

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 648**

[Docket No. 021120279-2279-01; I.D. 102302B]

RIN 0648-AN12

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Summer Flounder, Scup, and Black Sea Bass Fisheries; Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations to implement Amendment 13 to the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (FMP) developed by the Mid-Atlantic Fishery Management Council (Council). Pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and the FMP, this proposed rule would establish an annual coastwide quota for black sea bass and eliminate a provision requiring certain vessels to cancel their Northeast Region Black Sea Bass Permits during a fishery closure if they intend to continue fishing for black sea bass south of Cape Hatteras. Finally, this proposed rule would require that vessels issued a Federal moratorium permit for summer flounder, scup, and black sea bass be subject to the presumption that any fish of these species on board were harvested from the exclusive economic zone (EEZ).

DATES: Comments must be received on or before 5 p.m., local time, on January 21, 2003. (Note: must end no later than the date of the close of the comment period on NOA for FMP)

ADDRESSES: Written comments should be sent to Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, One Blackburn Drive, Gloucester, MA 01930. Mark the outside of the envelope, "Comments on Amendment 13 to the Summer Flounder, Scup, and Black Sea Bass FMP." Comments also may be sent via facsimile (fax) to (978) 281-9135. Comments will not be accepted if submitted via e-mail or Internet.

Copies of the FMP, Amendment 13, its Regulatory Impact Review (RIR) including the Initial Regulatory Flexibility Analysis (IRFA), and the Final Environmental Impact Statement (FEIS) are available from Daniel Furlong, Executive Director, Mid-Atlantic Fishery Management Council, Federal Building, Room 2115, 200 S. New Street, Dover, DE 19904-6790.

FOR FURTHER INFORMATION CONTACT: Peter W. Christopher, Fishery Policy Analyst, 978-281-9288, fax 978-281-9135, or email at Peter.Christopher@noaa.gov.

SUPPLEMENTARY INFORMATION: The purpose of Amendment 13 is to rectify problems in the black sea bass commercial fishery (specifically regarding the temporal and geographic distribution of landings and permit relinquishment requirements for certain vessels) and to consider management measures to minimize the adverse effects of fishing on essential fish habitat. Amendment 13 proposes a new quota program for the black sea bass commercial fishery and a change to the black sea bass permit requirements.

Black Sea Bass Management Measures

The black sea bass fishery is managed in Federal waters under the FMP and by the states through the Atlantic States Marine Fisheries Commission (ASMFC). Throughout the development of Amendment 13, the ASMFC was expected to consider and approve a state-by-state quota program. In August 2002, the ASMFC adopted state-by-state quota allocations for the states of Maine through North Carolina. Each state is required to establish management measures to ensure that its share of the quota is not exceeded.

With respect to the black sea bass fishery, the Council was concerned primarily with the quarterly quota program, which was causing a variety of problems in the fishery. Although the quarterly quota program was intended to ensure sustained landings of the species throughout each quarter, the last three quarters in 1999 and 2000 were closed early because the quotas were reached. Because some of the closures occurred early in the quarter, fishers in some states were not able to fish for black sea bass during the same time periods they had fished in the past. Upon reopening of the fishery in a subsequent quarter, market gluts and drops in prices occurred as high volumes of fish were landed. Further, the first quarter quotas in 1998 through 2000 were not harvested, indicating a problem in the overall allocation of the quota. Inequities in the quarterly quota

program have arisen as higher amounts of landings have shifted to the north, leaving southern regions without the landings that may be needed to sustain the fishery in those regions. Finally, during a closure of the fishery, vessels in North Carolina with both a Northeast Region Black Sea Bass Permit and a Southeast Region Snapper/Grouper Permit are required to relinquish their Northeast Black Sea Bass Permits for 6 months if they want to continue to fish for black sea bass south of Cape Hatteras under their Snapper/Grouper Permits. The requirement to relinquish the permit for 6 months leaves these few vessels with no ability to fish for black sea bass north of Cape Hatteras when the fishery reopens in a subsequent quarter. The Council believed that this was inequitable and needed to be addressed in Amendment 13. The Council proceeded with Amendment 13, recognizing that any action it recommended would need to be compatible with the action taken by the ASMFC in order for management to be consistent and effective.

The Council considered several alternatives to the current quarterly coastwide quota program, including state-by-state and regional quotas, state-by-state quotas with a coastwide quota component, subregional quotas with a coastwide component, quota by permit category, and quotas by gear type. The program most compatible with ASMFC allocations would have been a state-by-state quota program; however, the Administrator, Northeast Region, NMFS (Regional Administrator) commented during the development of Amendment 13 that a state-by-state quota program implemented for Federal waters could not be monitored effectively (with current monitoring methods) due to the small amounts of fish some states could be allocated. The Regional Administrator urged the Council to select a quota program that would have sufficiently large allocation shares that they could be effectively monitored by NMFS, or to devise a monitoring system sufficient to monitor small quotas that could be implemented in conjunction with the state-by-state quota program.

The Council determined that it needed to select a quota program alternative that would meet the monitoring needs while remaining compatible with the state-by-state allocations adopted by the ASMFC. The Council selected an annual coastwide quota program that would facilitate ASMFC's state-by-state quota allocations. The Council determined that this was within the range of alternatives considered in the Draft Environmental Impact Statement (DEIS)

because the impacts would be essentially the same as state-by-state allocations. The Council believes that the harvest of the coastwide quota will be extended throughout the year due to the management programs implemented by each state under the ASMFC's management plan.

To implement Amendment 13, NMFS proposes to: (1) Establish an annual (calendar year) coastwide quota for the commercial black sea bass fishery to replace the current quarterly quota allocation system; and (2) eliminate the provision requiring vessels issued both a Northeast Region Black Sea Bass Permit and a Southeast Region Snapper/Grouper Permit to relinquish their Northeast Black Sea Bass Permits for 6 months if they want to continue to fish for black sea bass south of Cape Hatteras under their Snapper/Grouper Permits during a Federal black sea bass fishery closure.

In addition, NMFS proposes to revise the presumptions in 50 CFR 648.14(x) for summer flounder, scup, and black sea bass. During the review of this proposed rule, NMFS determined that § 648.14(x) erroneously omits the presumption that summer flounder, scup, and black sea bass on board were caught in the EEZ for vessels issued moratorium permits under the three fisheries covered by the FMP. Therefore, this proposed rule would add the presumption that all summer flounder, scup, and black sea bass possessed on board a vessel issued a Federal permit under 50 CFR 648.4 are deemed to have been harvested from the EEZ within the management unit for the particular species. This presumption, as it pertains to black sea bass, would not apply to vessels issued a Southeast Region Snapper/Grouper permit and a Northeast Black Sea Bass permit that are fishing for black sea bass south of Cape Hatteras during a black sea bass fishery closure, north of Cape Hatteras.

Classification

At this time, NMFS has not determined that Amendment 13 to the FMP, which this proposed rule would implement, is consistent with the national standards of the Magnuson-Stevens Act and other applicable laws. NMFS, in making that determination, will take into account the data, views, and comments received during the comment period.

This proposed rule has been determined to be not significant for the purposes of Executive Order 12866.

The Council prepared an IRFA that describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the

action, why it is being considered, and the legal basis for this action are contained in the preamble and in the SUMMARY. While the IRFA prepared for this action by the Council does not follow NMFS' current "Guidelines for Economic Analysis of Fishery Management Actions," the analysis for this action provides an adequate description of the impacts on small entities for the purposes of the Regulatory Flexibility Act. Nevertheless, NMFS invites the public to comment specifically on the adequacy of the analysis using these criteria.

The proposed measures, and the alternatives, for addressing inefficiencies and inequities in the black sea bass fishery could affect any commercial vessel holding an active Federal permit for black sea bass, as well as vessels that fish for black sea bass in state waters. Data from the Northeast permit application database show that 1,119 commercial vessels are currently permitted to fish for black sea bass in Federal waters. Of these vessels, the Council considered the economic impacts on 727 vessels that were active in the black sea bass fishery in 2000. The analysis further investigated impacts on vessels by home state and affected counties. All of the federally permitted vessels, and vessels using the identified gear types listed above, readily fall within the Small Business Administration's (SBA) definition of small business and the RFA's definition of "small entity." Therefore, all alternatives and analyses associated with this proposed rule necessarily are alternatives and analyses applicable to impacts on small entities.

No additional recordkeeping and reporting requirements are included in this proposed rule.

Regulations implemented by the states under the ASMFC's Fishery Management Plan for black sea bass, which include state-by-state quota allocations, would overlap, but would not duplicate or conflict with the Federal coastwide quota program proposed in this action. NMFS is not aware of any other Federal rules that duplicate, overlap, or conflict with the proposed action. Any unavoidable adverse effects of the proposed action should be minimized due to the compatibility of the Federal coastwide annual quota program and the ASMFC's FMP.

Black Sea Bass Quota Alternatives

Under the proposed coastwide annual quota, the total number of vessels likely to be impacted by revenue losses of 5 percent or greater is expected to be similar to the number of vessels

impacted under the state-by-state allocation alternative that is based on the best 5 landing years for each state during the period 1988 to 1997 (the alternative included in the FEIS that best resembles the ASMFC's state-by-state quota allocations). Relative to vessel revenues in 2000, the economic impacts for the 727 vessels participating in the black sea bass fishery range from expected revenue losses of less than 5 percent for a total of 137 vessels, to a loss in revenues of greater than or equal to 50 percent, for 12 vessels. An increase in revenue would be expected for 564 vessels. A total of 26 out of 727 vessels (3.6 percent) considered in the analysis would be expected to suffer losses in revenue of 5 percent or greater relative to 2000 revenues. In addition, impacts were examined relative to a vessel's home state as reported on the vessel's permit application. Vessels with revenue losses exceeding 5 percent are concentrated in Barnstable and Suffolk Counties, Massachusetts. The proposed action alternative may further discourage derby-style fishing because landings would be constrained to the landings allowed under each state's management program to comply with the ASMFC's state-by-state quota allocations. Distributing the landings throughout the year would reduce the likelihood of an initial market glut and thus lowered black sea bass prices. Seasonal closures would be less likely, eliminating the economic burdens on fishermen that would have little or no income during a fishery closure.

Several alternatives to the proposed coastwide annual quota (including the quarterly allocation, state-by-state allocation, and various allocations by fishery gear sector, permit category, or region) were considered in the FEIS for Amendment 13 to the FMP. Each of the alternatives was also broken into sub-alternatives based on historical black sea bass landings information from either 1988 through 1997, or 1993 through 1997. Further, the quota by permit category alternative was broken down into alternatives with two or three permit categories, and the state-by-state quota alternative contained two sub-alternatives using the best 5 years of landings from either 1980 through 1997, or 1988 through 1997. While the de minimus specification alternative is presented as a separate alternative in the FEIS and RIR, its impacts would be considered under the state-by-state quota program alternatives. The analysis concluded that none of these alternatives would minimize economic impacts on small entities relative to the proposed measures. NMFS is not aware

of any other alternative that would achieve this action's objectives and minimize economic impacts on small entities.

Other Black Sea Bass Commercial Fishing Management Alternatives

According to both the Northeast and Southeast Region databases, the proposed action to no longer require vessels issued both a Northeast Region Black Sea Bass Permit and a Southeast Region Snapper/Grouper Permit to relinquish their Northeast Region Black Sea Bass Permit during a fishery closure north of Cape Hatteras if they want to continue fishing for black sea bass south of Cape Hatteras under their Southeast Region Snapper Grouper Permit would affect five vessels. Because the action would allow vessels to continue fishing south of Cape Hatteras, it would have no negative impacts on the five affected vessels, or any other vessels that in the future may be affected by the proposed elimination of the restriction. In comparison, continuation of the status quo, or requiring vessels to relinquish their Northeast Region Black Sea Bass Permit during a closure, could contribute to revenue losses for vessels that would lose fishing time north of Cape Hatteras when the fishery reopened. However, as noted, this would affect only 5 of the 727 vessels considered in the IRFA.

List of Subjects in 50 CFR Part 648

Fishing, Fisheries, Reporting and recordkeeping requirements.

Dated: November 29, 2002.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs/National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is proposed to be amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. In § 648.4, paragraph (b) is revised to read as follows:

§ 648.4 Vessel permits.

* * * * *

(b) Permit conditions. Any person who applies for a fishing permit under this section must agree, as a condition of the permit, that the vessel and the vessel's fishing activity, catch, and pertinent gear (without regard to whether such fishing occurs in the EEZ or landward of the EEZ; and without regard to where such fish or gear are

possessed, taken, or landed), are subject to all requirements of this part, unless exempted from such requirements under this part. All such fishing activities, catch, and gear will remain subject to all applicable state requirements. Except as otherwise provided in this part, if a requirement of this part and a management measure required by a state or local law differ, any vessel owner permitted to fish in the EEZ for any species except tilefish managed under this part must comply with the more restrictive requirement. Except as otherwise provided in this part, if a requirement of this part and a management measure required by a state or local law differ, any vessel owner permitted to fish in the tilefish management unit for tilefish managed under this part must comply with the more restrictive requirement. Owners and operators of vessels fishing under the terms of a summer flounder moratorium, scup moratorium, or black sea bass moratorium, or a spiny dogfish, or bluefish, commercial vessel permit must also agree not to land summer flounder, scup, black sea bass, spiny dogfish, or bluefish, respectively, in any state after NMFS has published a notification in the **Federal Register** stating that the commercial quota for that state or period has been harvested and that no commercial quota is available for the respective species. A state not receiving an allocation of summer flounder, scup, black sea bass, or bluefish, either directly or through a coast-wide allocation, is deemed to have no commercial quota available. Owners and operators of vessels fishing under the terms of the tilefish limited access permit must agree not to land tilefish after NMFS has published a notification in the **Federal Register** stating that the quota for the tilefish limited access category under which a vessel is fishing has been harvested. Owners or operators fishing for surfclams and ocean quahogs within waters under the jurisdiction of any state that requires cage tags are not subject to any conflicting Federal minimum size or tagging requirements. If a surfclam and ocean quahog requirement of this part differs from a surfclam and ocean quahog management measure required by a state that does not require cage tagging, any vessel owners or operators permitted to fish in the EEZ for surfclams and ocean quahogs must comply with the more restrictive requirement while fishing in state waters. However, surrender of a surfclam and ocean quahog vessel permit by the owner by certified mail addressed to the Regional Administrator allows an individual to comply with the

less restrictive state minimum size requirement, as long as fishing is conducted exclusively within state waters.

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3. In § 648.14, paragraphs (a)(96), (u)(3), (u)(11), (x)(3), (x)(6), and (x)(7) are revised to read as follows:

§ 648.14 Prohibitions.

(a) * * *

(96) Purchase or otherwise receive for commercial purposes black sea bass landed for sale by a moratorium vessel in any state, or part thereof, north of 35°15.3' N. lat., after the effective date of the notification published in the **Federal Register** stating that the commercial annual quota has been harvested and the EEZ is closed to the harvest of black sea bass.

* * * * *

(u) * * *

(3) Land black sea bass for sale in any state, or part thereof, north of 35°15.3' N. lat. after the effective date of the notification published in the **Federal Register** stating that the commercial annual quota has been harvested and the EEZ is closed to the harvest of black sea bass.

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(11) Possess black sea bass after the effective date of the notification published in the **Federal Register** stating that the commercial annual quota has been harvested and the EEZ is closed to the harvest of black sea bass, unless the vessel has been issued a Southeast Region Snapper/Grouper Permit and fishes for and possess black sea bass south of 35°15.3' N. lat.

* * * * *

(x) * * *

(3) Summer flounder. All summer flounder retained or possessed on a vessel issued a permit under § 648.4 are deemed to have been harvested in the EEZ.

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(6) Scup. All scup retained or possessed on a vessel issued a permit under § 648.4 are deemed to have been harvested in the EEZ.

(7) Black sea bass. All black sea bass retained or possessed on a vessel issued a permit under § 648.4 are deemed to have been harvested in the EEZ, unless the vessel also has been issued a Southeast Region Snapper/Grouper permit and fishes for, retains, or possesses black sea bass south of 35°15.3' N. lat.

4. In § 648.140, paragraph (d)(4) is removed and paragraphs (b)(1), (b)(2), and (d) are revised to read as follows:

§ 648.140 Catch quotas and other restrictions.

* * * * *

(b) * * *

(1) A commercial quota allocated annually, set from a range of zero to the maximum allowed to achieve the specified target exploitation rate, set after the deduction for research quota.

(2) A commercial possession limit for all moratorium vessels may be set from a range of zero to the maximum allowed to assure that the annual coastwide quota is not exceeded, with the provision that these quantities be the maximum allowed to be landed within a 24-hour period (calendar day).

* * * * *

(d) *Distribution of annual quota.* (1) Beginning on [insert effective date of the final rule], a commercial annual coastwide quota will be allocated to the commercial black sea bass fishery.

(2) All black sea bass landed for sale in the states from North Carolina through Maine by a vessel with a moratorium permit issued under § 648.4(a)(7) shall be applied against the commercial annual coastwide quota,

regardless of where the black sea bass were harvested. All black sea bass harvested north of 35°15.3' N. lat., and landed for sale in the states from North Carolina through Maine by any vessel without a moratorium permit and fishing exclusively in state waters will be counted against the quota by the state in which it is landed, pursuant to the Fishery Management Plan for the Black Sea Bass Fishery adopted by the Commission. The Regional Administrator will determine the date on which the coastwide quota will have been harvested; beginning on that date and through the end of the calendar year, the EEZ north of 35°15.3' N. lat. will be closed to the possession of black sea bass. The Regional Administrator will publish notification in the **Federal Register** advising that, upon, and after, that date, no vessel may possess black sea bass in the EEZ north of 35°15.3' N. lat. during a closure, nor may vessels issued a moratorium permit land black sea bass during the closure. Individual states will have the responsibility to close their ports to landings of black sea bass during a closure, pursuant to the

Fishery Management Plan for the Black Sea Bass Fishery adopted by the Commission.

(3) Landings in excess of the annual coastwide quota will be deducted from the quota allocation for the following year in the final rule that establishes the annual quota. The overage deduction will be based on landings for the current year through September 30, and landings for the previous calendar year that were not included when the overage deduction was made in the final rule that established the annual coastwide quota for the current year. If the Regional Administrator determines during the fishing year that any part of an overage deduction was based on erroneous landings data that were in excess of actual landings for the period concerned, he/she will restore the overage that was deducted in error to the appropriate quota allocation. The Regional Administrator will publish notification in the **Federal Register** announcing the restoration.

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