

*Executive Order 13132 Federalism*

This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act.

*Executive Order 13045 Protection of Children from Environmental Health and Safety Risks*

This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

*National Technology Transfer Advancement Act*

In reviewing plan submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a plan submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a plan submission, to use VCS in place of a plan submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

*Paperwork Reduction Act*

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

*Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 804 exempts from section 801 the following types of rules: (1) Rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules

of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). EPA is not required to submit a rule report regarding this action under section 801 because this is a rule of particular applicability.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 26, 2004. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Oxides of nitrogen, Ozone, Reporting and recordkeeping requirements.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: February 17, 2004.

**Bharat Mathur,**

*Acting Regional Administrator, Region 5.*

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**BILLING CODE 6560-50-P**

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 17**

**RIN 1018-AT57**

**Endangered and Threatened Wildlife and Plants; Proposed Rule To Designate Critical Habitat for the Santa Ana Sucker (*Catostomus santaanae*)**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for the Santa Ana sucker (*Catostomus santaanae*) pursuant to the Endangered Species Act of 1973, as amended (Act). This threatened species is now restricted to three noncontiguous populations in three different stream systems in southern California: The lower and middle Santa Ana River in San Bernardino, Riverside, and Orange counties; the East, West, and North Forks of the San Gabriel River in Los

Angeles County; and lower Big Tujunga Creek in Los Angeles County. When final, this rulemaking would replace the critical habitat designation for Santa Ana sucker as promulgated today by a rule that amends 50 CFR 17.11(h) and 17.95(e).

**DATES:** We will accept comments from all interested parties until April 26, 2004. We must receive requests for public hearings, in writing, at the address shown in the **ADDRESSES** section by April 12, 2004.

**ADDRESSES:** Comments and materials received, as well as supporting documentation used in the preparation of this proposed rule, will be available for public inspection, by appointment, during normal business hours at the Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, California 92009 (telephone 760/431-9440 or facsimile 760/431-9618).

If you wish to comment, you may submit your comments and materials concerning this proposed rule by any one of several methods:

1. You may submit written comments and information to the Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, California 92009.

2. You may hand-deliver written comments to our Office, at the address given above.

3. You may send comments by electronic mail (e-mail) to [fw1sasu@r1.fws.gov](mailto:fw1sasu@r1.fws.gov). Please see the Public Comments Solicited section below for file format and other information about electronic filing.

**FOR FURTHER INFORMATION CONTACT:** Jim Bartel at the address listed above (telephone 760/431-9440 or facsimile 760/431-9618).

**SUPPLEMENTARY INFORMATION:****Public Comments Solicited**

We solicit your comments on the proposed designation of critical habitat for the Santa Ana sucker. Comments particularly are sought concerning:

(1) The reasons why any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act, including whether the benefit of designation will outweigh any threats to the species due to designation;

(2) Specific information on the amount and distribution of Santa Ana sucker habitat, and what habitat is essential to the conservation of the species and why;

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat;

(4) Any foreseeable economic or other potential impacts resulting from the

proposed designation and, in particular, any impacts on small entities; and

(5) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments.

If you wish to comment, you may submit your comments and materials concerning this rule by any one of several methods (see **ADDRESSES** section). Please submit Internet comments to [fw1sasu@r1.fws.gov](mailto:fw1sasu@r1.fws.gov) in ASCII file format and avoid the use of special characters or any form of encryption. Please also include "Attn: Santa Ana Sucker Critical Habitat" in your e-mail subject header and your name and return address in the body of your message. If you do not receive a confirmation from the system that we have received your Internet message, contact us directly by calling our Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section).

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home addresses from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

### Background

The Santa Ana sucker was listed as a threatened species under the Act on April 12, 2000 (65 FR 19686). On March 19, 2002, California Trout, Inc., the California-Nevada Chapter of the American Fisheries Society, the Center for Biological Diversity, and the Friends of the River filed a complaint for declaratory and injunctive relief with the U.S. District Court for the Northern District of California. (*California Trout v. DOI*, No. 97-3779 (N.D.Cal.)). On

February 26, 2003, the district court held that the Service had failed to designate critical habitat for the listed populations of Santa Ana sucker within the statutory timeframe and ordered the Service to complete a final critical habitat designation for the Santa Ana sucker by February 21, 2004. The court further enjoined the Service from issuing any section 7 concurrence or biological opinion on a proposed Federal action that "may affect" the Santa Ana sucker until completion of the designation.

A final rule to designate critical habitat for the Santa Ana sucker is published in the Rules and Regulations section of this issue of the **Federal Register**. In order to comply with the designation deadline established by the district court, we were unable to open a public comment period, hold a public hearing, or complete an economic analysis of the final rule. However, we fully recognize the value and importance of public input in developing a critical habitat designation for the Santa Ana Sucker. Therefore, in order to allow members of the public an opportunity to comment on the critical habitat designation for the Santa Ana sucker, and to enable the Service to seek peer review of such designation and to complete and circulate for public review an economic analysis of critical habitat designation, we are publishing and soliciting comment on this proposed rule. The amendments made to 17.11(h) and 17.95(e) in the final critical habitat rule published elsewhere in this issue of the **Federal Register** are the same as the amendments we are proposing in this proposed rule. In addition, the **SUPPLEMENTARY INFORMATION** for that final rule is the same as the **SUPPLEMENTARY INFORMATION** for this proposed rule. Because this proposed critical habitat rule incorporates by reference the substance of the final rule, please refer to the final rule in formulating your comments on this proposal. At the conclusion of this rulemaking process we will determine whether the final critical habitat rule for the Santa Ana sucker separately published in this issue of the **Federal Register** should be replaced with a new final rule.

### Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial information available and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such

exclusions outweigh the benefits of specifying such areas as part of critical habitat. We cannot exclude such areas from critical habitat if such exclusion would result in the extinction of the species.

An analysis of the economic impacts of proposing critical habitat for the Santa Ana sucker will be prepared. We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment. We specifically solicit public comment on exclusion under section 4(b)(2) of the Act of lands included within the Western Riverside Multi-Species Habitat Conservation Plan (MSHCP) and lands included within the Santa Ana Sucker Conservation Program on the Santa Ana River. When completed, copies of the draft economic analysis will be available for downloading from the Internet at <http://carlsbad.fws.gov>, or by contacting the Carlsbad Fish and Wildlife Office directly (see **ADDRESSES** section).

### Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of such review is to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We will send these peer reviewers copies of this proposed rule immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposed designation of critical habitat.

We will consider all comments and information received during the comment period on this proposed rule during preparation of a final rulemaking. Accordingly, the final decision may differ from this proposal.

### Public Hearings

The Act provides for one or more public hearings on this proposal, if requested. Requests for public hearings must be made in writing at least 15 days prior to the close of the public comment period. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings in the **Federal Register** and local newspapers at least 15 days prior to the first hearing.

## Required Determinations

### *Regulatory Planning and Review*

The Office of Management and Budget (OMB) has not reviewed this proposed critical habitat designation in accordance with Executive Order 12866. In order to comply with the critical habitat designation deadline established by the district court, there was insufficient time for OMB to formally review this proposal.

We are preparing a draft economic analysis of this proposed action, which will be available for public comment, to determine the economic consequences of designating the proposed areas as critical habitat.

Within these areas, the types of Federal actions or authorized activities that we have identified as potential concerns are:

(1) Regulation of activities affecting waters of the United States by the Army Corps under section 404 of the Clean Water Act;

(2) Regulation of water flows, damming, diversion, and channelization by any Federal agency;

(3) Road construction and maintenance, right-of-way designation, or any activity funded or permitted by the Federal Highway Administration;

(4) Voluntary conservation measures by private landowners funded by the Natural Resources Conservation Service;

(5) Regulation of airport improvement activities by the Federal Aviation Administration;

(6) Licensing of construction of communication sites by the Federal Communications Commission; and,

(7) Funding of activities by the U.S. Environmental Protection Agency, Department of Energy, Federal Emergency Management Agency, Federal Highway Administration, or any other Federal agency.

The availability of the draft economic analysis will be announced in the **Federal Register** and in local newspapers so that it is available for public review and comments.

### *Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory

flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the Regulatory Flexibility Act (RFA) to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. However, the SBREFA does not explicitly define "substantial number" or "significant economic impact." Consequently, to assess whether a "substantial number" of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. The SBREFA also amended the RFA to require a certification statement. We are hereby certifying that this proposed rule will not have a significant effect on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations, such as independent nonprofit organizations, and small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this rule as well as the types of project modifications that may result. In general, the term significant economic impact is meant to apply to a typical small business firm's business operations.

If this critical habitat designation is finalized, Federal agencies must consult with us if their activities may affect designated critical habitat. Measures to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

Since the Santa Ana sucker was listed (2000), we have conducted approximately seven formal consultations involving this species. These formal consultations included: an

intra-Service study investigating the effects of temporary cessation of water discharge on the sucker, flood control improvements in Reach 8 and 9 of the Santa Ana River, flood control improvements in Prado Basin, the operation of Prado Dam for water conservation, emergency sand mining activity to maintain safety of a bridge, the widening of Interstate 71, and a programmatic consultation for the Angeles National Forest. These consultations resulted in non-jeopardy biological opinions.

We also conducted approximately five informal consultations since this species was listed. These informal consultations concerned activities such as: A seismic retrofit of six bridges, removal of nonnative vegetation, maintaining sewer line manholes and access, and continued use of recreational residences in the Angeles National Forest. Informal consultations regarding the Santa Ana sucker usually resulted in recommendations to employ erosion control measures, conduct certain activities by hand, conduct activities outside of spawning season, implement best management practices to avoid spilling hazardous materials, and avoidance of habitat, and resulted in little to no modification of the proposed activities. In reviewing these past informal consultations and the activities involved in light of proposed critical habitat, we do not believe the outcomes would have been different in areas designated as critical habitat.

In summary, we have considered whether this proposed designation would result in a significant economic impact on a substantial number of small entities, and we have concluded that it would not. Future consultations are not likely to affect a substantial number of small entities. We have no indication that the types of activities we review under section 7 of the Act will change significantly in the future. Given that a large part of the critical habitat designation overlaps with already designated critical habitat (*i.e.*, least Bell's vireo, southwestern willow flycatcher, San Bernardino kangaroo rat), or occupied habitat for other species (mountain yellow-legged frog, slender-horn spineflower, and woolly-star), we would expect no more than 1 additional section 7 consultation per year resulting from this rule as certain of the proposed critical habitat units are currently unoccupied by Santa Ana suckers. These consultations would likely address bridge widening, seismic retrofits of bridges, water diversion, water conservation, pipeline construction, post-fire actions, and fuel modification.

This rule would result in major project modifications only when proposed activities with a Federal nexus would destroy or adversely modify critical habitat. Based on our experience in consultations involving designated critical habitat for other listed species, we are almost always able to work with the Federal action agency, and non-Federal applicant, if any, to incorporate minor changes into a proposed project to avoid adverse modification of critical habitat and enable the project to go forward. While it is possible that major modifications to a proposed action might be necessary to avoid adverse modification of critical habitat, it is not expected to occur frequently enough to affect a substantial number of small entities. Therefore, we are certifying that the proposed designation of critical habitat for the Santa Ana sucker will not have a significant economic impact on a substantial number of small entities, and an initial regulatory flexibility analysis is not required.

Our determination is based upon the information regarding potential economic impact that is available to us at this time. This assessment of economic effect may be modified prior to final rulemaking based upon review of the draft economic analysis prepared pursuant to section 4(b)(2) of the ESA and E.O. 12866. This analysis is for the purposes of compliance with the Regulatory Flexibility Act and does not reflect our position on the type of economic analysis required by *New Mexico Cattle Growers Assn. v. U.S. Fish & Wildlife Service* 248 F.3d 1277 (10th Cir. 2001).

#### *Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 801 et seq.)*

Under the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 801 et seq.), this rule is not a major rule. As previously discussed, we have excluded critical habitat from private lands within the draft Western Riverside MSHCP and the SAS Conservation Program under section 4(b)(2) of the Act. The exclusion of these private lands and the activities associated with the draft Western Riverside MSHCP and SAS Conservation Program eliminates the potential for critical habitat in these excluded areas to have any effect on the increase in costs or prices for consumers or any significant adverse effects on competition, employment, investment, productivity, innovation or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Moreover, approximately 48 percent of the designated critical habitat is on Forest Service lands that are not intensively used for commercial or business

purposes and we anticipate that the designation will have little to no effect on costs or prices for consumers or any other significant commercial or business related activities. The remaining 52 percent of designated critical habitat that occurs on private lands is constrained by other existing conditions, such as being within wetlands regulated by the U.S. Army Corps of Engineers, floodplains identified by FEMA, or by the presence of listed species or other designated critical habitat. Therefore, we believe that this critical habitat designation will not have an effect on the economy of \$100 million or more, will not cause a major increase in costs or prices for consumers, and will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

#### *Executive Order 13211*

On May 18, 2001, the President issued an Executive Order (E.O. 13211) on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed rule to designate critical habitat for the Santa Ana sucker is not a significant regulatory action under Executive Order 12866, and it is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

#### *Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.):

(a) This rule will not produce a Federal mandate on State or local governments or the private sector of \$100 million or greater in any year, that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no direct obligations on State or local governments.

(b) This rule will not "significantly or uniquely" affect small governments so a Small Government Agency Plan is not required. Small governments will not be affected unless they propose an action requiring Federal funds, permits, or other authorizations. Any such activities will require that the Federal agency ensure that the action will not adversely modify or destroy designated critical habitat.

#### *Takings*

In accordance with Executive Order 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights"), we have analyzed the potential takings implications of designating critical habitat for the Santa Ana sucker in a takings implications assessment. The takings implications assessment concludes that this final designation of critical habitat for the Santa Ana sucker does not pose significant takings implications.

#### *Federalism*

In accordance with Executive Order 13132, this final rule does not have Federalism implications or impose substantial direct compliance costs on State and local governments. This designation requires Federal agencies to ensure that their actions do not adversely modify critical habitat; it does not impose direct obligations on State or local governments. A Federalism assessment is not required.

The designations may have some benefit to the State of California and local government, in that the areas essential to the conservation of the Santa Ana sucker are more clearly defined, and the primary constituent elements of the habitat necessary to their survival are specifically identified. While this definition and identification do not alter where and what federally sponsored activities may occur, they may assist these local governments in long-range planning, rather than causing them to wait for case-by-case section 7 consultation to occur.

#### *Civil Justice Reform*

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Endangered Species Act. This proposed rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of the Santa Ana sucker.

#### *Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)*

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not

conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

#### National Environmental Policy Act

We have determined that we do not need to prepare an Environmental Assessment and/or an Environmental Impact Statement as defined by the National Environmental Policy Act of 1969 in connection with regulations adopted pursuant to section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This final determination does not constitute a major Federal action significantly affecting the quality of the human environment.

#### Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations With Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and the Department of Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. We have determined that there are no tribal lands essential for the conservation of the Santa Ana sucker. Therefore, critical habitat for the Santa Ana sucker has not been designated on Tribal lands.

#### References Cited

A complete list of all references cited in this rulemaking is available upon request from the Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES** section).

#### Author

The primary author of this document is the Carlsbad Fish and Wildlife Office (see **ADDRESSES** section).

#### List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

#### Proposed Rule Promulgation

For the reasons set out in the preamble, we propose to amend 50 CFR 17.11(h) and 17.95(e) to designate critical habitat for the Santa Ana sucker. The text of the proposed amendments is identical to the text of the final rule amendments made to 17.11(h) and 17.95(e) for the Santa Ana sucker, published elsewhere in this issue of the **Federal Register**.

Dated: February 20, 2004.

**Craig Manson,**

*Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 04-4226 Filed 2-25-04; 8:45 am]

**BILLING CODE 4310-55-U**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 040210050-4050-01; I.D. 011204A]

RIN 0648-AN16

#### Fisheries of the Northeastern United States; Atlantic Sea Scallop Fishery; Amendment 10

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

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

**SUMMARY:** NMFS proposes regulations to implement Amendment 10 to the Atlantic Sea Scallop Fishery Management Plan (FMP) developed by the New England Fishery Management Council (Council). Amendment 10 proposes a long-term, comprehensive program to manage the sea scallop fishery through an area rotation management program to maximize scallop yield. Areas would be defined and would be closed and re-opened to fishing on a rotational basis, depending on the condition and size of the scallop resource in the areas. Amendment 10 evaluates and proposes measures to minimize the adverse effects of fishing on Essential Fish Habitat (EFH). Amendment 10 also proposes days-at-sea (DAS) allocations consistent with the current status of the resource, measures to minimize bycatch to the extent practicable, and other measures to make the management program more effective, efficient, and flexible.

**DATES:** Comments must be received at the appropriate address or fax number (see **ADDRESSES**) by 5 p.m., local time, on March 29, 2004.

**ADDRESSES:** Written comments should be sent to Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, One Blackburn Drive, Gloucester, MA 01930. Mark the outside of the envelope, "Comments on Amendment 10 to the Scallop FMP." Comments also may be sent via facsimile (fax) to (978) 281-9135. Comments submitted via e-mail or

internet should be sent to [ScallopAN16@noaa.gov](mailto:ScallopAN16@noaa.gov).

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule should be submitted to the Regional Administrator at the address above and by e-mail to [David\\_Rostker@omb.eop.gov](mailto:David_Rostker@omb.eop.gov), or fax to (202) 395-7285.

Copies of Amendment 10, its Regulatory Impact Review (RIR), including the Initial Regulatory Flexibility Analysis (IRFA), and the draft Final Supplemental Environmental Impact Statement (FSEIS) are available on request from Paul J. Howard, Executive Director, New England Fishery Management Council, 50 Water Street, Newburyport, MA 01950. These documents are also available online at <http://www.nefmc.org>.

**FOR FURTHER INFORMATION CONTACT:** Peter W. Christopher, Fishery Policy Analyst, 978-281-9288; fax 978-281-9135; e-mail [peter.christopher@noaa.gov](mailto:peter.christopher@noaa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

Amendment 10 was developed by the Council over a period of more than 3 years. The primary management measure included in Amendment 10 is the proposed area rotation management program, which is designed to improve yield from the scallop resource by defining areas to be closed and re-opened based on the condition and size of the scallop resource. Amendment 10 evaluates and proposes measures to minimize the adverse effects of fishing on EFH, in accordance with the Joint Stipulation and Order resulting from the legal challenge *American Oceans Campaign et al. v. Evans et al.* (Civil Case Number 99-982 (GK)) (Joint Stipulation and Order). Amendment 10 also proposes days-at-sea (DAS) allocations consistent with the current status of the resource, measures to minimize bycatch to the extent practicable, and other measures to make the management program more effective, efficient, and flexible.

Area-based management was first used for the scallop resource in 1998, when NMFS, in consultation with the Council, implemented an interim rule to close two areas in the Mid-Atlantic (MA) to scallop fishing (March 31, 1998, 63 FR 15324). These areas, the Hudson Canyon South and Virginia Beach areas, were closed to protect an abundance of small scallops that would have been vulnerable to excessive mortality if left unprotected. On March 29, 1999,