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Issued: November 6, 2009.

**Ronald L. Medford,***Acting Deputy Administrator.*

[FR Doc. E9-27231 Filed 11-9-09; 11:15 am]

BILLING CODE 4910-59-P

**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 temporary rule extends a closure of Federal waters. The FDA has determined that 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, with the exception of sea scallop adductor muscles harvested and shucked at sea, and that the southern area remain closed to the harvest of whole or roe-on scallops. The regulations contained in the temporary rule, emergency action, first published in 2005, and have been subsequently extended several times at the request of the U.S. Food and Drug Administration (FDA). 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.

**DATES:** The amendments to § 648.14, in amendatory instruction 2, are effective January 1, 2010. The amendments to § 648.14, in amendatory instruction 3, are effective from January 1, 2010, through December 31, 2010. The expiration date of the temporary

emergency action published on December 30, 2008 (73 FR 79720), is extended through December 31, 2010. Comments must be received by December 14, 2009.

**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, 55 Great Republic Drive, Gloucester, MA 01930. These documents are also available via the internet at <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, 55 Great Republic 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 eRulemaking Portal <http://www.regulations.gov>.

Instructions: No comments will be posted for public viewing until after the comment period has closed. 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:** Anna Macan, Fishery Management Specialist, phone: (978) 281-9165, 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 the coasts of New Hampshire and Massachusetts tested positive for the presence of 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 should remain closed to the harvest of bivalve molluscan shellfish, with the exception of sea scallop adductor muscles harvested and shucked at sea, and that the southern area should 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.

In 2005, the FDA first 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). Since 2005, the closure has been extended several times and the area has been expanded and divided into northern and southern components. The Northern Temporary PSP Closure Area remained closed to the harvest of all bivalve molluscan shellfish, while the Southern Temporary PSP Closure Area was reopened to the harvest of Atlantic surfclams, ocean quahogs, as sea scallop adductor muscles harvested and shucked at sea. The current closure will expire on December 31, 2009, and this action extends this closure for one additional year, through December 31, 2010.

The boundaries of the northern component of the Temporary PSP Closure Area comprise Federal waters bounded by the following coordinates specified in Table 1, below. Under this emergency rule, this area remains closed to the harvest of Atlantic surfclams, ocean quahogs, and whole or roe-on scallops.

**TABLE 1: COORDINATES FOR THE NORTHERN TEMPORARY PSP CLOSURE AREA**

Point	Latitude	Longitude
1	43°00'N	71°00'W
2	43°00'N	69°00'W
3	41°39'N	69°00'W
4	41°39'N	71°00'W
5	43°00'N	71°00'W

The boundaries of the southern component of the Temporary PSP Closure Area comprise Federal waters bound by the following coordinates

specified in Table 2. Under this emergency rule, the Southern Temporary PSP Closure Area remains closed only to the harvest of whole or roe-on scallops.

TABLE 2: COORDINATES FOR THE SOUTHERN TEMPORARY PSP CLOSURE AREA

Point	Latitude	Longitude
1	41°39'N	71°00'W
2	41°39'N	69°00'W
3	40°00'N	69°00'W
4	40°00'N	71°00'W
5	41°39'N	71°00'W

### 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 action, 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 December 31, 2009, expiration date continued through October 2009, 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](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 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 action 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.

This rule is not significant for the purposes of Executive Order 12866.

### List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: November 6, 2009

#### 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 is amended 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.*

### § 648.14 [Amended]

■ 2. In § 648.14, paragraphs (a)(10)(iii) and (a)(10)(iv) are removed.

■ 3. In § 648.14, paragraphs (a)(10)(iii) and (a)(10)(iv) are added to read as follows:

### § 648.14 Prohibitions.

(a) \* \* \*

(10) \* \* \*

(iii) 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, unless 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:

(A) 43°00'N. lat., 71°00'W. long.;

(B) 43°00'N. lat., 69°00'W. long.;

(C) 41°39'N. lat., 69°00'W. long.;

(D) 41°39'N. lat., 71°00'W. long.; and then ending at the first point.

(iv) 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, unless 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:

(A) 41°39'N. lat., 71°00'W. long.;

(B) 41°39'N. lat., 69°00'W. long.;

(C) 40°00'N. lat., 69°00'W. long.;

(D) 40°00'N. lat., 71°00'W. long.; and then ending at the first point.

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[FR Doc. E9-27320 Filed 11-12-09; 8:45 am]

BILLING CODE 3510-22-S