

# **Solutions to Late Implementation of Scallop Management Measures**

## **Discussion Document**

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## **Introduction**

We adjust management measures in the Atlantic Sea Scallop Fishery Management Plan (Scallop FMP) every 2 years through the Scallop FMP's framework adjustment process. Framework measures include annual catch limit (ACL), days-at-sea (DAS), access area trip, and individual fishing quota (IFQ) allocations. The New England Fishery Management Council (Council) typically includes additional measures intended to improve overall management of the scallop fishery or specific aspects of the Scallop FMP. These can be fairly minor and easily addressed, or major, complicated, and time consuming issues.

We should be implementing Framework measures by the March 1 start of the scallop fishing year, but in most recent years, the framework measures take effect in June or later. This leads to a much more complicated set of management measures and inseason changes in DAS, access area trip, and IFQ allocations. This causes confusion and uncertainty for the fleet and the scallop industry goes to great lengths during our review to try to find out when measure will go into place (which can be very disruptive for staff during the review). Despite knowing the implications of late Council action and standard NOAA National Marine Fisheries Service (NOAA Fisheries) review, some of the scallop industry continue to expect NOAA Fisheries to implement management measures on March 1. Others understand that March 1 is not possible, but still blame NOAA Fisheries for taking too long to implement measures. Late implementation also makes the management program much more complicated and creates difficult implementation scenarios, requiring complicated payback measures, and occasionally emergency actions, when default allocations are not consistent with the final allocations for a given fishing year. NOAA Fisheries, the Council, and the scallop industry recognize the need to make changes that will allow us to implement measures at, or closer to, the start of the fishing year.

This document provides details on why we have implemented measures late and solutions to the problem, and includes background, issues, and options to address the problem with the development of scallop management measures.

## **Background**

The Council begins developing a biennial framework in June. Implementation of annual measures is supposed to coincide with the March 1 start of the fishing year, but only two annual adjustments have been implemented on time in the last 7 framework adjustments (see attached table showing submission and implementation dates for framework actions since 2000). The Council considered changing the fishing year in 3 different actions, but a change was never adopted due to scallop industry opposition. The scallop industry was very frustrated with the late implementation of Framework 21 in 2010 even though the delay was the result of industry pressure for the Council to reconsider its November decision, resulting in the resubmission of Framework 21 in March. Although NOAA Fisheries worked very hard to publish the proposed

rule for Framework 21 in April, less than a month after the Council's resubmission, the rulemaking process did not have enough flexibility to have final measures in effect sooner than late June 2010. The scallop industry was even more frustrated with the late implementation of Framework 22, despite very clear timelines available from the start of this action's development in June 2010 showing that it could not be implemented until Amendment 15 was implemented. NOAA Fisheries and the Council targeted implementation of Amendment 15 and Framework 22 management measures to occur in June 2011, but the final rules for both actions ultimately published in late July, resulting in specifications effective August 1, 2011. This delay past the June target was due to some delays in the amendment submission, review, and rulemaking. Amendment 15 was delayed by a month since the final Amendment 15 document was submitted in January instead of December, as planned. Council staff had to complete Amendment 15 before completing Framework 22, causing a delay in submitting Framework 22. Framework 22 was further delayed because the document required significant revisions to comply with National Environmental Policy Act (NEPA) requirements (a problem that we have recognized would be solved with better coordination and improved timing of document review within the Council and NOAA Fisheries). Finally, the timing of Amendment 15 and Framework 22 resulted in the Council recommending, and NOAA Fisheries completing, an emergency action to close the Nantucket Lightship Access Area because it would have opened to the detriment of the resource in the area without action. The emergency rule added to our workload and was an extreme result of implementing measures late. While these things caused the very late implementation of Framework 22, there are issues that will routinely cause late implementation if not corrected.

There are currently a few critical process issues that cause measures to be implemented well after March 1. Depending on weather and availability of research vessels the Northeast Fisheries Science Center (NEFSC) completes the annual scallop survey before mid-July, but estimates of average density are not available in time to incorporate them into the projections and management alternatives before the September Council meeting. In order to incorporate the most recent available scallop survey information, the Council has been taking final action in November. Fulfillment of the various regulatory requirements has required about 5 to 6 months for reviewing the action and completing the rulemaking process once the Council submits the action for review and implementation. The earliest we could implement an action submitted in early-December is about May 1 (e.g., Northeast (NE) Multispecies framework adjustments approved by the Council in November are implemented on May 1).

Currently, the timeline for a framework without delays (other than from survey data availability) is presented in Table 1:

**Table 1: Current Biennial Framework Timeline**

<b>Milestone</b>	<b>Date</b>	<b>Days between each milestone</b>	<b>Notes</b>
Staff begins working on Framework	June		
Council initiates Framework	June		
NEFSC Survey data available	September		
Council approves framework	November	0	
Council staff submits Framework	December	30	Assumes no resubmission
Framework Proposed Rule publishes in <u>Federal Register</u> (30 day comment period)	February	40	
Framework Final Rule publishes in <u>Federal Register</u> (30 day cooling-off period)	April	60	Allows for 30-day comment period on proposed rule and 30 days to publish the final rule.
Framework effective	May	30	
Total Time from first Council submission to Implementation	5.3 months	160	

**Issues that Lead to Late Scallop FMP Framework Implementation**

The following problems lead to late implementation of scallop actions:

- 1) Resource and fishery projections based on the most recent scallop survey data in the year the Council is developing a framework adjustment are not available in time to incorporate into the pending framework action for final Council action in September.
- 2) The resultant delay in the Council decision to November means that the submission occurs in December at the earliest. This does not provide sufficient time to complete agency review and the rulemaking process by March 1. With Council action in November, even submission of a document that requires no revisions and resubmission would not allow for March 1 implementation. May 1 implementation is more likely with December final document submission.
- 3) Council often works on more than one scallop action at a time. This extends the amount of time that it takes for framework development and analyses.
- 4) Document review and revisions take up significant amount of time. For example, the Council submitted the final Framework 22 document in March 2011 (after initial January submission), following several rounds of document revisions.
- 5) NOAA Fisheries review of action, coordinating document revisions, drafting proposed rule, completing Council deeming process, comment period, and completion of

action for frameworks takes 5 to 6 months. Streamlining this process would improve timeliness but not allow for March 1 implementation, even if the Council submitted the framework in December.

6) In recent years additional requirements have added more complexity and development challenges. For example, after the Plan Development Team (PDT) identifies a range of specifications, specific measures for turtles and yellowtail flounder allocations need to be set. The overlap with yellowtail flounder bycatch often requires coordination with other PDTs, Committees, and has timing issues related to Council decisions under the Northeast Multispecies FMP.

### **How Other Regions Address Similar Issues**

The Northwest and Alaska regions have a very similar and equally confounding specifications timing problem. While the Alaska Region has a system in place to partially address it, the Northwest is trying to create a system that will also only partially solve the problem.

#### Alaska's Bering Sea and Aleutian Islands Fishery

This fishery's year begins on January 1, but new specifications go into place around March 1. The prior year's specifications remain in place until the new ones take effect. The delay relates to survey and updated assessment availability and the resulting timing of Council recommendations and the rulemaking process. Like the scallop fishery, Alaska fishermen would prefer that new specifications are effective on time because they want to harvest pollock and cod before spring. Alaska tries to reduce the negative impacts of late specifications by publishing proposed specifications based on preliminary resource and assessment data prior to the final Council meeting in December. After the December final Council recommendation, the Region publishes a final specification rule, going into place a few months into the new fishing year. The final specifications are what Alaska calls a "logical outgrowth" of the proposed specifications. Alaska considers the impacts of the final specifications to be within the range of expected impacts analyzed in the proposed specifications. Having analyzed the impacts and already published the proposed rule, Alaska can quickly publish the final rule after the Council makes final recommendations.

#### Northwest Groundfish Fishery

In the Northwest, the groundfish specifications should be in place on January 1, but for several years (including this year), NOAA Fisheries did not implement new measures until well after that. The specifications rule for 2011/2012 noted that continuing under roll-over measures is problematic, in particular if the new specifications are lower and there is a threat of exceeding it under rolled-over specifications. Staff from the Northwest Region indicated that the delay caused them to implement emergency measures to establish specifications for the start of the 2011 fishing year, similar to the Nantucket Lightship scallop access area closure this year

through emergency action. As a solution, the Northwest hopes to establish measures so that if specifications are not in place in time, they would use the lower end of a Council-proposed range of allocations at the start the fishing year. They would do this through proposed and final rulemaking based on Council recommendations in June. The Council's June recommendations are based on preliminary information for some species. The Council makes final recommendations in December based on final resource status information. The NEPA document analyzes a range of specifications for each species. Once the specifications are finalized later in the year, NOAA Fisheries would "top-up" amounts for any species with higher final harvest specifications. Northwest Region staff noted that while it would get them out of the need to implement an emergency rule, it is still not ideal to have to top-up accounts later in the year. In effect, this works a lot like the third-year default measures included in Amendment 15 because the Northwest Region implements final measures mid-fishing year.

### **Proposed Solutions for the Scallop FMP**

#### **Option 1: Third-year default measures**

Amendment 15 specifies that the Council will develop third-year default measures as part of its biennial framework adjustment to ensure that management measures in year three are consistent with resource and fishery conditions, as predicted in the development of the biennial framework.

Framework 22 included the first third-year default measures, which included DAS set at 75 percent of projected DAS and a full allocation of access area trips in areas likely to support trips for the 2013 fishing year. In the future, third-year default measures could be set at a low enough level so that DAS would not exceed the ultimate DAS allocations and would only allow small initial allocations into an access area if it has unquestionably sufficient biomass to support each limited access vessel taking one or two trips. Under third-year default measures, we would not open an access area if there is any doubt in it having sufficient biomass to be able to support trips (as determined by the PDT).

The downside to this approach is that we still will not know exactly when the new measures will go into place, although ideally it could be as soon as May if the Council submits a nearly flawless framework document. Vessel owners start to use DAS and access area trips after March 1 and some may start to run out of trips or DAS. IFQ vessel owners may be reluctant to arrange IFQ transfers until they get official notice of the new IFQ allocations. The transition to new measures in-season may still be somewhat complicated, in particular if the default allocations turn out to be too high (same problem as now) or conflict with other complicated framework measures, such as the measures to minimize sea turtle interactions. Therefore, some of the same problems that exist now may continue.

### Option 2: Establish an October Final Council Meeting

A simple solution to the timing problem would be to move the final Council action to a meeting before November. The earliest the Council could take action with current scallop survey data availability would be October. In order to implement measures on March 1 and avoid default measures, a proposed rule would need to be published no later than December 1. This would allow for a 30-day comment period, about 30 days between proposed and final rule, a 30-day delay in effectiveness, and about 2 weeks for NOAA Fisheries review of the document if it is submitted no later than the end of October. This timeline is very tight, would require a nearly flawless document, and reduced time for NOAA Fisheries review of the document after submission (typically 4 weeks, but could only be about 2 weeks to provide some flexibility in the timeline). Reducing the comment period would also provide some timeline flexibility.

#### Example Timeline:

October 15:	Final Council Action
November 1:	Action submitted
December 1:	Proposed rule published
January 2:	Proposed rule comment period ends
January 31:	Final rule published

### Option 3: Proposed Rule Based on September Preliminary Action; Final Rule after Final Council Action

This approach is a concept which we could develop further if it is preferred. There are a number of details that we will need to resolve as a concept and in formal development, since such a change to the framework process would likely require a plan amendment.

Using preliminary information in September, the Council would adopt a range of measures based on preliminary projections from available scallop surveys. A proposed rule would be published prior to the November Council meeting. The proposed rule would include the range of specifications as presented and analyzed in the Council's framework document. In November, the Council would select the final set of measures. A final rule would be published after the November Council meeting, prior to January 31. This approach, although complicated, would ensure that we implement measures by March 1. Third-year default measures should remain as a fallback in case the timeline slips.

Timing would be difficult: We would need to publish the proposed rule before the November Council meeting in order to publish the final rule as soon as possible after the November Council meeting. An example timeline is presented in Table 2:

**Table 2: Timeline for Proposed Rule Based on Preliminary Council Action Followed by Final Rule Based on Final Council Action**

Milestone	Date	Notes
Staff begins working on Framework	June	PDT begins Stock Assessment and Fishery Evaluation (SAFE) document, identifies new data
Council initiates Framework	June	
PDT Develops Range of Specifications	August	PDT specifies range based on available data from all available resource surveys and fishery information
Audited NEFSC Survey data available	September	May provide for updated range for PDT to provide to Committee
Committee recommends range of specifications	September	
Council approves specs range (with preliminary specification determination)	September	
Council staff submits Framework	Early October	Assumes no resubmission
Projections from NEFSC survey data available	October/November	
Framework Proposed Rule publishes in <u>Federal Register</u> (30 day comment period)	Early November	Must be published prior to November Council meeting
Council reviews proposed rule, updated projections from survey data, approves final specifications	November	
Council submits final action	December	
Framework Final Rule publishes in <u>Federal Register</u>	January 30	Allows for 30-day delay in effective date.
Framework effective	March 1	

The document and proposed rule could include a preferred alternative. Both the proposed rule and the document would have to clearly present the range of possible measures. The proposed rule would need to present the impacts and rationale for all of the alternatives (this may be an issue primarily for the initial regulatory flexibility analysis).

Establishing this process would require an amendment since it would be a complete change to the way framework adjustments are done for the Scallop FMP.

This approach may have the most associated workload because of the need to publish a range of alternatives in the proposed rule. In addition, this approach would only be successful if the environmental assessment (EA)/Framework document is completed and nearly flawless in early



January, in order for the Finding of No Significance (FONSI) to be signed for the final rule to be published in late January.

#### Option 4: Menu approach

This approach is a concept which we could develop further if it is preferred. There are a number of details that we will need to resolve as a concept and in formal development, since such a change to the framework process would likely require a plan amendment.

Through an amendment to the Scallop FMP, a set of measures would be selected by the Council and analyzed in an environmental impact statement (EIS). The Council would be able to choose the measures from these pre-defined measures for each biennial framework. For example, the EIS could specify a range of DAS and access area trips that the Council would be able to choose from each year. Specific access areas would not need to be named, but a sufficient range of areas in the Mid-Atlantic and Georges Bank would need to be specified to ensure that it would cover the likely rotational closed and access area strategy for any year. The basic set of decisions would look something like this:

##### **Decision 1: DAS**

- A. 25
- B. 30
- C. 35
- D. 40

##### **Decision 2: Access Area Trips in NE Multispecies Closed Areas:**

CAI: 0; 1; 2; or split trips  
CAII: 0, 1, 2 or split trips  
NLSA: 0; 1; 2 or split trips

##### **Decision 3: Rotational Management**

Mid-Atlantic Area A trips: 0 (Rotational Closed Area); 1; 2; or split trips  
Mid-Atlantic Area B trips: 0 (Rotational Closed Area); 1; 2; or split trips  
Mid-Atlantic Area C trips: 0 (Rotational Closed Area); 1; 2; or split trips  
Georges Bank Area A trips: 0 (Rotational Closed Area); 1; 2; or split trips  
Georges Bank Area B trips: 0 (Rotational Closed Area); 1; 2; or split trips

Other decisions would need to be specified for required measures to comply with the Endangered Species Act (e.g., reasonable and prudent measures restricting effort), bycatch, the Northern Gulf of Maine fishery, scallop incidental catch, and potentially other measures.

DAS and access area allocations would be chosen based on the overfishing limit (OFL), annual biological catch (ABC), ACL, and annual catch target specified for each year (and ABC approved by the Scientific and Statistical Committee). It will take a fair amount of up front work to establish the range of DAS and access area trips that will sufficiently match a possible range of OFL, ABC, etc.

In each framework, the Council would select the measures based on those specified and analyzed in the EIS. The Council could not consider allocation alternatives outside of the range considered in the EIS unless the Council determines that the range is inappropriate and warrants a delay in implementation. The PDT would develop an EA based on a SAFE document for the framework. The EA would include only updated analyses of the range of measures and would therefore require very little development and review. The PDT would complete the majority, if not all, of the review prior to Committee and Council action. A change in the range specified in the EIS would require more analysis and discussion and would delay implementation, but would still likely not require a time-consuming review process.

The Council would still start developing the specifications in June and would select final recommendations in November. The Council would submit the action and document very soon after the Council meeting, no later than the first week of December. The regulation deeming process would not be required since the regulations would only include the new DAS, trip, and IFQ allocations for the upcoming 3 years. The proposed rule would be ready very quickly, much like an inseason notice, because it would require only updates to the values (including the preamble and initial regulatory flexibility analysis). The target date for publishing the proposed rule would be December 15 with a 15-day comment period (the predetermined range would justify less than 30 days for comment). A final rule would be published by January 30. Third-year default measures would remain as a fallback in case measures cannot be implemented by March 1. An example timeline for this option is provided in Table 3:

**Table 3: Menu Approach Timeline**

<b>Milestone</b>	<b>Date</b>	<b>Notes</b>
Staff and PDT begins working on Framework	June	Development of Stock Assessment and Fishery Evaluation (SAFE) document, identifies new data
Council initiates Framework	June	
Audited NEFSC Survey data available	September	
Projections from NEFSC survey data available	October	
PDT completes EA with evaluation of specifications range	October	Likely to be the end of October to allow PDT to review, assess, and incorporate new projections into EA.
PDT and Committee recommend specifications for the framework	Late October or early November	
Council approves specifications	November	
Council submits framework adjustment package.	December 1	
Framework Proposed Rule publishes in <u>Federal Register</u> (15-day comment period)	December 15	No deeming required, very little time needed to complete proposed rule.
Framework Final Rule publishes in <u>Federal Register</u>	January 30	Allows for 30 days following close of comment period (January 2) and 30-day delay in effective date.
Framework effective	March 1	

This approach would require a plan amendment and would be difficult to develop. It may constrain decisions, but decisions would be more focused on specifications measures. There would be no room for additional measures to be added to frameworks. Unexpected issues that need to be addressed would derail this process, but better coordination between NOAA Fisheries offices, the Council, and industry could minimize unexpected issues.

#### Option 5: Change survey date/timing

Currently, changing the timing of the scallop survey is not possible, but the NEFSC is also considering a transition of the scallop survey to an image-based survey over the next several years. Ultimately, the timing of the survey, data availability, and projections based on the survey may allow for Council final decision in September. However, transition to a new survey approach, and specifically improving the timing of processed survey data will take several years

and will require implementation of software, storage and methods that are presently untested. It is therefore not an immediate solution. As the scallop survey progresses, we will determine if there are ways that we can use the survey data earlier. Other surveys are available, including the video survey by the University of Massachusetts, School for Marine Science and Technology, and the dredge survey conducted by the Virginia Institute of Marine Science. Both are very valuable surveys that provide critical data for biomass estimates and access area trip allocations. While the results from these surveys are available sooner than the NEFSC survey, they have not been sufficient for fishery-wide allocations (in particular the VIMS survey which is confined to specific access areas).

### **Other Necessary Changes**

With any of the solutions described above, implementing framework adjustments on time will continue to be a challenge unless we eliminate some key factors for delays. The following actions should ensure that we have a streamlined framework adjustment process.

#### Improve document review coordination, timely submission, and improved rulemaking efficiency

Document preparation prior to the final Council meeting must be improved, which will take a commitment from those preparing the document and those reviewing the document. There are some steps that can be taken to ensure that the document submitted to NOAA Fisheries after the final Council decision does not require multiple rounds of revisions before it is acceptable. They include:

- Open communication and PDT members engaging early on what information and analysis should be included in the document;
- Commitments from reviewers to do preliminary reviews of appropriate material;
- Agreement on document structure early in the process;
- Provide document segments, and more of them, sooner in the development stage; and
- Develop boilerplate sections that can be incorporated into documents each year

The Council should set and uphold a clear deadline for document submission. Often, the submission date drifts later in December, particularly when other actions are being developed concurrently, which causes problems in particular in December with major holidays and limited staff availability. More up-front completion of document sections, boilerplate sections, and preliminary reviews should help the Council meet a deadline.

NOAA Fisheries staff can find ways of improving regulatory action efficiency, including drafting regulatory packages early, even prior to the Council's final decision as much as possible (specific decisions would need to be omitted). If framework adjustments are limited to specifications only, regulatory text could be easily modified with place-holders for the pending decisions. Most framework action final rules are similar to the proposed rule. Therefore, final rule packages can be drafted almost simultaneously with the proposed rule, with sections for

disapproved measures (if any), changes from proposed to final, and comments and responses left empty.

Council and NOAA Fisheries staff have already met and discussed a plan for streamlining document review and submission but the success of this will not be fully realized until the next specifications-setting framework.

#### More outreach and communication with industry

While some of the industry understands the process, there is still misinformation about why measures take as long as they do to implement. Continuing to educate the industry will help resolve the controversy when measures are delayed. In the past, timelines have been discussed and distributed at Council meetings, but they are not typically in the final framework document. The Council's document could include a section explaining the timing and review process in more detail so the industry is more aware of it.

#### Limit the range of issues in frameworks

Some frameworks should be limited to specifications only and the Council should develop other frameworks in years between the biennial specifications adjustments for "extra" issues (unless they can be easily developed). The additional measures added to frameworks are generally what takes the Committee and PDT more time to resolve. Extra measures can add more time to the review and may make measures more complicated.

### **Conclusion**

The immediate solution to late implementation is to continue to implement default measures that are conservative so that DAS allocations would only increase and we would not need to take emergency action to close access areas that would open due to roll-over measures. With Council action in November, we should be able to implement measures by May 1. It is critical to improve coordination between Council, NEFSC, and NERO staff to improve the quality of the framework document that the Council submits. Implementation by March 1 is not possible without either shifting the Council decision to an earlier meeting or establishing a complicated process that would need to be developed under an amendment to the Scallop FMP. In all possible solutions, we will first need to work on vastly improving coordination of document preparation and review, more timely submission, and improved industry understanding of the regulatory process are critical. In addition, biennial framework packages must be limited to specifications-setting as much as possible since additional items will continue to bog down the development and implementation of the measures.

Attachment

Submission and Implementation Dates for Annual (and Biennial) Adjustments since Fishing Year 2000

<b>Specifications- Setting Action</b>	<b>Fishing Years</b>	<b>Date of Council Submission</b>	<b>Date of Publication in <u>Federal Register</u></b>	<b>Effective Date</b>
Framework 22 (EA)	2011-2012	3/22/2011	7/21/2011	8/1/2011
Framework 21 (EA)	2010	3/19/2010	6/28/2010	6/28/2010
Framework 19 (EA)	2008-2009	12/19/2007	5/29/2008	6/1/2008
Framework 18 (EA)	2006-2007	12/16/2005	6/8/2006	6/16/2006
Framework 16 (EA)	2004 (mid- year adjustment) – 2005	7/2/2004	11/2/2004	11/2/2004
Amendment 10 (EIS)	2004	12/19/2003	6/23/2004	7/23/2004
Framework 15 (EA)	2003	12/12/2002	2/28/2003	3/1/2003
Framework 14 (EIS)	2001-2002	2/28/2001	5/11/2001	5/1/2011
Framework 12 (EA)	2000	12/9/1999	3/3/2000	3/1/2000