of E.O. 12866 is unexplained and is not legally correct.

*Response.* The EA/RIR/Initial Regulatory Flexibility Analysis prepared for the FMP addressed the significance of the interim closure authorized under the FMP relative to E.O. 12866. This information was not required to be repeated in the preamble to the proposed rule.

NMFS requires the preparation of a RIR for all regulatory actions that either implement a new fishery management plan or significantly amend an existing plan. The RIR is part of the process of preparing and reviewing fishery management plans and provides a comprehensive review of the changes in net economic benefits to society associated with proposed regulatory actions. The analysis also provides a review of the problems and policy objectives promoting the regulatory action and an evaluation of the major alternatives that could be used to solve the problems. The RIR addresses many of the items in the regulatory philosophy and principles of E.O. 12866.

E.O. 12866 requires that the Office of Management and Budget review proposed regulatory programs that are considered to be "significant." A "significant regulatory action" 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 entitlement, grants, user fees, or loan programs or the rights and 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 E.O. 12866.

A regulatory program is "economically significant" if it is likely to result in the effects described in item (1) above. The RIR is designed to provide information to determine whether the proposed regulation is likely to be "economically significant."

NMFS believes the RIR prepared for the proposed FMP adequately assessed the costs and benefits that could result from the implementation of the proposed FMP and that the determination that the rule implementing the FMP is not significant under E.O. 12866 is justified. *Comment 15.* The legal brief supporting Trawler Diane Marie, Inc.'s motion for summary judgment in its case seeking to set aside the February 24, 1995, emergency rule, as well as the associated affidavit of James E. Kirkley and William D. DuPaul commenting on both the emergency rule and the proposed FMP closure of the scallop fishery in Federal waters off Alaska are submitted as comment on the proposed FMP.

*Response*. The issues and complaints contained in the legal brief filed by the plaintiffs in *Trawler Diane Marie, Inc.* v. *Ronald H. Brown*, No. 2–95–CV–15–D(2) (E.D.N.C.), have been responded to in several subsequent memoranda of reply and are not repeated here. General comments that directly pertain to the proposed FMP and that were contained also in the Kirkley and DuPaul review of the proposed FMP are addressed above. Comments specific to the Kirkley and DuPaul review are addressed below.

*Comment 16.* The proposed FMP presents insufficient information to assess whether or not the FMP will improve resource conditions and benefit the nation. There has been no stock assessment of the resource in recent years. Furthermore, the structure of the stock is not defined and information is lacking on whether the resource is characterized as an open population or defined in terms of discrete, localized, and self-contained populations.

Response. NMFS acknowledges that the data on the weathervane scallop resource are not complete. ADF&G conducted an assessment of the Cook Inlet stock in 1984 and intends to conduct an assessment of the Prince William Sound stock this summer. Although stock structure of the weathervane scallop resource is not well defined, scientists generally recognize the resource to comprise megapopulations, which are discrete collections of adult animals that do not intermix but that may be connected by larval drift. Such populations are susceptible to localized depletion. Furthermore, the proposed FMP refers to scientific evidence that a number of other scallop species have megapopulations comprising multiple discrete self-sustaining populations. NMFS concludes from these studies that weathervane scallops structure may be organized similarly and be susceptible to localized overfishing. Weathervane scallops and other scallop species have a history of overexploitation that resulted in serious depletion of localized stocks, which may have led to overfishing (Shirley and Kruse 1995). Concerns about overexploitation as well as uncertainty about scallop stock

structure and abundance support a conservative interpretation of available data and development of a management regime in favor of resource protection. This approach is superior to that alluded to in Comment 16, which indicates that, in the absence of definitive information about the scallop resource, NMFS should err on the side of resource exploitation.

Comment 17. No apparent information exists on catch and effort or meat counts, although the proposed FMP refers to voluntary data submitted by members of the scallop fishery and to other anecdotal information. NMFS indicates that this information suggests a resource problem, because the number of meats per pound has increased and CPUE has declined in recent years. Contrary to NMFS' premise, increased meat counts could be the result of many factors, one of which is the fact that scallop vessels have increasingly exploited Federal waters off Alaska. The water depth is typically deeper in offshore waters and scallops from deep waters typically have lower yields or higher counts than scallops of the same size for shallow water areas because of reduced food abundance. Also, since the fishery has intensified, there has been more exploitation throughout the year. As a consequence, more scallops may now be harvested during the spawning period when meat yields typically decline or the counts increase.

Response. ADF&G has collected landings data from fish tickets from the Alaska scallop fishery since the 1960's. This information includes catch amounts and limited data on fishing effort (e.g., number of vessels, vessel size, number of tows). ADF&G also collected data from on board catch sampling and logbook interview programs from the scallop fishery during 1968–1972 and provided additional effort information (actual number of days fished) as well as data on shucked meat weights. In addition, ADF&G has conducted an on board observer program since 1993 that collects detailed data on catch and effort (e.g., duration of tows). Published literature indicates that

Published literature indicates that scallop growth can vary between inshore and offshore areas (MacDonald and Bourne 1987, Can. J. Fish. Aquat. Sci. 44: 152–160) and between geographic areas. A movement of vessels from inshore to offshore fishing grounds would indicate that catch rate is declining in the area the vessels are leaving. This suggests inshore scallop stocks have been fished down to the point where vessels no longer can profitably harvest them. Furthermore, age composition data from the