

## **12.0 Relationship to Applicable Law**

This fishery management plan has been prepared primarily in response to the requirements of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). It also addresses requirements of the Marine Mammal Protection Act and the Endangered Species Act. However, these are not the only laws and administrative orders that the Council must consider in developing an FMP. In preparing a fishery management plan, the Council must comply with requirements of the National Environmental Policy Act (NEPA), the Regulatory Flexibility Act (RFA), the Administrative Procedures Act (APA), the Paperwork Reduction Act (PRA), the Coastal Zone Management Act (CZMA), and Executive Orders 12612 (Federalism), 12866 (Regulatory Planning), and 13158 (Marine Protected Areas).

These other applicable laws and administrative orders help ensure that, in developing an FMP, the Council considers the full range of alternative actions and their expected impacts on the marine environment, living marine resources, and the human communities that could be affected. This integrated Red Crab FMP document contains all elements of the Fishery Management Plan and the Environmental Impact Statement (EIS) (which is required by NEPA). This chapter addresses the requirements of these other applicable laws and administrative orders. Some of the requirements of the other applicable laws are discussed in the body of the FMP and are not repeated here. Section references are provided. In other cases, the element required by law is not found elsewhere and is addressed fully in this chapter.

### **12.1 Administrative Procedures Act**

Sections 551-553 of the Federal Administrative Procedures Act establish procedural requirements applicable to informal rulemaking by federal agencies. The purpose is to ensure public access to the federal rulemaking process, and to give the public notice and an opportunity to comment before the agency promulgates new regulations.

Development of this fishery management plan provided many opportunities for public review, input, and access to the rulemaking process. Section 14.0 details a list of public meetings at which the proposed measures in the Red Crab FMP were discussed. In addition to entertaining public comments throughout the development process, the Council notified the public of two formal review and comment periods, a 20-day FMP scoping period (65 FR 4941) and a 38-day review period for the Draft FMP/DEIS (66 FR 59404 and 66 FR 59787).

### **12.2 Coastal Zone Management Act**

#### **12.2.1 States Contacted and Council Determination of Consistency with State Programs**

Section 307(c)(1) of the Federal Coastal Zone Management Act of 1972 requires that all federal activities which directly affect the coastal zone be consistent with

approved state coastal zone management programs to the maximum extent practicable. The coastal zone management plans of the following states were reviewed to determine the consistency of the proposed Red Crab FMP with the state programs: Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, and North Carolina. The draft FMP was provided to all affected states. The final FMP and all supporting documents were also provided to all affected states, along with a letter stating the Council's initial CZMA consistency determination. Copies of these letters are provided in Appendix E.

### **12.2.2 States Contacts**

The following individuals were contacted regarding the CZMA consistency determination for the Red Crab FMP:

- Ms. Kathleen Leydon, Maine Coastal Program
- Mr. David Hartman, New Hampshire Coastal Program
- Mr. Tom Skinner, Massachusetts Coastal Zone Management
- Mr. Grover Fugate, Rhode Island Coastal Resources Council
- Mr. Todd Oulette, Connecticut Office of Long Island Sound Programs
- Mr. George Stafford, New York Division of Coastal Resources
- Mr. Richard H. Kropp, New Jersey Department of Environmental Protection
- Mr. E. James Tabor, Pennsylvania Department of Environmental Protection
- Mr. Nicholas Di Pasquale, Delaware Division of Natural Resources
- Ms. Gwynne Schultz, Maryland Coastal Zone Management Division
- Ms. Laura McKay, Virginia Coastal Resources Management Program
- Ms. Donna Moffitt, North Carolina Division of Coastal Management

### **12.2.3 CZMA Consistency Determination Transmittal Letters**

Copies of the CZMA consistency determination transmittal letters are provided in Appendix E.

### **12.2.4 State Concurrences**

At the time of this submission, the Council received consistency determination concurrences from two states, New Jersey and Virginia. It should be noted that both were in response to the Draft FMP. No state concurrences with the Council's determinations have been received on the Final FMP at the time of the submission of this FMP.

## **12.3 Endangered Species Act**

Section 7 of the Endangered Species Act requires federal agencies conducting, authorizing or funding activities that affect threatened or endangered species to ensure that those effects do not jeopardize the continued existence of listed species. The Council has concluded, and NMFS has concurred, that the Red Crab FMP and the prosecution of the red crab fishery is not likely to result in jeopardy to any ESA-listed species under NMFS jurisdiction, or alter or modify any critical habitat, based on the discussion in this

document (see NMFS ESA Section 7 Consultation Biological Opinion dated February 6, 2002). For further information on the potential impacts of the fishery and the proposed management action, see Sections 5.3, 5.4 and 8.7.4.

#### **12.4 Executive Order 12612 (Federalism)**

The Executive Order on Federalism established nine fundamental federalism principles to which Executive agencies must adhere in formulating and implementing policies having federalism implications. The E.O. also lists a series of policy making criteria to which agencies must adhere when formulating and implementing policies that have federalism implications. However, no federalism issues or implications have been identified relative to the actions proposed in this fishery management plan and the associated regulations.

The FMP does not contain policies with federalism implications sufficient to warrant preparation of an assessment under E.O. 12612. The affected states have been closely involved in the development of the proposed management measures through their involvement in the Regional Fishery Management Council process (i.e., all affected states are represented as voting members on at least one Council). This FMP was developed with the full participation and cooperation of the state representatives of the New England Council, and the draft FMP was provided to the Mid-Atlantic Council for their review and consideration. No comments were received from any state officials relative to any federalism implications of the proposed Red Crab FMP.

#### **12.5 Executive Order 12866 (Regulatory Review)**

This executive order applies to the issuance of new rules and the review of existing rules. E.O. 12866 requires that the Office of Management and Budget (OMB) review proposed regulatory programs that are considered to be “significant.” A significant rule is one that is likely to (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Order.

Section 11.0 of this FMP provides the Regulatory Impact Review (RIR) which includes an assessment of the costs and benefits of the proposed action and other alternatives in accordance with the guidelines established by E.O. 12866. The analysis included in the RIR shows that the Red Crab FMP is not a “significant regulatory action” since it will not adversely affect in a material way the economy or a sector of the economy. The proposed regulations will not have an annual impact on the economy of \$100 million or more, and will not adversely affect productivity, competition, the environment, public health or safety, or state, local or tribal governments or communities over the long term. The proposed action also does not interfere with an action planned by

another agency since no other agency regulates the harvest of deep-sea red crabs. The FMP does not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients. The FMP also does not raise any novel legal and/or policy issues because it extends the types of fishing regulations already in place in many other federally-managed fisheries.

## **12.6 Executive Order 13158 (Marine Protected Areas)**

The Executive Order on Marine Protected Areas requires each federal agency whose actions affect the natural or cultural resources that are protected by an MPA to identify such actions, and, to the extent permitted by law and to the maximum extent practicable, in taking such actions, avoid harm to the natural and cultural resources that are protected by an MPA.

The E.O. directs federal agencies to refer to the MPAs identified in a list of MPAs that meet the definition of MPA for the purposes of the Order. The E.O. requires that the Departments of Commerce and the Interior jointly publish and maintain such a list of MPAs. As of the date of submission of this FMP, the list of MPA sites has not been developed by the departments. However, it is likely that when the list is available, the Stellwagen Bank National Marine Sanctuary and the Council's year-round groundfish closed areas (Closed Area I, Closed Area II, Nantucket Lightship Closed Area, and Western Gulf of Maine Closed Area), at a minimum, will meet criteria for an MPA and thus may be considered in the population of the list.

The fishing activities proposed to be managed under this FMP, and all actions associated with this FMP, occur well outside the boundaries of any areas that might be considered to meet the intention of E.O. 13158 as an MPA. The red crab fishery does not occur in the Gulf of Maine or on Georges Bank; therefore, there is no potential harm to either the natural or cultural resources protected by the Stellwagen Bank National Marine Sanctuary or any of the groundfish closed areas.

## **12.7 Marine Mammal Protection Act**

The Council has reviewed the impacts of the Red Crab FMP on marine mammals and concluded that the management actions proposed are consistent with the provisions of the MMPA and will not alter existing measures to protect the species likely to inhabit the red crab management unit. For further information on the potential impacts of the fishery and the proposed management action, see Sections 5.3, 5.4 and 8.7.4.

## **12.8 Paperwork Reduction Act**

The purpose of the Paperwork Reduction Act (PRA) is to control paperwork requirements imposed on the public by the federal government. The authority to manage information and record-keeping requirements is vested with the Director of the Office of Management and Budget (OMB). This authority encompasses establishment of guidelines and policies, approval of information collection requests, and reduction of paperwork burdens and duplications.

This proposed Red Crab FMP contains collection of information requirements subject to the PRA. The FMP includes requirements for four types of permits: open access incidental catch vessel permits, controlled access directed fishery vessel permits, vessel operator permits, and dealer permits. The FMP includes four types of record-keeping requirements: open access incidental catch vessel trip reports, controlled access directed fishery vessel trip reports, controlled access directed fishery vessel interactive voice response call-in reports, and dealer weighout purchase reports. The FMP also includes gear marking requirements for the controlled access directed fishery vessels.

The PRA package prepared in support of this FMP and the information collection identified above, including the required 83-I forms and supporting statements, is provided as Appendix D. This PRA package is under review and will be submitted to OMB for approval.

## **12.9 Regulatory Flexibility Act**

The purpose of the Regulatory Flexibility Act (RFA) is to reduce the impacts of burdensome regulations and record-keeping requirements on small businesses. To achieve this goal, the RFA requires government agencies to describe and analyze the effects of proposed regulations and possible alternatives on small business entities. On the basis of this information, the Regulatory Flexibility Act Analysis (RFAA) determines whether the proposed action would have a “significant economic impact on a substantial number of small entities.”

Section 11.9 of this FMP provides the Initial Regulatory Flexibility Act Analysis (IRFAA) which includes an assessment of the expected effects of the proposed action and other alternatives in accordance with the guidelines established by RFA.

# Deep-Sea Red Crab Fishery Management Plan

**Proposed Actions:** Measures to implement the fishery management plan for deep-sea red crab, which include preventing overfishing, identifying essential fish habitat, implementing controlled access in the Northeast deep-sea red crab fishery, and other measures to comply with Federal law.

**Type of Statement:** Final Environmental Impact Statement

**Lead Agency:** New England Fishery Management Council

**Cooperating Agencies:** National Marine Fisheries Service

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**Abstract:** The New England Fishery Management Council proposes management measures to implement a new fishery management plan (FMP) for the Northeast U.S. deep-sea red crab fishery. The proposed measures address the requirements of the Magnuson-Stevens Fishery Conservation and Management Act, including preventing overfishing and controlling bycatch mortality and identifying essential fish habitat.

The Council has selected Alternative 5 as the preferred alternative for the Red Crab FMP. This alternative includes measures to limit the landing of red crab as incidental catch in other fisheries, control access to the directed red crab fishery, restrict landings to male crabs only, prohibit the complete processing of crabs at sea and/or claw-snapping, establish a maximum of 600 traps per vessel, restrict the directed red crab fishery to be trap/pot only, control effort using a days-at-sea program based on a target TAC, and set maximum trip/possession limits for the directed fishery. The FMP will also implement a permit program for vessels, operators, and dealers, and require reporting and record-keeping of the same.

## 12.10 Environmental Impact Statement

The National Environmental Policy Act (NEPA) requires preparation of an Environmental Impact Statement (EIS) for major Federal actions that significantly affect the quality of the human environment. The Council published a Notice of Intent (NOI) to prepare this EIS in the *Federal Register* on February 2, 2000 (65 FR 4941) followed by two public scoping meetings. The Council prepared a scoping document that outlined some of the major issues and types of management measures that the Council might consider in the Red Crab FMP. The Council invited discussion on this document and any other issues of concern at the scoping meetings. The Council invited public comment on the types of measures that would be appropriate for consideration in this fishery. During preparation of the FMP/EIS, the Council held 6 meetings of its Red Crab Oversight Committee and four meetings of its Red Crab Advisory Panel. A Notice of Availability (NOA) on the Draft EIS was published in the *Federal Register* on November 30, 2001 (66 FR 59786). The comment period on the Draft EIS was open from November 30, 2001 until January 7, 2002. In December 2001, the Council held two public hearings on the Draft EIS, one in Gloucester, MA and one in New Bedford, MA. All of these meetings were open to the public. The Council considered public comments received during this time when developing the final program of management measures to propose to NMFS in the FMP.

The table of contents for the EIS is provided to aid reviewers in referencing the appropriate corresponding sections of the FMP.

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### **12.10.1 Executive Summary**

For an executive summary for this EIS, please see the executive summary for the overall FMP, beginning on page xiii.

### **12.10.2 Background and Purpose**

#### 12.10.2.1 Background

For a description of the background for this EIS, please see Section 2.1 of the FMP.

#### 12.10.2.2 Statement of the Problem

For a statement of the problems associated with the red crab fishery, please see Section 2.2 of the FMP.

#### 12.10.2.3 Purpose and Need for the Action

For a description of the purpose and need for the action associated with this EIS, please see Section 2.3 of the FMP.

#### 12.10.2.4 Management Goals and Objectives

For a description of the management goals and objectives associated with this EIS, please see Section 3.1 of the FMP.

#### 12.10.2.5 Scoping Process

In February 2000, the Council's Notice of Intent to Prepare an Environmental Impact Statement (EIS) was published in the *Federal Register*, officially beginning the Council's FMP scoping process (65 FR 4941). The Council hosted two scoping meetings, held in Portsmouth, NH and New Bedford, MA, that were well attended by the red crab industry and other interested parties. The Council prepared a scoping document that outlined some of the major issues and types of management measures that the Council might consider in the Red Crab FMP. The Council invited discussion on this document and any other issues of concern at the scoping meetings. The Council invited public comment on the types of measures that would be appropriate for consideration in this fishery. At the scoping meetings, there was general support for the development of a Red Crab FMP, including the consideration of management measures such as a limited entry program, setting a minimum allowable size, restricting the fishery to male crabs only, prohibiting the processing of red crabs at sea, and some type of reasonable trap limits. There was less support for measures such as closed areas, closed seasons, and quotas (either trip limits or IFQs).

During preparation of the draft FMP/DEIS, the Council held five meetings of its Red Crab Oversight Committee and three meetings of its Red Crab Advisory Panel. Once the DEIS was available for review (66 FR 59786), the Council held two public hearings on the DEIS and accepted written comments from November 30, 2001 - January

7, 2002. The Council held additional meetings of its Red Crab Advisory Panel and Red Crab Oversight Committee. All of these meetings were open to the public.

### **12.10.3 Summary of the EIS**

#### **12.10.3.1 Issues to be Resolved**

For a description of the issues to be resolved associated with this EIS, please see Section 2.4 of the FMP.

#### **12.10.3.2 Major Conclusions**

The EIS concludes that the proposed management program and measures for the red crab fishery will have positive impacts on the physical, biological, and human environment.

#### **12.10.3.3 Areas of Controversy**

NOAA Administrative Order 216-6 defines “controversial” as referring to a substantial dispute which may concern the nature, size, or environmental effects, but not the propriety, of a proposed action. The need for management is widely recognized throughout the red crab fishery (it was, in fact, a request by a majority of the fishery participants that initiated the Council’s involvement with the red crab fishery and it was at their request that the Council undertook to develop this FMP). There is near universal agreement with the proposed requirements for permits, reporting, an incidental catch limit, a prohibition on landing female crabs, gear limits and restrictions, restrictions on processing at sea, and the use of a target TAC with DAS allocations. There are, however, several proposed measures that create some controversy.

The proposed controlled access program for the directed red crab fishery, a cornerstone of this FMP, generated controversy based on the Council’s proposed criteria. The proposed criteria, which are expected to allow the majority of current participants to continue to participate in the directed fishery but will exclude several others, polarized the participants. The proposed criteria are considered necessary to control and reduce the capacity of the fishing fleet -- vessels entering the fishery in late 2000 and early 2001 increased the number of vessels targeting red crab by 40% and increased the fleet capacity by 180%. A strict controlled access program that maintains the capacity of the fishing fleet to levels comparable to the time prior to the March 1, 2000 control date was a necessary component of the FMP in order to comply with the goals and objectives established for the FMP.

Related to the overall controlled access program, the March 1, 2000 control date also generated controversy, as this is the date the Council is proposing be used to distinguish participants who may qualify for the controlled access program from those who will not. The Council recognizes that the use of the control date may disadvantage some vessels who wish to continue participating in the directed fishery (there were two vessels that began landing red crabs in the northeast in January 2001, ten months after the publication of the control date). However, the published intent of the control date was to

serve this express purpose. The Council considered alternatives to the control date as a controlled access qualification criterion, but none of these met all the goals and objectives of the FMP.

The proposed differential trip limit also resulted in controversy. There were several options for a differential trip limit (as well as a standard trip limit) considered by the Council. None of the options were deemed to be fair and equitable for all potential participants of the directed fishery. All options were considered by members of the industry to be more favorable to some participants than others. The Council considered having no trip limit as a potential solution, but this option was also considered unfair by some members of the industry and the Council became concerned that without a trip limit, the FMP would not be as effective. After several debates on the issue, the Council developed a form of differential trip limit it believed to be the most fair possible to the largest number of potential participants in the directed red crab fishery.

#### **12.10.4 Description of the Management Alternatives**

##### 12.10.4.1 Description of the Management Measures

For a description of the management measures considered with this EIS, please see Section 4.2 of the FMP.

##### 12.10.4.2 Description of the Management Alternatives

For a description of the management alternatives considered with this EIS, including the no action alternative, please see Section 4.3 of the FMP.

##### 12.10.4.3 Measures Considered but Rejected

For a description of the measures considered but rejected for further analysis and review in this EIS, please see Section 4.4 of the FMP.

##### 12.10.4.4 Identification of the Preferred Alternative

The Council's preferred alternative is the alternative that the Council believes will fulfill its statutory mission and responsibilities under the Magnuson-Stevens Act, giving full consideration, to the extent possible, to economic, social, environmental, and technical factors. For a description of the preferred alternative, please see Section 4.3.1 of the FMP.

##### 12.10.4.5 Identification of the Environmentally-Preferable Alternative

The "environmentally-preferable" alternative is the alternative that is believed to best promote the national environmental policy expressed in NEPA. Generally, this means the alternative that causes the least damage to the biological and physical environment; it also may mean the alternative which best protects, preserves, and enhances historic, cultural, and natural resources.

In the case of the proposed Red Crab FMP, the alternative that causes the least damage to the biological and physical environment, in fact, the alternative that best protects the biological and physical environment, would be one of the management alternatives that implements a hard TAC as an upper cap on potential landings in the directed red crab fishery (Alternatives 2 or 3). What is consistent in these two alternatives is that there is a firm control on potential landings in the directed red crab fishery, through an annual hard TAC, which would result in the fishery being shut down once the annual TAC is reached. The management alternatives that implement an individual vessel quota (IVQ) program (Alternatives 9 or 10) offer similar controls on the total annual landings, but these alternatives did not propose controls on individual vessel effort or gear use, such that the total fishing effort and the total number of traps in use could be greater under these alternatives than under other alternatives considered.

Although Alternative 2 or 3 may be the environmentally-preferable, neither of these is the Council's preferred alternative (Alternative 5). This is because the use of a hard TAC would have significant and detrimental economic and social impacts on the red crab fishery and their communities compared with the alternatives that propose a target TAC with a control on overall fishing effort (through the days-at-sea program). Alternative 5, the Council's preferred alternative, minimizes not only the potential adverse impacts to the red crab resource and its environment, but also the potential adverse impacts to the human environment dependent upon the red crab resource and its fishery. For a description of Alternatives 2 and 3, please see Sections 4.3.3 and 4.3.4 of the FMP. For a description of Alternative 5, the preferred alternative, please see Section 4.3.1 of the FMP.

## **12.10.5 Description of the Affected Environment**

### **12.10.5.1 Introduction**

A full description of the affected environment, including a description of the resource species, the habitat, fishing activities, economic characteristics, and social characteristics of those likely to be affected by the actions under consideration and proposed in this EIS can be found in Section 8.0 of the FMP. Additional background material can be found in Appendix A and Appendix B. Appendix A is a complete description of the life history and habitat characteristics of the deep-sea red crab. Appendix B is a description of baseline social and economic information relevant to the Northeast red crab fishery.

The description of the affected environment is intended to present sufficient background information on the various resources and entities likely to be affected by the actions proposed and/or under consideration in this EIS. This section presents relevant information on the resource components of the existing environment. This section summarizes the available information on the physical, biological and ecological, and human components of the environment involved in the red crab fishery. The components of the environment described herein include those that would be affected by the alternatives and that would affect the alternatives if they were implemented. Although this section deals with the *affected* environment, it does not present the effects of the

proposed management program. Instead, this section provides the baseline against which the alternatives will be compared in the following sections.

The deep-sea red crab fishery is located only in the deep waters of the continental slope, beyond the 400 meter isobath. Because of the remote nature of this fishery, many components of the coastal and marine environment normally considered in fishery management plans are not described in this section, nor are they addressed in the sections dealing with the potential effects of the proposed management alternatives. Components of the coastal and marine environment such as estuaries, wetlands (including salt marshes), the intertidal zone, nearshore subtidal areas, riverine systems, and the majority of the continental shelf, while they are very important components of the overall ecosystem, are not integral components of the environment of the red crab fishery and are not directly affected by any of the management measures and alternatives under consideration.

The Gulf of Maine is excluded from this discussion in its entirety because although deep-sea red crabs occur in the Gulf of Maine, they are primarily small (< 3.1" CW) and the directed fishery does not occur in this area. There are many resource and non-resource species that occur in the marine environment along with the deep-sea red crab, such as monkfish, tilefish, and offshore hake, among others. These species are not considered in this EIS, however, because there is little interaction between the directed red crab fishery and these species.

#### 12.10.5.2 Physical Environment

For a description of the physical environment affected by this EIS, please see Section 8.2 of the FMP.

#### 12.10.5.3 Biological Environment

##### *Abundance and Present Stock Condition*

For a description of the fishery resource affected by this EIS, please see Section 8.1.3 of the FMP.

##### *Ecological Relationships*

For a description of the ecological relationships affected by this EIS, please see Section 8.1.4 of the FMP.

#### 12.10.5.4 Human Activities

For a description of the human activities affected by this EIS, including a description of the fishery and the relevant social/cultural and economic factors, please see Section 8.3 of the FMP.

## **12.10.6 Environmental Impacts of the Alternatives**

### **12.10.6.1 Preferred Alternative**

#### *Biological Impacts on Red Crab*

For a description of the biological and ecological impacts on the red crab resource expected as a result of the preferred alternative, please see Section 5.4.6.1 of the FMP.

#### *Ecological Impacts on Other Species*

For a description of the ecological impacts on other species and their communities expected as a result of the preferred alternative, please see Section 5.4.6.2 of the FMP.

#### *Impacts to Essential Fish Habitat*

For a description of the impacts to the essential fish habitat of Federally-managed species expected as a result of the preferred alternative, please see Section 5.4.6.3 of the FMP.

#### *Economic Impacts on the Fishery*

For a description of the economic impacts on the fishery expected as a result of the preferred alternative, please see Section 5.4.6.4 of the FMP.

#### *Social/Cultural Impacts*

For a description of the social and cultural impacts on the fishery and associated communities expected as a result of the preferred alternative, please see Section 5.4.6.5 of the FMP.

#### *Impacts on Protected Species*

For a description of the impacts on protected species expected as a result of the preferred alternative, please see Section 5.4.6.6 of the FMP.

### **12.10.6.2 Other Alternatives**

#### *Biological Impacts on Red Crab*

For a description of the biological and ecological impacts on the red crab resource expected as a result of the non-preferred alternatives, please see Section 5.4 of the FMP.

#### *Ecological Impacts on Other Species*

For a description of the ecological impacts on other species and their communities expected as a result of the non-preferred alternatives, please see Section 5.4 of the FMP.

### *Impacts to Essential Fish Habitat*

For a description of the impacts to the essential fish habitat of Federally-managed species expected as a result of the non-preferred alternatives, please see Section 5.4 of the FMP.

### *Economic Impacts on the Fishery*

For a description of the economic impacts on the fishery expected as a result of the non-preferred alternatives, please see Section 5.4 of the FMP.

### *Social/Cultural Impacts*

For a description of the social and cultural impacts on the fishery and associated communities expected as a result of the non-preferred alternatives, please see Section 5.4 of the FMP.

### *Impacts on Protected Species*

For a description of the impacts on protected species expected as a result of the non-preferred alternatives, please see Section 5.4 of the FMP.

## **12.10.7 Cumulative Impacts of the Proposed Action**

### **12.10.7.1 Background**

The National Environmental Policy Act (NEPA) requires that cumulative effects of “past, present, and reasonably foreseeable future actions” (40 CFR § 1508.7) be evaluated along with the direct effects and indirect effects of each proposed alternative. In environmental analyses, direct and indirect effects of an action are routinely addressed. For the actions proposed in this fishery management plan, the likely direct and indirect effects on the red crab resource, its environment, and the red crab fishery have been addressed in previous sections. Analyzing the likely cumulative effects of this action is more difficult because of the difficulty in defining the spatial and temporal boundaries of this proposed action as well as foreseeable future actions.

According to the Council on Environmental Quality (CEQ) (1997), if the spatial and temporal boundaries of an action are defined too broadly, the analysis of cumulative effects becomes unwieldy, but if they are defined too narrowly, significant issues may be missed. According to CEQ (1997), “determining the cumulative environmental consequences of an action requires delineating the cause-and-effect relationships between the multiple actions and the resources, ecosystems, and human communities of concern.” In order to make this determination, analysts must first attempt to identify the specific possible actions that would substantially affect the resources of concern from among the entire complex network of possible actions (CEQ 1997). Then, they must describe the response of the resource to this environmental change using a variety of tools and methods (CEQ 1997).

The CEQ (1997) specifies that “the significance of cumulative effects depend on how they compare with the environmental baseline and relevant resource thresholds.” The CEQ directs federal agencies to determine the significance of cumulative effects by comparing likely changes to the environmental baseline. On a more practical note, the CEQ (1997) states that the range of alternatives considered must include the “no-action alternative *as a baseline* against which to evaluate cumulative effects (emphasis added).” Thus, our cumulative effects analysis compares the likely effects of this action as compared to the no-action alternative.

#### 12.10.7.2 Principles of Cumulative Effects Analysis

The CEQ (1997) identify eight principles of cumulative effects analysis. These eight principles are:

1. Cumulative effects are caused by the aggregate of past, present, and reasonably foreseeable future actions.
2. Cumulative effects are the total effect, including both direct and indirect effects, on a given resource, ecosystem, and human community of all actions taken, no matter who (Federal, non-Federal, or private) has taken the actions.
3. Cumulative effects need to be analyzed in terms of the specific resource, ecosystem, and human community being affected.
4. It is not practical to analyze the cumulative effects of an action on the universe; the list of environmental effects must focus on those that are truly meaningful.
5. Cumulative effects on a given resource, ecosystem, and human community are rarely aligned with political or administrative boundaries.
6. Cumulative effects may result from the accumulation of similar effects or the synergistic interaction of different effects.
7. Cumulative effects may last for many years beyond the life of the action that caused the effects.
8. Each affected resource, ecosystem, and human community must be analyzed in terms of its capacity to accumulate additional effects, based on its own time and space parameters.

#### 12.10.7.3 Description of the Cumulative Effects

The likely effects of the preferred alternative will be described in terms of each of the above eight principles of cumulative effects analysis. In response to each principle, we will consider the likely cumulative effects of the preferred alternative compared to the likely cumulative effects of the no action alternative.

*Cumulative effects are caused by the aggregate of past, present, and reasonably foreseeable future actions.*

Except for the short-term regulations associated with the emergency rule, this FMP represents the first management program developed for the red crab fishery. There can be no effects of past actions to consider in a cumulative effects analysis for this fishery. The only present actions are those proposed in this FMP. Given the nature of this fishery and the likelihood of overfishing if adequate management action is not taken, it is reasonable to assume that even if management action is not taken at this time, qualitatively similar management action would be taken in the future.

The effects of the preferred alternative, or a qualitatively similar management program established in the future, are to reduce the probability of overfishing the red crab resource and prevent the stock from becoming overfished, to stabilize the red crab fishing industry and prevent or reduce overcapitalization, and to prevent or minimize the likelihood of adverse impacts to the ecosystem associated with the red crab fishery. The effects of the no action alternative would be to continue the current expansion of the red crab fishery with no controls on fishing effort or landings, and no controls on the operations of the fishery. Relative to the no action alternative, the most likely effects of the proposed action are expected to be positive for the red crab resource, its environment, and the directed red crab fishery.

*Cumulative effects are the total effect, including both direct and indirect effects, on a given resource, ecosystem, and human community of all actions taken, no matter who (Federal, non-Federal, or private) has taken the actions.*

This fishery occurs only in Federal waters within the exclusive economic zone (EEZ). The only management actions taken in this fishery would be taken under Federal jurisdiction. The direct and indirect effects of the preferred alternative are expected to protect the resource from overexploitation and maintain a sustainable fishery. The direct and indirect effects expected as a result of the no action alternative include overfishing of the red crab resource and a destabilized and overcapitalized fishery. There may also be effects on the ecosystem resulting from the lack of control on fishing methods used to harvest red crab. Relative to the no action alternative, the most likely effects of the proposed action are expected to be positive for the red crab resource, its environment, and the directed red crab fishery.

*Cumulative effects need to be analyzed in terms of the specific resource, ecosystem, and human community being affected.*

The effects of the present and reasonably foreseeable future actions will be to reduce the likelihood of the red crab resource being subject to overfishing and becoming overfished. The ecosystem in which red crabs live will be protected from undue adverse impacts that may be associated with changes in the operations, extent, and intensity of the red crab fishery. The human community, comprised of the participants in the red crab fishery, would be subject to both direct and indirect effects as a result the preferred alternative, but these effects would be much less severe than if the no action alternative is

selected. Relative to the no action alternative, the most likely effects of the proposed action are expected to be positive for the red crab resource, its environment, and the directed red crab fishery.

*It is not practical to analyze the cumulative effects of an action on the universe; the list of environmental effects must focus on those that are truly meaningful.*

The effects most meaningful and relevant include:

- the effects on the red crab resource, such as overfishing;
- the potential effects on the ecosystem, especially impacts on the habitat and associated biological communities, that may result from changes fishing gear used in the red crab fishery such as from otter trawls and dredges; and
- the effects on the participants of the directed red crab fishery.

Relative to the no action alternative, the most likely effects of the proposed action are expected to be positive for the red crab resource, its environment, and the directed red crab fishery.

*Cumulative effects on a given resource, ecosystem, and human community are rarely aligned with political or administrative boundaries.*

All of the expected effects associated with the preferred alternative will be constrained to the U.S. EEZ. The red crab fishery does not occur within state waters.

*Cumulative effects may result from the accumulation of similar effects or the synergistic interaction of different effects.*

In addition to the direct and indirect effects on the resource, its ecosystem, and the participants in the fishery, there can also be cumulative effects as a result of similar or synergistic management actions. This is most often apparent in multi-species fisheries where single-species regulations combine to result in more significant effects on the participants of the fishery than would occur from the regulations for one species alone. The red crab fishery, however, is a single-species fishery with very little interactions or dependence upon any other Federally-regulated fishery. The majority of the participants in the directed red crab fishery are involved only in the red crab fishery and will only be affected by the regulations established by this FMP.

*Cumulative effects may last for many years beyond the life of the action that caused the effects.*

This FMP is intended to establish a management program for the directed red crab fishery that will last, in various forms depending upon the needs of the resource and the fishery, for many years. The expected effects of the no action alternative would also be expected to last many years, assuming that overfishing results from the lack of management and the resource becomes overfished, needing at least several years to

recover and rebuild. Relative to the no action alternative, the most likely long-term effects of the proposed action are expected to be positive for the red crab resource, its environment, and the directed red crab fishery.

*Each affected resource, ecosystem, and human community must be analyzed in terms of its capacity to accumulate additional effects, based on its own time and space parameters.*

Section 5.0 of the FMP identifies and describes the potential effects of the proposed management actions on the red crab resource, its environment including habitat, associated species, and communities, and the fishery, including fishing communities. This section relates the potential long-term effects of the proposed management program and compares and contrasts these effects with those that would be expected to occur in the absence of management. Relative to the no action alternative, the most likely long-term effects of the proposed action are expected to be positive for the red crab resource, its environment, and the directed red crab fishery.

#### **12.10.8 Determination of Significance**

Section 6.02 of the NOAA Administrative Order 216-6, Environmental Review Procedures for Implementing the National Environmental Policy Act, provides specific guidance on determining the significance of fishery management actions. The nine criteria to be addressed are as follows:

- a. *May the proposed action be reasonably expected to jeopardize the sustainability of any target species that may be affected by the action?*

The objective of the proposed action is to ensure the long-term sustainability of the Atlantic deep-sea red crab fishery. Section 2.3 describes the need for this proposed action and the likelihood that overfishing may occur without the proposed action. Thus, the proposed action would not be expected to jeopardize the sustainability of the target species directly affected by the action. The sustainability of the target species would be jeopardized if the proposed action is not implemented.

The red crab fishery occurs primarily in the deep waters of the continental slope (200 - 400 fathoms). Currently, very little fishing activity other than for red crabs occurs at these depths along the continental slope. Most other target species managed under federal fishery management plans occur primarily in more shallow waters on the continental shelf. This proposed action, therefore, is not be expected to jeopardize the sustainability of any other managed target species, as no other target species would be affected by this action.

Although the proposed action is not expected to jeopardize the sustainability of any target species that may be affected by the action, the no action alternative would be expected to result in overfishing of the red crab resource and would also be expected to jeopardize the sustainability of this target species. Thus, the proposed action is expected to have potentially significant positive effects on the red crab resource relative to the no action alternative.

- b. *May the proposed action be reasonably expected to jeopardize the sustainability of any non-target species?*

The commercial red crab fishery is currently prosecuted entirely with traps and these traps are reported to retain very little in the way of by-catch species. The proposed action is intended to reduce the amount of fishing and the fishing capacity that occurs in the red crab fishery to ensure the sustainability of the red crab resource and its fishery. Because there are few, if any, species caught as bycatch in the red crab fishery, and the overall effort in the red crab fishery is expected to decrease as a result of the proposed action, the proposed action is not be expected to jeopardize the sustainability of any non-target species.

- c. *May the proposed action be reasonably expected to cause substantial damage to the ocean and coastal habitats and/or essential fish habitat as defined under the Magnuson-Stevens Act and identified in FMPs?*

Section 8.2.3 provides the required assessment of the likely impacts of this proposed action on essential fish habitat. Of the many types of fishing gear used in the New England region (otter trawls, scallop dredges, gillnets, longlines, etc.), lobster and crab pots and traps are believed to have relatively little impact on ocean habitats, including essential fish habitat. While all fishing gears have some degree of impact on the environment, static gears such as traps and pots generally are not associated with adverse impacts to fish habitat (Barnette 2001; Eno et al. 1996; NEFMC 1998). Because there are no potential adverse impacts associated with this action, an EFH consultation and a proposed mitigation plan are not required. For this reason, the proposed action is not expected to cause substantial damage to the ocean and coastal habitats and/or essential fish habitat as defined under the Magnuson-Stevens Act and identified in FMPs.

- d. *May the proposed action be reasonably expected to have a substantial adverse impact on public health or safety?*

The preferred alternative proposed in this document is not likely to have an adverse impact on either public health or safety. In developing management measures for any fishery, the Council and NMFS usually receive extensive comments from affected members of the public regarding the safety implications of various alternatives under consideration. No safety or public health concerns related to the measures proposed in this FMP were identified during the development of this proposed action.

- e. *May the proposed action be reasonably expected to adversely affect endangered or threatened species, marine mammals, or critical habitats of these species?*

The management measures proposed in this action may affect, but are not likely to jeopardize, the continued existence of any endangered or threatened species, or prevent any marine mammal species from achieving optimum population levels. This action proposes to implement controls on a fishery that would otherwise remain uncontrolled and these controls are intended to reduce, rather than increase, the amount of fishing effort occurring in the red crab fishery. Thus, if there are any impacts to endangered or

threatened species or marine mammals associated with the red crab fishery, these impacts would be reduced as a result of the proposed action.

- f. May the proposed action be reasonably expected to result in cumulative adverse effects that could have a substantial effect on the target species or non-target species?*

Aside from the short-term regulations implemented under the 2001-2002 emergency regulations, the management measures proposed in this action represent the first attempt at developing a management program for the red crab fishery. Because the proposed action represents the first long-term management action for this fishery, this action will not result in cumulative adverse effects that could have a substantial effect on the target species or non-target species. If the preferred alternative is not implemented, continued unregulated fishing activity could have adverse cumulative effects on the red crab resource, its environment, and the fishery dependent upon the resource.

Although the proposed action is not expected to result in cumulative adverse effects that could have a substantial effect on the target species or non-target species, the no action alternative would be expected to result in overfishing of the red crab resource and could have a substantial effect on the target species. Thus, the proposed action is expected to have potentially significant positive effects on the red crab resource relative to the no action alternative.

- g. May the proposed action be reasonably expected to have a substantial impact on biodiversity and ecosystem function within the affected area?*

The proposed action is not expected to have a substantial impact on biodiversity and ecosystem function within the affected area because the proposed action is intended to reduce the amount of fishing activity and limit the amount of red crabs harvested.

- h. Are significant social or economic impacts interrelated with significant natural or physical environmental effects?*

No significant social, economic, natural or physical environmental effects are predicted to result from the proposed action, thus there are no significant interactions between these types of effects predicted.

- i. What is the degree to which the effects on the quality of the human environment are likely to be highly controversial?*

The effects of the proposed action on the quality of the human environment may be highly controversial. Controversy may surround the selection of a preferred alternative if this preferred alternative limits the ability of some fishing vessels to harvest as much of the red crab resource as they would without the management program or limits the number of vessels that would otherwise wish to participate in the directed red crab fishery (through the proposed controlled access program). The only way to avoid this potential controversy would be to continue to allow the uncontrolled and unlimited harvest of the red crab resource, which would have significant effects on the resource and would also be

controversial. The intent of the proposed action is to prevent overfishing the red crab resource and maintain a sustainable directed fishery for red crab in the Northeast U.S.

## **12.10.9 Other Required Considerations**

### **12.10.9.1 Unavoidable Adverse Effects**

Sections 5.3 and 5.4 identify the likely effects of the management measures and alternatives under consideration in this FMP, including the preferred alternative. This discussion includes descriptions of the potential biological, ecological, economic, and social impacts to the red crab resource, its environment, and the directed red crab fishery. There are no unavoidable adverse effects identified in this FMP. All potential adverse effects are avoidable in one way or another, although some of the methods that could be used to avoid one set of potential adverse effects would increase the likelihood of causing other adverse effects. For example, implementation of the proposed controlled access program for this fishery has the potential to cause adverse impacts to those elements of the directed red crab fishery that are no longer allowed to participate in the directed fishery. An alternative to reduce this potential adverse effect would be to increase the number of vessels allowed to qualify for the directed fishery, but this would increase the risk of overfishing the resource and jeopardizing the sustainability of the resource, as well as incur adverse economic effects on the other participants of the directed fishery who would be subject to more restrictive catch limits and reduced opportunities to fish. The Council has selected a preferred alternative management strategy intended to mitigate to the extent possible all possible social and economic adverse effects while minimizing the risks to the resource and its environment. Overall, the proposed action is expected to have potentially significant positive effects on the red crab resource relative to the no action alternative.

### **12.10.9.2 Relationship Between Short-Term Uses and Long-Term Productivity**

The development and implementation of this FMP for red crab is intended to ensure the long-term productivity and sustainability of the red crab resource and, by extension, the directed red crab fishery. In order to ensure the long-term productivity of the resource and its fishery, the necessary management measures may cause some short-term adverse economic and social impacts to some current participants in the fishery. Without these management measures, the short-term use of the red crab resource via unregulated harvesting by an overcapitalized fishing fleet would have adverse impacts on the long-term productivity of the resource and the sustainability of the directed red crab fishery. Overall, the proposed action is expected to have potentially significant positive effects on the red crab resource relative to the no action alternative.

### **12.10.9.3 Irreversible and Irrecoverable Commitments of Resources**

There are no known irreversible or irretrievable commitments of resources associated with this FMP and the proposed action. Under the no action alternative, while there are unlikely to be any irreversible commitments of resources, there may be irretrievable losses if the red crab resource is overexploited to a level that takes a long

time for the population to recover. The risks of irretrievable losses are higher in this fishery than in many others in the northeast due to the relatively slow growth and late maturation of this species.

#### **12.10.10 List of Preparers**

The list of individuals involved in the preparation of this FMP and EIS are provided in Section 13.0 of the FMP.

#### **12.10.11 List of Persons Receiving Copies of DEIS**

Ms. Kathleen Leydon, Maine Coastal Program  
Mr. David Hartman, New Hampshire Coastal Program  
Mr. Tom Skinner, Massachusetts Coastal Zone Management  
Mr. Grover Fugate, Rhode Island Coastal Resources Council  
Mr. Todd Oullette, Connecticut Office of Long Island Sound Programs  
Mr. George Stafford, New York Division of Coastal Resources  
Mr. Lawrence Torok, New Jersey Division of Coastal Resources  
Mr. Nicholas Di Pasquale, Delaware DNREC  
Ms. Gwynne Schultz, Maryland Coastal Zone Management Division  
Ms. Laura McKay, Virginia Coastal Resources Management Program  
Ms. Donna Moffitt, North Carolina Division of Coastal Management  
Mr. E. James Tabor, Pennsylvania Department of Environmental Protection  
Mr. Chris Brooks, South Carolina Ocean and Coastal Resources Management  
Mr. Daniel Furlong, Mid-Atlantic Fishery Management Council  
Mr. Robert Mahood, South Atlantic Fishery Management Council  
Mr. Jack Dunnigan, Atlantic States Marine Fisheries Commission  
Mr. Jeff Pike, Sher and Blackwell, LLP  
Mr. Earl Comstock, Sher and Blackwell, LLP  
Ms. Bonnie Spinazzola, Atlantic Offshore Lobstermen's Association  
Mr. Richard Allen, New England Red Crab Harvesters' Association  
Mr. John Boggs, F/V Canyon Enterprise  
Mr. Peter Cooke, F/V Frank H. Wetmore  
Mr. Neal Goff, F/V Frank H. Wetmore  
Mr. Gilbert Guimond, F/V Diamond Girl  
Mr. Einar Gustafsson, Atlantic Coast Fisheries  
Mr. Donald Kenney, Downeast Specialty Products  
Mr. Peter Lawsig, F/V Frank H. Wetmore  
Mr. James McCanna, East Bay Crab and Lobster Co.  
Mr. Peter Mendonca  
Mr. Kenneth Ostebo, Fisheries Management and Consulting, Inc.  
Mr. Clark Sandler, F/V Hannah Boden  
Mr. Thorne Tasker, F/V Canyon Explorer  
Mr. Frank Wetmore, Portland Shellfish  
Mr. Jon Williams, F/V Crystal James

## 12.10.12 Public Comments on the Draft EIS

The following section contains a summary of written and verbal comments received during the Red Crab DEIS public hearings and review period from November 30, 2001 - January 7, 2002. The comments received are summarized because the same point was often made by more than one individual. Further, a number of comments addressed points not directly relevant to FMP proposals, objectives, or analyses. These comments are not included in the summary. Appendix E includes all written comments submitted to the Council, as well as summaries of the public hearings. This section also includes brief responses from the Council related to the comments.

### 12.10.12.1 General Comments on the Draft EIS and FMP:

**Comment:** A large number of letters, form letters, and verbal comments from fishing organizations, individual fishermen, and fishing vessel support services, supported, in total, the Council's preferred alternatives for the Red Crab FMP.

**Response:** The Council has elected to retain as final management measures the measures proposed as the preferred alternatives, with minor adjustments based on information received during the public review process. The only adjustments to the management measures made after the public review process involved specifying certain elements of FMP in more detail than what was proposed in the draft FMP. For example, the draft FMP identified starting the fishing year based on information about the fishery, but did not specify any particular start date. Following the public review process, the Council specified that March 1 would be the start date of the fishing year. Similarly, although the Council originally identified differential trip limits as a preferred alternative, it did not specify how the trip limits would be differentiated or what the trip limits would be. In the final FMP, based on input received during the public review process, the Council has specified the particular trip limits and how they would be differentiated.

**Comment:** One commenter asked for the FMP to include an explicit preference for U.S.-based processors to receive product from fishing vessels.

**Response:** The FMP requires that all dealers who receive red crab be Federally-permitted, and requires that all Federally-permitted vessels sell red crab only to such Federally-permitted dealers. The FMP makes no distinction between dealers beyond the requirement to obtain a Federal permit. The FMP directly manages only the harvesting sector, establishing a controlled access program, trip limits, DAS limits, etc., and places no restrictions or constraints on the sale of their product other than to a Federally-permitted dealer. It is assumed that all vessels will choose a dealer based on who offers the best price, and that the market competition will result in an efficient allocation of product.

**Comment:** One commenter suggested that the FMP should include the means to prevent the unauthorized sale of red crab to foreign processors.

**Response:** The FMP will require that all vessels harvesting, possessing, landing, and/or selling red crab obtain either an open access incidental catch permit or a controlled

access directed fishery permit. One of the requirements of the permit is that red crab may only be sold to Federally-permitted dealers. All dealers who receive red crab must obtain a Federal dealer's permit and they may only purchase red crab from a Federally-permitted vessel. Violation of any permit requirements will be grounds for revocation of the permit.

**Comment:** One commenter believes that the proposed management is based on suspect science.

**Response:** Compared to many of the other species managed by the Council, there is little information available on the deep-sea red crab; however, the Council has no reason to doubt the veracity of the information on which it is basing its management decisions. The commenter provided no rationale or justification for the claim.

**Comment:** One commenter indicated that the FMP should not reward five or six vessels with a monopoly on the fishery.

**Response:** The decision to develop a controlled access fishery that limits the number and/or capacity of the participants to a relatively low level was based not on the desire for a few participants to be rewarded with monopolistic control over the resource, but instead on the limitations of the resource and the ability of the resource to sustain a full-time fishery. All indications are that for the deep-sea red crab resource to sustain a full-time fishery, the number of participants must be small. Although the proposed controlled access system for the directed red crab fishery may limit the participants to five or six vessels, these vessels will not enjoy a pure monopoly simply due to the fact that there will be multiple independent firms involved in the fishery and none of these firms will be granted an overwhelming share of the market. Each participant will have equal access to the resource, limited by their own operating efficiencies, and no one firm currently dominates the market. This may be perceived as a shared monopoly or cartel, but this would require that all participants coordinate price and/or harvest levels. Currently, there is sufficient competition between the participants, there are multiple dealers, and there are differences in the products sold by the participants (live crabs, butchered sections, partially processed sections) to prevent the industry from acting as a monopoly.

#### 12.10.12.2 Comments on Specific Elements of the Fishery Management Program:

**Comment:** There were two comments suggesting that the management unit should be defined only to the Virginia-North Carolina border. The comments indicated this was to avoid overlap with the Golden Crab FMP, managed by the South Atlantic Fishery Management Council, and specifically to avoid potential gear conflicts between the golden crab and red crab fisheries.

**Response:** The proposed boundaries reflect the traditional extent of the red crab fishery in the Northeast U.S., are consistent with prior action taken by the Secretary of Commerce (the Emergency Regulations), incorporate a well-known biogeographic boundary (Cape Hatteras, NC), and are consistent with other New England Council

FMPs. The option to set the management unit boundary at the Virginia-North Carolina border would have arbitrarily split the traditional fishing area into a managed area and an area subject to no management. This would not necessarily have solved the concern over potential gear conflict issues. In fact, it might have exacerbated it due to the fact that fishing for red crab could still occur south of the Virginia-North Carolina border, but this fishing activity would not be subject to the controls of the Red Crab FMP. It is anticipated that, under the Red Crab FMP, there will be one and at most two vessels that may choose to fish south of the Virginia-North Carolina border. Since the South Atlantic Council reports two golden crab vessels moving to the northern area, it appears that the potential gear conflicts will be limited to, at most, three or four vessels. This is a small number of vessels; thus, the potential for gear conflicts is considered to be small. The Council intends to monitor potential gear conflicts and will consider taking action if warranted.

**Comment:** One commenter suggested that the fishing year should start on the date that the FMP is implemented.

**Response:** The Council considered this suggestion, but decided that it would be better to determine the date on which the fishing year will start before submitting the FMP, in order to assist with analysis. It is impossible at this time to predict exactly when the FMP will be implemented. Also, the Council was concerned about the increased administrative burden on the NMFS if there was another fishing year offset from the other existing fishing years. March 1, as selected by the Council, meets the objectives of the Council's preferred alternative to base the start of the fishing year on the actual practices of the fishery, it is consistent with an existing fishing year for the Sea Scallop FMP, and it enables the Council and NMFS to plan when the next fishing year will begin prior to submitting the FMP.

**Comment:** One commenter suggested that the red crab MSY should be 12 - 15 million pounds, rather than the specified 6.24 million pounds.

**Response:** The commenter provided no information or rationale in support of the claim that the MSY should be 12 - 15 million pounds. All the information available to the Council and NMFS suggests that the MSY should be 6.24 million pounds, as is indicated in the FMP.

**Comment:** Several commenters supported the proposed program to require vessels in the controlled access directed fishery to declare into or out of the fishery on an annual basis.

**Response:** The Council adopted this measure and the FMP will require that all vessels in the controlled access program declare into or out of the fishery for the following fishing year. This will allow the Council to base the allocation of DAS on the number of vessels actually intending to participate in the fishery.

#### 12.10.12.3 Comments on Specific Elements of the Proposed Management Measures:

**Comment:** A comment from a fishing organization asked the Council to consider

an incidental catch limit of 1,000 pounds during the months of November - April, with zero pounds during May - October.

**Response:** The Council considered this request but was concerned with the proposed zero possession limit during May - October. The fishing organization making this request represents one sector of the fishing industry that may not need an incidental catch limit during May - October, but other sectors of the industry may still wish to have the ability to land some amount of red crab. Because it was the intent of the Council with this measure to allow small amounts of red crab to be landed as incidental catch, rather than to encourage directed fishing for red crab, the Council elected to maintain a 500 pound incidental catch limit year-round.

**Comment:** One commenter suggested that the incidental catch limit ought to be on the order of 5,000 pounds per trip.

**Response:** The Council considered a higher trip limit for the incidental catch fishery, but determined that 5,000 pounds exceeded the intent of the proposed incidental catch limit measure, which was intended to allow a small amount of red crab, caught as bycatch in other fisheries, to be landed by vessels not authorized to participate in the controlled access directed fishery. The person making this comment indicated their intent to develop a small directed fishery for red crab, rather than utilizing an incidental catch allowance. Since the development of small-scale but open access directed fishing for red crabs was not the intent of this measure, the Council did not elect to adopt the much higher incidental catch limit.

**Comment:** One commenter suggested that a minimum size of 4 ½" may be advisable.

**Response:** The Council considered implementing a minimum size limit for this fishery, but determined that this measure would be too complex and burdensome to effectively administer and enforce if butchering and/or processing at sea was to be allowed. The Council received many comments that butchering and partial processing at sea should be allowed to continue under the FMP. The Council also received many comments that market controls and constraints serve to maintain the average size of landed red crabs at a reasonable size and that undersized crabs (less than one pound) are not accepted. The Council acknowledges that markets can change, so it is requesting that NMFS conduct port sampling on red crab landings to monitor the sizes of the crabs being landed. If the size structure of the landings changes and/or there is an increase in the number or percentage of undersized crabs being landed, the Council will consider implementing an appropriate minimum size regulation at that time via a framework adjustment to the FMP.

**Comment:** One commenter indicated that he/she would not support a requirement for individual trap tags.

**Response:** The Council is not proposing to require individual trap tags. Instead, the Council is requiring that each vessel attach a permit declaration that indicates the

maximum number of red crab traps they employ per string of traps. All vessels would then be limited in the number of trap strings they can fish to 600 (the maximum number of allowable red crab traps) divided by the maximum number per string specified on their permit declaration, rounded *down* to the nearest whole number. For example, a vessel that declares that they fish a maximum of 100 traps per string would be allowed to fish 6 strings, for a total of 600 traps; a vessel that declares they use a maximum of 180 traps per string would be limited to 3 strings for a total of 540 traps; and a vessel that declares they use a maximum of 125 traps per string would be limited to 4 strings, even though this indicates a maximum of 500 traps. Enforcement of the gear restrictions will utilize gear marking requirements on the buoys on the end of each trap string in conjunction with the permit declaration and occasional spot checks at sea to determine the number of traps actually being used per string.

**Comment:** One commenter reported that they do not support the need for a trip limit in the red crab fishery.

**Response:** The trip limit may not be necessary strictly in a fishing mortality control context, but the trip limit is still important as a mechanism to prevent changes in the per day efficiency of the fishing fleet. Large vessels, especially those with processing capabilities, can remain at sea for much longer than smaller vessels that land live crabs. As such, they can spend significantly more DAS actually fishing rather than traveling to and from the fishing grounds. Without a trip limit, there would be no control over how much time a vessel could spend on the fishing grounds versus traveling. This effect could undermine the DAS program and allow much more red crab to be caught per DAS than was anticipated during the DAS allocation process. The trip limit is intended to ensure that, as closely as possible, a DAS is roughly equivalent for all vessels in the fishery.

**Comment:** Comments from an industry organization indicated that they would support differential trip limits based on each vessel's highest trip on record.

**Response:** The Council considered this approach and is proposing a slight variation as a differential trip limit for the controlled access red crab fishery. This approach, as suggested by the industry organization, would have resulted in each vessel having a trip limit distinct from all other vessels. The Council felt that this would be too burdensome to implement and monitor for enforcement purposes. This approach also creates problems for how to assign a trip limit to new vessels that might be allowed to enter the fishery at some time in the future, if the Council determines that additional vessels may participate. Because the approach relies on landings history prior to the control date, for any vessel without landings history prior to the control date but granted access to the red crab fishery the Council would not be able to determine its trip limit. Instead, the Council decided to establish a baseline trip limit that would apply to all vessels, with the exception that any vessel that can establish a record of a higher trip during the controlled access qualification period would be granted a trip limit at that level (to the nearest 5,000 pounds).

**Comment:** Comments from an industry organization opposed individual trip

limits based on a vessel's highest trip on record.

**Response:** As noted above, the Council did not propose to base the trip limit solely on a vessel's highest trip on record. Instead, the Council adopted a baseline trip limit of 75,000 for all vessels, unless they can show evidence of higher trips during the controlled access qualification period.

**Comment:** An industry organization suggested that, if a trip limit is imposed, they recommend two categories of trip limits: 150,000 pounds per trip for catcher-processor vessels and 75,000 pounds per trip for catcher vessels.

**Response:** The Council considered a two-tiered approach to the red crab trip limit, but was concerned that this system would allow any vessel claiming to be a catcher-processor to get a much higher trip limit than a vessel claiming to be a catcher vessel. Instead, the Council opted to implement a differential trip limit with a baseline of 75,000 pounds for all vessels, regardless of whether they are catcher-processor vessels or catcher vessels, with the allowance that a vessel with a history of higher trips during the controlled access qualification period could qualify for a higher trip limit. This approach is intended to be more equitable to all vessels, as all vessels would be subject to the baseline trip limit, except for those vessels who traditionally had higher trips. The trip limit does not differentiate between types of vessels.

**Comment:** An industry organization commented that they believe the controlled access program ought to include all current vessels that participated in the fishery under a letter of authorization during the emergency regulations.

**Response:** National Standard 1 of the Magnuson-Stevens Act requires the Council to prevent overfishing of all managed resources. The intent of the controlled access program was to establish a fishery with a harvest capacity similar to that which existed prior to the control date. The control date was established as an express way to differentiate participation in the fishery prior to the control date from recent and potentially speculative entrants into the fishery. The regulations implemented in the emergency rule did not control access to the fishery, but allowed an open access fishery for all vessels that requested a letter of authorization (LOA) from NMFS. This allowed vessels which had never participated in the red crab fishery prior to the emergency regulations to request an LOA and fish for red crab. Allowing all vessels that participated in the fishery during the emergency period to participate in the controlled access fishery under the FMP would increase the overall harvest capacity of the fleet to much more than what existed at the time of the control date. This excess harvest capacity could limit the ability of the Council and NMFS to prevent overfishing and maintain a sustainable resource that is not overfished. The excess harvest capacity would also threaten the sustainability of the fishery itself.

**Comment:** Comments from an industry organization suggested that the control date is invalid and should not be used as the basis for the controlled access program.

**Response:** The Council disagrees that the control date, March 1, 2000 (65 FR

11029), is invalid. The control date was established with the express purpose of delineating a time after which new entrants into the red crab fishery could be distinguished and potentially be treated separately from those that were involved in the fishery prior to the control date. The control date explicitly stated that the Council was considering developing a limited or controlled access system for the red crab fishery and that the control date could be used to establish qualification criteria for such a program.

**Comment:** One commenter suggested that the FMP should allow for new entrants to the red crab fishery.

**Response:** As written, the FMP does allow for new entrants to be allowed into the controlled access fishery, if, at some time in the future, new information indicates that an increase is appropriate and would not threaten the sustainability of the resource or the existing fishery. This type of change could be implemented through a future framework adjustment to the FMP.

**Comment:** One commenter indicated that they would not support vessel upgrading and transfer restrictions that were retroactive to the control date.

**Response:** The Council is proposing to implement restrictions on vessel upgrading and transfer, consistent with other FMPs in the Northeast, but these restrictions will not be retroactive. These restrictions are intended to prevent an increase in the overall harvest capacity of the fishing fleet, while allowing for vessels to be upgraded or replaced in order to improve vessel safety as they age.

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