

Dated: December 21, 2007.

Samuel D. Rauch III,

Deputy Assistant Administrator for
Regulatory Programs, National Marine
Fisheries Service.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No.050613158-5262-03]

RIN 0648-AT48

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Extension of Emergency Fishery Closure Due to the Presence of the Toxin that Causes Paralytic Shellfish Poisoning

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

ACTION: Temporary rule; emergency
action; extension of effective period;
request for comments.

SUMMARY: This action extends a
temporary final rule initially published
on October 18, 2005. The regulations
contained in the temporary rule,
emergency action, published on October
18, 2005, and subsequently extended
several times at the request of the U.S.
Food and Drug Administration (FDA),
will expire on January 1, 2008. This
temporary rule extends a closure of
Federal waters through December 31,
2008. The FDA has determined that
current oceanographic conditions and
alga sampling data suggest that the
northern section of the Temporary
Paralytic Shellfish Poison (PSP) Closure
Area remain closed to the harvest of
bivalve molluscan shellfish and that the
southern area remain closed to the
harvest of whole or roe-on scallops.
NMFS is publishing the regulatory text
associated with this closure in this
temporary emergency rule in order to
ensure that current regulations
accurately reflect the codified text that
has been modified and extended
numerous times, so that the public is
aware of the regulations being extended
through December 31, 2008.

DATES: The amendments to § 648.14 are
effective from January 1, 2008, through
December 31, 2008. The expiration date
of the temporary emergency action
published on July 27, 2007 (72 FR

35200), is extended through December
31, 2008. Comments must be received
by January 30, 2008.

ADDRESSES: Copies of the Small Entity
Compliance Guide, the emergency rule,
the Environmental Assessment, and the
Regulatory Impact Review prepared for
the October 18, 2005, reinstatement of
the September 9, 2005, emergency
action and subsequent extensions of the
emergency action, are available from
Patricia A. Kurkul, Regional
Administrator, National Marine
Fisheries Service, One Blackburn Drive,
Gloucester, MA 01930. These
documents are also available via the
internet at [http://www.nero.noaa.gov/
nero/hotnews/redtide/index.html](http://www.nero.noaa.gov/nero/hotnews/redtide/index.html).

You may submit comments, identified
by RIN 0648-AT48, by any one of the
following methods:

- Mail: Patricia A. Kurkul, Regional
Administrator, Northeast Region,
NMFS, One Blackburn Drive,
Gloucester, MA 01930-2298. Mark on
the outside of the envelope, "Comments
on PSP Closure."

- Fax: (978) 281-9135.

- Electronic Submissions: Submit all
electronic public comments via the
Federal Rulemaking Portal [http://
www.regulations.gov](http://www.regulations.gov).

Instructions: All comments received
are a part of the public record and will
generally be posted to [http://
www.regulations.gov](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:
Brian Hooker, Fishery Policy Analyst,
phone: (978) 281-9220, fax: (978) 281-
9135.

SUPPLEMENTARY INFORMATION:

Background

This emergency closure is being
implemented at the request of the FDA
after samples of shellfish from the
inshore and offshore waters off of the
coasts of New Hampshire and
Massachusetts tested positive for the
toxins (saxotoxins) that cause PSP.
These toxins are produced by the alga
Alexandrium fundyense, which can
form blooms commonly referred to as
red tides. Current oceanographic
conditions and alga sampling data
suggest that the northern section of the

Temporary PSP Closure Area remain
closed to the harvest of bivalve
molluscan shellfish and that the
southern area remain closed to the
harvest of whole or roe-on scallops. Red
tide blooms, also known as harmful
algal blooms (HABs), can produce
toxins that accumulate in filter-feeding
shellfish. Shellfish contaminated with
the toxin, if eaten in large enough
quantity, can cause illness or death from
PSP.

On June 10, 2005, the FDA requested
that NMFS close an area of Federal
waters off the coasts of New Hampshire
and Massachusetts to fishing for bivalve
shellfish intended for human
consumption. On June 16, 2005, NMFS
published an emergency rule (70 FR
35047) closing the area recommended
by the FDA, i.e., the Temporary PSP
Closure Area, through September 30,
2005. On July 7, 2005 (70 FR 39192), the
emergency rule was modified to
facilitate the testing of shellfish for the
toxin that causes PSP by the FDA and/
or FDA-approved laboratories through
the issuance of a Letter of Authorization
(LOA) from the NMFS Regional
Administrator. On September 9, 2005
(70 FR 53580), the emergency regulation
was once again modified by the division
of the Temporary PSP Closure Area into
northern and southern components. The
northern area remained closed to the
harvest of all bivalve molluscan
shellfish, while the southern component
was reopened to the harvest of Atlantic
surfclams and ocean quahogs, but
remained closed to the harvest of whole
or roe-on scallops. The rule was
extended as published on September 9,
2005, on October 3, 2005 (70 FR 57517);
reinstated on October 18, 2005, (70 FR
60450) to correct a technical error;
extended on December 28, 2005 (70 FR
76713); and subsequently on June 30,
2006 (71 FR 37505); January 4, 2007 (72
FR 291); and again on June 27, 2007 (72
FR 35200), through December 31, 2007.
On May 18, 2007, the FDA indicated
that it could not support the re-opening
of the Temporary PSP Closure Area due
to insufficient analytical data from the
area, and recommended the area remain
closed indefinitely. The boundaries of
the northern component of the
Temporary PSP Closure Area comprise
Federal waters bound by the following
coordinates in the order stated: (1)
43°00' N. lat., 71°00' W. long.; (2) 43° 00'
N. lat., 69° 00' W. long.; (3) 41°39' N.
lat., 69° 00' W. long.; (4) 41° 39' N. lat.,
71° 00' W. long., and then ending at the
first point. Under this emergency rule,
this area remains closed to the harvest
of Atlantic surfclams, ocean quahogs,
and whole or roe-on scallops. The

boundaries of the southern component of the Temporary PSP Closure Area comprise Federal waters bound by the following coordinates in the order stated: (1) 41° 39' N. lat., 71° 00' W. long.; (2) 41° 39' N. lat., 69° 00' W. long.; (3) 40° 00' N. lat., 69° 00' W. long.; (4) 40° 00' N. lat., 71° 00' W. long., and then ending at the first point. Under this emergency rule, this southern component of the area remains closed only to the harvest of whole or roe-on scallops.

Classification

This action is issued pursuant to section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1855(c). Pursuant to section 5 U.S.C. 553(b)(B) of the Administrative Procedure Act, the Assistant Administrator for Fisheries finds there is good cause to waive prior notice and an opportunity for public comment on this action as notice and comment would be impracticable and contrary to the public interest due to a public health emergency, and public comment has been solicited concurrently with each of the extensions of this actions, as detailed and responded to below. In addition, under section 553(d)(3) there is good cause to waive the 30-day delay in effectiveness due to a public health emergency. Consultation with the FDA concerning the extension of this action beyond the January 1, 2008, expiration date continued through December 2007, making it impossible to first publish this action as a proposed rule and provide for a 30-day delay of effectiveness. The original emergency closure was in response to a public health emergency. Toxic algal blooms are responsible for the marine toxin that causes PSP in persons consuming affected shellfish. People have become seriously ill and some have died from consuming affected shellfish under similar circumstances. Pursuant to section 305(c)(3)(C) of the Magnuson-Stevens Act, the closure to the harvest of shellfish, as modified on September 9, 2005, and re-instated on October 18, 2005, may remain in effect until the circumstances that created the emergency no longer exist, provided the public has had an opportunity to comment after the regulation was published, and, in the case of a public

health emergency, the Secretary of Health and Human Services concurs with the Commerce Secretary's action. During the initial comment period, June 16, 2005, through August 1, 2005, no comments were received. One comment was received after the re-opening of the southern component of the Temporary PSP Closure Area on September 9, 2005. The commenter expressed reluctance to re-opening a portion of the closure area without seeing the results of the FDA tests. Data used to make determinations regarding closing and opening of areas to certain types of fishing activity are collected from Federal, state, and private laboratories. NOAA maintains a Red Tide Information Center (http://www.cop.noaa.gov/news/fs/ne_hab_200605.html), which can be accessed directly or through the website listed in the ADDRESSES section. Information on test results, modeling of algal bloom movement, and general background on red tide can be accessed through this information center. While NMFS is the agency with the authority to promulgate the emergency regulations, it modified the regulations on September 9, 2005, at the request of the FDA, after the FDA has determined that the results of its tests warranted such action. If necessary, the regulations may be terminated at an earlier date, pursuant to section 305(c)(3)(D) of the Magnuson-Stevens Act, by publication in the **Federal Register** of a notice of termination, or extended further to ensure the safety of human health.

This emergency/interim rule is exempt from the procedures of the Regulatory Flexibility Act because the rule is issued without opportunity for prior notice and opportunity for public comment.

The rule, as last published on October 18, 2005, was determined to be not significant for the purposes of Executive Order 12866.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: December 20, 2007.

Samuel D. Rauch III,

Deputy Assistant Administrator For Regulatory Programs, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR part 648 continues to read 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 § 648.14, paragraphs (a)(170) and (a)(171) are added to read as follows:

§ 648.14 Prohibitions.

(a) * * *

(170) Fish for, harvest, catch, possess or attempt to fish for, harvest, catch, or possess any bivalve shellfish, including Atlantic surfclams, ocean quahogs, and mussels with the exception of sea scallops harvested only for adductor muscles and shucked at sea, or a vessel issued and possessing on board a Letter of Authorization (LOA) from the Regional Administrator authorizing the collection of shellfish for biological sampling and operating under the terms and conditions of said LOA, in the area of the U.S. Exclusive Economic Zone bound by the following coordinates in the order stated:

(i) 43° 00' N. lat., 71° 00' W. long.;

(ii) 43° 00' N. lat., 69° 00' W. long.;

(iii) 41° 39' N. lat., 69° 00' W. long.;

(iv) 41° 39' N. lat., 71° 00' W. long.;

and then ending at the first point.

(171) Fish for, harvest, catch, possess, or attempt to fish for, harvest, catch, or possess any sea scallops except for sea scallops harvested only for adductor muscles and shucked at sea, or a vessel issued and possessing on board a Letter of Authorization (LOA) from the Regional Administrator authorizing collection of shellfish for biological sampling and operating under the terms and conditions of said LOA, in the area of the U.S. Exclusive Economic Zone bound by the following coordinates in the order stated:

(i) 41° 39' N. lat., 71° 00' W. long.;

(ii) 41° 39' N. lat., 69° 00' W. long.;

(iii) 40° 00' N. lat., 6° 00' W. long.;

(iv) 40° 00' N. lat., 71° 00' W. long.;

and then ending at the first point.

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