

**List of Subjects in 49 CFR Part 40**

Administrative practice and procedures, Alcohol abuse, Alcohol testing, Drug abuse, Drug testing, Laboratories, Reporting and recordkeeping requirements, Safety, Transportation.

Issued this 24th day of July 2009, at Washington, DC.

**Jim L. Swart,**

*Director, Office of Drug and Alcohol Policy Compliance.*

**49 CFR Subtitle A—Authority and Issuance**

■ For reasons discussed in the preamble, the Department of Transportation is amending part 40 of Title 49 Code of Federal Regulations as follows:

**PART 40—PROCEDURES FOR TRANSPORTATION WORKPLACE DRUG AND ALCOHOL TESTING PROGRAMS**

■ 1. The authority citation for 49 CFR Part 40 continues to read as follows:

**Authority:** 40 U.S.C. 102, 301, 322, 5331, 20140, 31306, and 54101 *et seq.*

■ 2. Section 40.67 is amended by revising paragraph (b) to read as follows:

**§ 40.67 When and how is a directly observed collection conducted?**

\* \* \* \* \*

(b) As an employer, you must direct a collection under direct observation of an employee if the drug test is a return-to-duty test or a follow-up test.

[FR Doc. E9-18156 Filed 7-29-09; 8:45 am]

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

[Docket No. 090224231-91118-02]

**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:** Final rule.

**SUMMARY:** This final rule allows 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 provides an exemption from scallop days-at-sea (DAS) for limited access DAS scallop vessels, provided the vessel fishes 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:** Effective August 31, 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.

**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 state waters 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 § 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 do 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 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-inch (14-cm) twine tops on scallop dredges, while the Federal regulations require a 10-inch (25.4-cm) minimum twine-top mesh size. The state waters exemption therefore allows an exemption from the 10-inch (25.4-cm) minimum twine-top mesh size. In addition, the state waters exemption provides an exemption from scallop DAS for limited access DAS scallop vessels, but does 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 are required to declare their intent to fish, and the vessel must fish, exclusively in ME state waters, subject to more restrictive state measures, if applicable. Vessels with Federal Incidental Catch scallop permits are still confined to the 40-lb (18-kg) limit under Federal regulations. The target TAC 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 more than 40 lb (18 kg) per trip could therefore compromise the TAC.

As required by the scallop fishery regulations, exemptions can only be granted if the state's scallop fishery would not jeopardize the biomass and fishing mortality/effort limit objectives of the FMP. The exemption from the Federal twine-top restriction and DAS has no impact on the effectiveness of Federal management measures for the scallop fishery overall on the NGOM Area because the remainder of ME's scallop fishery regulations are more restrictive and would limit mortality and effort beyond the Federal management program. The twine top minimum mesh size restrictions are designed to help reduce bycatch in the scallop fishery. In particular, larger

twine top mesh size is effective at reducing the bycatch of flatfish, including yellowtail, winter, and summer flounder, in various areas. Exempting vessels in this program from the 10-inch (25.4-cm) twine top mesh size is not expected to increase bycatch or be inconsistent with the Scallop FMP or Magnuson-Sevens Act. The use of 5.5-inch (14-cm) twine top mesh size in the ME fishery is confined to approximately 2 months. The possession limit of 200 lb (91 kg) of scallops in ME's waters also limits overall fishing time. In addition, vessels with Federal scallop permits may decide not to replace the 10-inch (25.4-cm) twine tops for the limited amount of time they might fish in ME state waters. Yellowtail and summer flounder are not common in most of ME state waters, and winter flounder concentrations are primarily offshore during winter months when ME's scallop fishery is open. Low concentrations of these flounder species would limit exposure of these species to the scallop dredge fishing under the exemption. For these reasons, exempting vessels from the 10-inch (25.4-cm) twine top mesh size is consistent with the FMP's overall objectives and National Standard 9 requirement of minimizing bycatch and bycatch mortality to the extent practicable. Compliance with other National Standards is not affected by the exemption since it is fully consistent with the Scallop FMP, which has been determined to be consistent with the Magnuson-Stevens Act, including the National Standards and required provisions.

ME is the only state that has requested an exemption. MA has not requested an exemption, and NH state agency staff worked with staff at the NMFS Northeast Regional Office to determine that new possession limit restrictions in NH state waters alleviated the need for the exemption program in NH waters.

#### Comments and Responses

*Comment:* NMFS received one comment on the proposed rule, from ME's Department of Marine Resources (MEDMR). MEDMR requested that the final rule allow vessels with individual fishing quota (IFQ) scallop permits to fish under the ME state waters exemption program without having landings deducted from the vessels' IFQs. MEDMR suggested that this provision is warranted since vessels with limited access scallop permits (i.e., vessels with DAS) would be exempt from DAS if they enroll in the ME state waters exemption program.

*Response:* Allowing vessels to fish in the state waters exemption without having landings deducted from their IFQ would be inconsistent with the measures in Amendment 11 for the NGOM Area. Moreover, such an exemption is not allowed under the state waters exemption provisions, and it is therefore excluded from the ME state waters exemption.

The regulations for the state waters exemption program only authorize exemptions from DAS restrictions, gear, and possession limits. Inclusion of this provision would have had to be included in Amendment 11 to be considered in this exemption program. In addition, exemption from the IFQ program under the state waters exemption would not be consistent with conservation goals of the FMP. The measures in the NGOM Area were specifically designed to include a disincentive for some IFQ vessels to fish in the NGOM. The NGOM is subject to a very restrictive TAC, and there was concern that, if landings were not counted against a vessel's IFQ, the IFQ vessels would re-direct effort to the NGOM and harvest the NGOM Area TAC before vessels with dedicated NGOM Area permits could catch much of the TAC. The Council debated this issue at length and determined that the landings should count against the IFQ so that a vessel would not be inclined to fish in the NGOM Area just to avoid having landings count against its IFQ. State waters exemptions must be consistent with Federal management measures for the scallop fishery.

#### Classification

The RA determined that this regulatory amendment is necessary for the conservation and management of the scallop fishery and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

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

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

#### List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: July 24, 2009.

**James W. Balsiger,**

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

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

#### PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

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

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

■ 2. In § 648.54, paragraphs (a), (b), (c), (d), and (g) are revised to read as follows:

#### § 648.54 State waters exemption.

(a) *State eligibility for exemption.* (1) 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 Scallop FMP.

(2) The Regional Administrator shall determine which states have a scallop fishery and which of those states have a scallop conservation program that does not jeopardize the biomass and fishing mortality/effort limit objectives of the Scallop FMP. In such case, the Regional Administrator shall publish a rule in the **Federal Register**, in accordance with the Administrative Procedure Act, to provide the exemption for such states.

(3) A state that has been issued a state waters exemption under paragraph (a)(4) of this section must immediately notify the Regional Administrator of any changes in its scallop conservation program. The Regional Administrator shall review these changes and, if a determination is made that the state's conservation program jeopardizes the biomass and fishing mortality/effort limit objectives of the FMP, or that the state no longer has a scallop fishery, the Regional Administrator shall publish a rule in the **Federal Register**, in accordance with the Administrative Procedure Act, to eliminate the exemption for that state.

(4) The Regional Administrator has determined that the State of Maine has a scallop fishery conservation program for its scallop fishery that does not jeopardize the biomass and fishing mortality/effort limit objectives of the Scallop FMP. A vessel fishing in State of Maine waters may fish under the State of Maine state waters exemption,

subject to the exemptions specified in paragraphs (b) and (c) of this section, provided the vessel is in compliance with paragraphs (d) through (g) of this section.

(b) *Limited access scallop vessel exemption.* Any vessel issued a limited access scallop permit is exempt from the DAS requirements specified in § 648.53(b) while fishing exclusively landward of the outer boundary of the waters of a state that has been issued a state waters exemption under paragraph (a)(4) of this section, provided the vessel complies with paragraphs (d) through (g) of this section.

(c) *Gear and possession limit restrictions.* Any vessel issued a limited access scallop permit, an LAGC NGOM, or an LAGC IFQ scallop permit is exempt from the minimum twine top mesh size for scallop dredge gear specified in § 648.51(b)(4)(iv) while fishing exclusively landward of the outer boundary of the waters of the State of Maine under the state waters exemption specified in paragraph (a)(4) of this section, provided the vessel is in compliance with paragraphs (d) through (g) of this section.

(d) *Notification requirements.* Vessels fishing under the exemptions specified

in paragraph (b) and/or (c) of this section must notify the Regional Administrator in accordance with the provisions of § 648.10(e).

\* \* \* \* \*

(g) *Applicability of other provisions of this part.* A vessel fishing under the exemptions provided by paragraphs (b) and/or (c) of this section remains subject to all other requirements of this part.

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