska Natives and systematic aerial survey data document a contraction of the summer range of

Cook Inlet belugas. While belugas were once abundant and frequently sighted in the lower Inlet during summer, they are now primarily concentrated in the upper Inlet. This constriction is likely a function of a reduced population seeking the highest quality habitat that offers the most abundant prey, most favorable feeding topography, the best calving areas, and the best protection from predation. An expanding population would likely use the lower Inlet more extensively.

While mating is assumed to occur sometime between late winter and early spring, there is little information available on the mating behavior of belugas. Most calving in Cook Inlet is assumed to occur from mid-May to mid-July (Calkins, 1983), although Native hunters have observed calving from April through August (Huntington, 2000). Alaska Natives described calving areas as the northern side of Kachemak Bay in April and May, off the mouths of the Beluga and Susitna rivers in May, and in Chickaloon Bay and Turnagain Arm during the summer (Huntington, 2000). The warmer waters from these freshwater sources may be important to newborn calves during their first few days of life (Katona *et al.*, 1983; Calkins, 1989). Surveys conducted from 2005 to 2007 in the upper Inlet by LGL, Inc., documented neither localized calving areas nor a definitive calving season, since calves were encountered in all surveyed locations and months (April-October) (McGuire *et al.*, 2008). The warmer, fresher coastal waters may also be important areas for belugas' seasonal summer molt.

Cook Inlet belugas are opportunistic feeders and feed on a wide variety of prey species, focusing on specific species when they are seasonally abundant. Eulachon (locally referred to as hooligan or candlefish) is an important early spring food resource for beluga whales in Cook Inlet, as evidenced by the stomach of a beluga hunted near the Susitna River in April 1998 that was filled exclusively with eulachon (NMFS unpubl. data). These fish first enter the upper Inlet in April, with two major spawning migrations occurring in the Susitna River in May and July. The early run is estimated at several hundred thousand fish and the later run at several million (Calkins, 1989).

In the summer, as eulachon runs begin to diminish, belugas rely heavily on several species of salmon as a primary prey resource. Beluga whale hunters in Cook Inlet reported one whale having 19 adult king salmon in its stomach (Huntington, 2000). NMFS (unpubl. data) reported a 14 foot 3 inch

(4.3 m) male with 12 coho salmon, totaling 61.5 lbs (27.9 kg), in its stomach.

The seasonal availability of energy-rich prey such as eulachon, which may contain as much as 21 percent oil (Payne *et al.*, 1999), and salmon are very important to the energetics of belugas (Abookire and Piatt, 2005; Litzow *et al.*, 2006). Native hunters in Cook Inlet have stated that beluga whale blubber is thicker after the whales have fed on eulachon than in the early spring prior to eulachon runs. In spring, the whales were described as thin with blubber only 2–3 inches (5–8 cm) thick compared to the fall when the blubber may be up to 1 ft (30 cm) thick (Huntington, 2000). Eating such fatty prey and building up fat reserves throughout spring and summer may allow beluga whales to sustain themselves during periods of reduced prey availability (e.g., winter) or other adverse impacts by using the energy stored in their blubber to meet metabolic needs. Mature females have additional energy requirements. The known presence of pregnant females in late March, April, and June (Mahoney and Shelden, 2000; Vos and Shelden, 2005) suggests breeding may be occurring in late spring into early summer. Calves depend on their mother's milk as their sole source of nutrition, and lactation lasts up to 23 months (Braham, 1984), though young whales begin to consume prey as early as 12 months of age (Burns and Seaman, 1986). Therefore, the summer feeding period is critical to pregnant and lactating belugas. Summertime prey availability is difficult to quantify. Known salmon escapement numbers and commercial harvests have fluctuated widely throughout the last 40 years; however, samples of harvested and stranded beluga whales have shown consistent summer blubber thicknesses.

In the fall, as anadromous fish runs begin to decline, belugas again return to consume the fish species found in nearshore bays and estuaries. This includes cod species as well as other bottom-dwellers such as Pacific staghorn sculpin and flatfishes, such as starry flounder and yellowfin sole. This change in diet in the fall is consistent with other beluga populations known to feed on a wide variety of food. Pacific staghorn sculpin are commonly found nearshore in bays and estuaries on sandy substrate (Eschmeyer *et al.*, 1983). Flatfish are typically found in very shallow water and estuaries during the warm summer months and move into deeper water in the winter as coastal water temperatures cool (though some

may occur in deep water year-round) (Morrow, 1980).

The available information indicates that Cook Inlet belugas move throughout much of the Inlet in the winter months. They concentrate in deeper waters in mid Inlet past Kalgin Island, with occasional forays into the upper Inlet, including the upper ends of Knik and Turnagain Arms. While the beluga whales move into the mid to lower Inlet during the winter, ice cover does not appear to limit their movements. Their winter distribution does not appear to be associated with river mouths, as it is during the warmer months. The spatial dispersal and diversity of winter prey likely influence the wider beluga winter range throughout the mid Inlet.

There is obvious and repeated use of certain habitats by Cook Inlet beluga whales. Intensive aerial abundance surveys conducted in June and July since 1993 have consistently documented high use of Knik Arm, Turnagain Arm, Chickaloon Bay and the Susitna River delta areas of the upper Inlet. The high use of these areas by belugas is further supported by data from satellite tagging studies.

We considered habitat type and value in our 2008 Cook Inlet Beluga Conservation Plan (NMFS, 2008). That document stratified Cook Inlet into three regions based upon patterns of beluga habitat use, labeling them as valuable habitat types 1, 2, and 3. Type 1 habitat encompasses habitats with intensive beluga use from spring through fall, and which are important foraging and nursery habitats. Type 1 habitat includes all of Cook Inlet northeast of a line drawn from 3 miles southwest of the Beluga River across to Point Possession. Type 2 habitat is based on less concentrated spring and summer beluga use, and known fall and winter use areas. Type 2 habitat is located south of Type 1 habitat and north of a line at 60.2500 north latitude. It also extends south along the west side of the Inlet following the tidal flats into Kamishak Bay around to Douglas Reef, and includes an isolated section within Kachemak Bay. Type 3 habitat encompasses the remaining portions of their range in Cook Inlet; the southern boundary is an opening into the Gulf of Alaska approximately 85 km across from Cape Douglas to Elizabeth Island. Type 1 habitat is believed to be the most valuable of the three habitat types based on the frequency of use and its importance as feeding and calving habitats.

#### *Areas Occupied by the Species at the Time of Listing*

The ESA specifies that critical habitat is that habitat occupied by the species "at the time it is listed" (ESA section 3(5)(A)(i)). The range of Cook Inlet belugas has been previously defined as the waters of the Gulf of Alaska north of 58°N, and freshwater tributaries to these waters based on then-available scientific data (65 FR 34590, May 31, 2000; MMPA Sec. 216.15(g); 76 FR 62919, Oct. 22, 2008). There are few beluga sightings in the Gulf of Alaska outside Cook Inlet. In the 1970s and 1980s, beluga sightings occurred across much of the northern and central parts of Cook Inlet, but in the 1990s the summer distribution narrowed to primarily the northernmost portions of Cook Inlet. More of the Inlet was used by beluga whales during the spring, summer, and fall during the 1970s and 1980s than is presently used. However, because sightings continue to occur over the described range, we consider the present range of this DPS to be occupied habitat. The present range of the listed Cook Inlet beluga is limited to Cook Inlet waters north of a line from Cape Douglas to Cape Elizabeth.

#### *Critical Habitat Boundaries*

NMFS' ESA regulations relevant to describing a geographical area and "specific areas" state that "each critical habitat will be defined by specific limits using reference points and lines as found on standard topographic maps of the area" (50 CFR 424.12). These regulations require that we also identify the state(s), county(ies), or other local governmental units within which all or part of the critical habitat is located. However, the regulations note that such political units typically would not constitute the boundaries of critical habitat. In addition, the regulations state that ephemeral reference points (e.g., trees, sand bars) shall not be used in defining critical habitat.

We seek the best scientific information available to make the designations as precise as practicable. During the information-gathering phase, we are seeking information that will allow us to map specific areas, using reference points and lines as found on standard nautical charts and topographic maps, that (1) are currently occupied by the species and (2) contain essential physical and biological features.

We have limited information on the distribution and occurrence of Cook Inlet beluga whales within tributary waters of Cook Inlet. Traditional Knowledge of Alaska Native hunters

tells us these whales have occurred several miles up the Susitna and Beluga Rivers in past years, and whales have been observed above tidewater in the Knik River at Turnagain Arm. We seek more information on habitat in estuaries and freshwater as well as marine areas.

#### *Physical and Biological Features Essential for Conservation*

As described in ESA section 3(5)(A)(i), we will assemble the best available information to identify those "specific areas within the geographical area occupied by the species at the time it is listed . . . on which are found those physical or biological features . . . (I) essential to the conservation of the species and (II) which may require special management considerations or protection." Joint NMFS/FWS regulations for listing endangered and threatened species and designating critical habitat at section 50 CFR 424.12(b) state that the agency "shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection" (also referred to as "Essential Features" or "Primary Constituent Elements"). Pursuant to the regulations, such requirements include, but are not limited to the following: (1) Space for individual and population growth, and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally (5) habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species. These regulations go on to emphasize that the agency shall focus on essential features within the specific areas considered for designation. These features "may include, but are not limited to, the following: roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, geological formation, vegetation type, tide, and specific soil types."

We seek information on the identification of these essential features for purposes of identifying critical habitat.

#### *Special Management Considerations or Protection*

Coupled with the identification of essential features, during the information-gathering phase we seek input on whether the above essential features may require special

management considerations or protection. For example, unrestricted passage and access between habitats within upper Cook Inlet may require management of this waterway for projects that have the potential to disrupt passage, such as dams or causeways. Similarly, essential prey species such as king salmon may require special management to ensure long-term viability and to prevent overharvest. We will document the special management considerations and protection associated with the essential features and relate these to the factors affecting the species and/or critical habitat during formal rulemaking (see "Schedule and Contents of Rulemaking").

#### *Areas Outside the Geographical Area Occupied by the Species*

Section 3(5)(A)(ii) of the ESA defines critical habitat to include specific areas outside the geographical area occupied by the species only if the Secretary determines them to be essential for the conservation of the species. Section 3(3) of the ESA defines conservation as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary." NMFS' ESA regulations at 424.12(e) state that the agency "shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species." We would thus include areas outside the occupied geographical area only if areas within the occupied geographical area were not adequate to support conservation. We seek information on the adequacy of the currently occupied habitat to support conservation of the Cook Inlet beluga DPS, and whether areas that are unoccupied might be "essential for conservation."

#### *Determining Economic and Other Relevant Impacts*

Section 4(b)(2) of the ESA requires that the Secretary, in deciding to designate critical habitat, consider economic impacts, impacts to national security, and any other relevant impacts of such designation. We seek information relating to any of these impacts.

The ESA gives the Secretary discretion to exclude any area from critical habitat if the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat. During the information-gathering phase, we seek information

regarding the benefits of excluding particular areas from the critical habitat designation and the benefits of including each such area as part of the critical habitat designation. We seek information that would allow us to monetize these effects to the extent practicable, as well as information on qualitative impacts to these effects. We also seek input on what approaches would allow us to determine if excluding a particular area from designation will result in the extinction of the species.

#### *Determining Conservation Value*

We seek information on the conservation value of potential critical habitat, based on the quality and quantity of the essential feature(s). We also seek input on the best methods for evaluating the conservation value of potential critical habitat areas. We are interested in information relevant to monetizing the conservation value of an area, to the extent useful measurement can be made, and/or to ranking the conservation benefits in an ordinal manner, if full monetization is not practicable.

#### *The Appropriate Geographic Scale for Weighing the Benefits of Exclusion and Benefits of Inclusion*

Cook Inlet is a vast region occupying a variety of habitat types and human presence. Much of it is undeveloped, while portions of the Inlet are adjacent to the most populated areas of the State. Consideration of areas for exclusion presents a problem of scale, wherein we wish to maintain the ecological perspective of important habitat for Cook Inlet beluga whales while allowing meaningful distinction between areas to be evaluated under section 4(b)(2).

In some cases, it may be useful to consider habitat units at a finer scale, for example, along the Municipality of Anchorage's waterfront on lower Knik Arm. We seek input on the scale to be used in this analysis for the balancing test.

#### **Information Sought**

Past critical habitat designations have generated considerable public interest. Therefore, we believe it is important to engage the public early and often in the rulemaking process. This ANPR is a key first step, and we encourage all interested parties to submit comments regarding the issues raised in this notice.

In accordance with agency regulations at 50 CFR 424.13, we will consult as appropriate with affected states, interested persons and organizations, other affected Federal agencies, and, in

cooperation with the Secretary of State, with the country or countries in which the species concerned are normally found or whose citizens harvest such species from the high seas. Data reviewed may include, but are not limited to, scientific or commercial publications, administrative reports, maps or other graphic materials, information received from experts, and comments from interested parties. Specific data needs include:

- (1) Information on the past and current numbers and distribution of Cook Inlet beluga whales;
  - (2) Information describing the habitat type and quality of marine, estuarine, and freshwater habitats for all Cook Inlet beluga whales;
  - (3) Within areas occupied by Cook Inlet beluga whales, information regarding the physical and biological features that are essential to the conservation of this DPS;
  - (4) Any special management considerations or protection currently associated with essential physical and biological features within areas occupied by Cook Inlet beluga whales, such as any land use management plan, a state statute, a municipal ordinance, or other binding local enactment;
  - (5) Any specific areas within the range of Cook Inlet beluga whales that may not qualify for critical habitat designation because they lack essential physical or biological features or may not require special management consideration or protections;
  - (6) Any specific areas outside the area occupied by Cook Inlet beluga whales that are essential for their conservation;
  - (7) Any specific areas that should be excluded from critical habitat designation because the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat;
  - (8) Any current or planned activities in the range of Cook Inlet beluga whales and their possible impacts on areas that may qualify as critical habitat;
  - (9) Any economic or other relevant impacts that may result from designating critical habitat, regardless of whether those impacts are attributable co-extensively to other causes, in particular those impacts affecting small entities;
  - (10) Other benefits of excluding or designating a specific area as critical habitat; and
  - (11) Potential peer reviewers for proposed critical habitat designations, including persons with biological and economic expertise relevant to the designations.
- As described in a joint NMFS/FWS policy on ESA information standards

published on July 1, 1994 (59 FR 34271), we will rely on the best and most comprehensive technical information available; gather and impartially evaluate information that disputes official positions; document evaluation of information; use, retain, and reference primary and original sources of information; and conduct management-level review of documents to verify and assure the quality of the science used to make the critical habitat designations. We will review all comments and information resulting from this ANPR prior to making any proposed designations and will include such documents in our public record. The public may review information submitted by contacting NMFS (see **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT**) or via the internet at <http://www.fakr.noaa.gov/>.

Dated: April 7, 2009.

**James W. Balsiger,**

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

[FR Doc. E9-8519 Filed 4-13-09; 8:45 am]

**BILLING CODE 3510-22-S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 090224231-9594-01]

RIN 0648-AX54

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

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

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

**SUMMARY:** NMFS proposes regulations to allow an exemption from the minimum twine-top mesh size for vessels issued Federal scallop permits and fishing exclusively in State of Maine (ME) waters. In addition, the state waters exemption would provide an exemption from scallop days-at-sea (DAS) for limited access DAS scallop vessels, provided the vessel owner declares that the vessel will fish exclusively in ME state waters. The scallop fishery regulations specify that a state may be eligible for a state waters exemption if it has a scallop fishery and a scallop conservation program that does not jeopardize the biomass and fishing mortality/effort limit objectives of the

Atlantic Sea Scallop Fishery Management Plan (FMP). The regulations further state that the Regional Administrator, Northeast Region, NMFS (RA), shall determine which states meet those criteria and shall authorize the exemption for such states by publishing a rule in the **Federal Register**.

**DATES:** Comments must be received by 5 p.m., local time, on May 14, 2009.

**ADDRESSES:** Documents supporting this action, including ME's request for the exemption, Amendment 11 to the FMP, and Framework 19 to the FMP, are available upon request from Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930.

You may submit comments, identified by 0648-AX54, by any one of the following methods:

- **Electronic Submissions:** Submit all electronic public comments via the Federal eRulemaking Portal <http://www.regulations.gov>.
- **Fax:** (978) 281-9135, Attn: Peter Christopher.

- **Mail:** Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope, "Comments on Maine State Waters Exemption."

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. NMFS will accept anonymous comments. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

**FOR FURTHER INFORMATION CONTACT:** Peter Christopher, Policy Analyst, 978-281-9288; fax 978-281-9135.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

Amendment 11 to the FMP (Amendment 11), implemented on June 1, 2008 (73 FR 20090, April 14, 2008), includes a comprehensive new management program for the general category scallop fleet. Amendment 11 created a Northern Gulf of Maine Scallop Management Area (NGOM Area) that includes a total allowable catch (TAC), gear restrictions, and a possession limit for the NGOM Area that are more restrictive than previous

regulations for the area. Under Amendment 11, NMFS determined that the exemptions for ME, New Hampshire (NH), and Massachusetts (MA), should be suspended, pending submission of additional information from those states regarding their state waters fisheries and the potential effects of allowing state waters exemptions under the Amendment 11 scallop regulations. In response, ME requested a state waters exemption and provided background information on the State's current scallop fishery management measures, the potential state waters scallop fishery, and information regarding potential new measures that the State was developing at the time.

The scallop fishery regulations at 50 CFR 648.54(c) specify that a state may be eligible for the state waters exemption if it has a scallop fishery and a scallop conservation program that does not jeopardize the biomass and fishing mortality/effort limit objectives of the FMP. The regulations further state that the RA shall determine which states meet those criteria and shall publish a rule in the **Federal Register**, in accordance with the Administrative Procedure Act, to provide the exemption for such states.

Based on the information submitted, NMFS has preliminarily determined that ME state waters qualify for the state waters exemption program under the FMP. The majority of ME's scallop fishery restrictions are either equally or more restrictive than Federal scallop fishing regulations. The exception is that ME allows vessels to use a minimum mesh size of 5.5-in (14-cm) twine tops on scallop dredges, while the Federal regulations require a 10-in (25.4-cm) minimum twine-top mesh size. The state waters exemption would therefore allow an exemption from the 10-in (25.4-cm) minimum twine-top mesh size. In addition, the state waters exemption would provide an exemption from scallop DAS for limited access DAS scallop vessels, but would not exempt such vessels from any other Federal restrictions other than the minimum twine-top mesh size as noted above. To fish under the exemption, owners of scallop vessels would be required to declare their intent to fish exclusively in ME state waters, subject to more restrictive state measures if applicable. Vessels with Federal Incidental Catch scallop permits would still be confined to the 40-lb (18-kg) limit under Federal regulations. The target total allowable catch was set at 50,000 lb (22,680 kg) for these vessels based partly on the very low possession limit. Allowing these vessels to harvest